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Some Animals Are More Equal than Others: The Rehnquist Court and “Majority Religion”

Garrett Epps*

I. INTRODUCTION

In the early 1970s, a radical theater company in Cambridge, Massachusetts, created a play called “How to Make a Woman” dramatizing the difficulties women face in a patriarchal culture. After each performance, members of the audience would remain for a consciousness-raising session with the cast. At one of those sessions, as I recall, a plainly flustered male audience member asked, “Do women really want *total* equality with men?” A female voice from the audience responded, “Hell, no! We’d be stupid to settle for a crummy deal like that!”

One commentator has famously called equality an “empty idea,”¹ but, as a concept, equality is in fact not empty at all, but instead dangerously overfull. To those who believe they are looking upward on the ladder of hierarchy, equality seems a golden vision, like Jacob’s angels ascending to heaven; but when those same people look back down at those below them, the ladder takes on a threatening, hellish cast. As the old saying goes: “Everyone wants to go to Heaven, but nobody wants to die.” Similarly, everyone wants to rise to equality, but no one wants to descend to it, even in small things.

The exchange also illustrates that every insurgent movement finds itself torn between two demands. On the one hand, it may request

* Orlando John and Marian H. Hollis Professor, University of Oregon School of Law. I would like to thank Professor Neil Richards and the editors of the *Washington University Journal of Law & Policy* for their invitation to participate in their symposium. Other members of the Washington University faculty were also helpful and inspiring. Thanks also to Professors William Van Alstyne, Ann Hubbard and Robert Tsai, who reviewed a draft. Jessica Freeman provided research assistance.

1. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

equality for its members—the simple opportunity to fit into the existing order of society. On the other hand, it may ask for transformation—social change so pervasive that the very question of equality will cease to be meaningful. Thus, the Civil Rights Movement at its height did not simply demand an end to discrimination in employment, housing, education and other existing areas; “it also envisioned a ‘beloved community,’”² defined as a ‘social order defined by justice infused by love.’”³ In this new world, the divisions between the haves and the have-nots would be reconciled by an overarching vision of justice and brotherhood. So, too, the feminist movement of the 1960s and 70s imagined a world in which existing gender categories would disappear, and women would not seek equality with men because the idea of a male norm would become meaningless.

These reflections are sparked by the remarkable change that the Rehnquist Court has made in the law of religious freedom in the United States. Even for a Court that moved the Constitution radically towards the right over the last two decades, the degree and direction of the shift in the law of church and state is not just striking, but almost vertiginous. The Court narrowed the Free Exercise Clause;⁴ changed the test for Establishment Clause violations;⁵ and permitted, for the first time in modern memory, the expenditure of tax funds for individual tuition at religious schools.⁶ Many who have surveyed the final term of the Court have noted that the doctrinal result is unstable, and portends a revolution that not only has not yet ended, but may not yet even have truly begun. My purpose here is to show the scope of the change the Court has wrought in the discourse of religion and the

2. The “beloved community” is identified with the social thought of Martin Luther King Jr. King once wrote “[o]ur ultimate goal is integration which is genuine intergroup and interpersonal living. Only through nonviolence can this goal be attained, for the aftermath of nonviolence is reconciliation and the creation of the beloved community.” MARTIN LUTHER KING, STRIDE TOWARD FREEDOM (1958), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 417, 487 (1988).

3. This definition is of the “redemptive community.” Student Nonviolent Coordinating Committee, http://www.stanford.edu/group/King/about_king/encyclopedia/enc_SNCC.htm (Oct. 25, 2006).

4. *See, e.g.,* Employment Div. v. Smith, 494 U.S. 872 (1990).

5. *See* Agostini v. Felton, 521 U.S. 203 (1997).

6. *See, e.g.,* Mitchell v. Helms, 530 U.S. 793 (2000).

Constitution. Warren- and Burger-era concepts such as “neutrality,” “substantial burden,” or “accommodation” no longer address the schema the Court has created for regulating religion’s public role. Instead, the Court has used the ambiguous idea of equality to create a remarkable shift—one that is not even remotely tied to the text or history of the Religion Clauses. Though the shift relies on dribs and drabs of judicial rhetoric in earlier cases, it is resolutely scornful of precedent. It is not an evolution, or a refinement, or a correction. It is, or aspires to be, transformative: it is something brand new.

Early in the Rehnquist years, Justices favoring greater involvement of state and religion proclaimed the necessity of ending the oppression of religion. This oppression was of a particular kind—not oppression of religious minorities (which the Court indulgently suggested is to be expected), but oppression of the religious majority by the minority forces of secularism. At the Court’s mid-point, a majority of Justices proclaimed that the year of Jubilee had come, and that religion would henceforth be treated equally, even when equal treatment seemed to entail violating core values of the Religion Clauses.⁷ In the Court’s final term, the same prophetic voice that first demanded freedom from oppression now announced that, properly understood, the Constitution does not require equality at all, but a favored place, at the right hand of Caesar, for certain “traditional” American faiths, even if the result is state oppression, or at least conscious disregard, of religious minorities.⁸ The result promises to favor any religious group numerous and powerful enough to make itself heard at the polls, and in essence relegates “discrete and insular” religious minorities to the kindly care, or neglect, of the majority. When majority religions have the opportunity to obtain government subsidy in particular, they may not be denied it on the plea that the Establishment Clause forbids this—for that would not be treating them equally. The argument that religion is special cannot operate to restrict the speech or practice of a majority. But when religious minorities find themselves excluded from the famously disputed public square, that exclusion may be permissible because religion, or at least some religion, is, after all, special. Not special in

7. *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995).

8. See *McCreary County v. ACLU*, 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting).

the traditional understanding of enduring special restraints in exchange for robust constitutional protection, but rather special in the sense that American history and tradition require that government and the courts favor a particular religious tradition or traditions. That tradition or those traditions are never to be treated as less than equal; but they may, and should, be treated as more than equal. To paraphrase George Orwell, the new doctrine is pregnant with the idea that in the noisy, colorful Noah's Ark of American religious tradition, "[a]ll animals are equal, but some animals are more equal than others."⁹

This Article explores the evolution of this remarkable new view of religion and the Constitution during the Rehnquist Court era. Part II analyzes Justice Scalia's dissent in *Lee v. Weisman*,¹⁰ which set out the agenda for the religious caucus of the Court in the early years. Part III shows how the rhetoric of equality and historical grievance has been used to dismantle the boundary—for old time's sake, let us call it a "wall of separation"—that separated religious institutions from the public fisc. Part IV analyzes Justice Scalia's dissent in *McCreary County v. American Civil Liberties Union*.¹¹ In that dissent, as he did in *Lee v. Weisman*,¹² Justice Scalia seemed to draw a battle map of how his troops would storm the next walled city of separation. The Conclusion suggests what the territory may look like if the pro-"traditional religion" forces achieve all their objectives. It is, I argue, not a pretty prospect, and it is pregnant with precisely the malign possibilities that led the Framers to include the oracular but powerful Religion Clauses in the Bill of Rights.¹³

II. RELIGION AS PORNOGRAPHY

The First Amendment contains no overarching language enunciating a goal of "religious freedom" or "separation of church and state." Instead, it protects religious freedom through two clauses,

9. GEORGE ORWELL, *ANIMAL FARM* 92 (Centennial ed. 2003).

10. 505 U.S. 577, 631 (1992) (Scalia, J., dissenting).

11. *McCreary*, 125 S. Ct. at 2748 (Scalia, J., dissenting).

12. *See supra* note 10.

13. U.S. CONST. amend. 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

the Establishment Clause and the Free Exercise Clause.¹⁴ Neither clause is perspicuous in meaning, and together they form a net of ambiguity—what to one observer may seem like a protection for “the free exercise of religion” may seem to another like a “special privilege” granted to religion, and thus an “establishment of religion” by law. Scholars and judges have struggled, and uniformly failed, to bring the two clauses into stable harmonic alignment.¹⁵ Until recently, perhaps the only thing that could be said with some confidence was that both clauses implied some restraint on majority rule in matters of religion and the state. The majority could not by vote strip religious minorities of their free exercise rights; nor could it use its numerical predominance to proclaim itself the official religion of the United States or, under the Fourteenth Amendment, of any particular state.

This anti-majoritarian character is now in question for both clauses. The Rehnquist Court’s first major foray into the area of religion and the Constitution was its unsettling and radical decision in *Employment Division v. Smith*,¹⁶ in which a majority held that states could burden, or even outlaw entirely, the free exercise of minority faiths so long as the legal burden on that free exercise arose from a neutral, generally applicable law and not from active conscious hostility.¹⁷ If that meant that minority religions could be burdened or even banned, that was just too bad for them. As Justice Scalia explained:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.¹⁸

14. *Id.*

15. See Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563 (1998) (discussing scholars’ confusions among the two clauses).

16. 494 U.S. 872 (1990).

17. *Id.* at 878–82.

18. *Id.* at 890.

Arguably, *Smith* represents the flood tide of Justice Scalia's influence over the other Justices. The record in *Smith* shows clearly that Justice Scalia was the Court-maker in the long history of the case,¹⁹ and that he led the majority down a path that he designed. That path has been sharply criticized by scholarly commentators for its wholesale revision of precedent and dismissive attitude toward minority rights.²⁰ The shocking opinion in *Smith* got the Court in trouble both with Congress and with organized religion, and has led to an elaborate process of attempted legislative overruling and judicial narrowing in an evident attempt to draw the sting of the opinion's full-throated majoritarianism.²¹

In the Establishment Clause context, *Smith* suggested that a majority of the Court might be disposed to ease the burden on a local religious majority that wanted to include lightly concealed prayers of its faith in official governmental exercises. During the waning years of the Burger Court, members of the Court had begun to express discomfort with the three-part test for Establishment Clause violations established in *Lemon v. Kurtzman*.²² Under the *Lemon* test, government action required both a secular purpose and a primary effect that neither advanced nor inhibited religion to be valid.²³ It was difficult, though not impossible, to argue that officially led or sanctioned public prayer had either. So, two new tests were offered in *Lemon's* place—Justice O'Connor's "endorsement" test and Justice Kennedy's "coercion" test.²⁴ Under the former, a government action

19. See GARRETT EPPS, *TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL* (1st ed. 2001) (documenting Justice Scalia's memoranda shaping the question presented in the final *Smith* opinion).

20. See Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L.J. 953, 956 n.11 (1998) (collecting hostile scholarly commentary). On Justice Scalia's use of precedent in *Smith*, see Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1120 (1990) (calling use of precedent "shocking"); see also EPPS, *supra* note 19, at 217 (opining that a first-year law student who interpreted cases as Justice Scalia did in the *Smith* opinion would receive a failing grade); Garrett Epps, "You Have Been in Afghanistan": *A Discourse on the Van Alstyne Method*, 54 DUKE L.J. 1555 (2005) (calling Justice Scalia's published strictures against judges who manipulate precedent a "cry for help—*Stop me before I distinguish more*").

21. See, e.g., Garrett Epps, *The Wrong Vampire*, 21 CARDOZO L. REV. 455 (1999) (documenting Congressional attempts at overriding *Smith*).

22. 403 U.S. 602 (1971).

23. *Id.* at 612.

24. See *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J.,

was invalid if, by endorsing religion in general or a particular religion, it sent “a message to non-adherents 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.”²⁵ Under the latter, a government action, even one endorsing religion, was valid so long as non-believers were not “coerced” to engage in religious speech or behavior contrary to their consciences.²⁶ Justice Kennedy proposed this standard in dissent in *County of Allegheny v. American Civil Liberties Union*, a crèche-display case,²⁷ and it was endorsed by an influential commentator, Professor (now Judge) Michael McConnell.²⁸

The coercion test in particular seemed to offer a wide field for government acknowledgement of the majority faith or faiths of a locality and for public prayer invoking majority religious language so long as no one was “coerced” to take part, whatever that might mean. This prospect became clear when the Court considered one of its first major Establishment Clause cases, *Lee v. Weisman*.²⁹ The case was a challenge by a dissenting student and her parents to the practice of a Providence, Rhode Island, public school of inviting local clergy members to deliver religious, but “non-sectarian,” invocations and benedictions at middle- and high-school graduation ceremonies.³⁰ Under a traditional endorsement test, the practice of having an officially designated prayer would seem to be, at the very least, constitutionally shaky. But if coercion became the test, it could be argued that the official prayers were not even close to the Establishment Clause line. This was made clear by an exchange during oral argument in the case.³¹ Former assistant Attorney General Charles W. Cooper, Jr., representing the Providence school district,

concurring in the judgment in part and dissenting in part); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

25. *Lynch*, 465 U.S. at 688. For a good discussion of this test, see Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL'Y 499 (2002).

26. *Allegheny*, 492 U.S. at 659–63.

27. 492 U.S. 573.

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

29. 505 U.S. 577 (1992).

30. *Id.* at 580–81.

31. Transcript of Oral Argument, *Lee v. Weisman*, 505 U.S. 577 (1992) (No. 90-1014).

first stated that the Clause did not forbid the “non-sectarian” prayer at issue in the case, and suggested that it would not even bar a sectarian prayer containing references to specific deities.³² Justice O’Connor then asked whether the Clause would be violated if “a State legislature were to adopt a particular religion as the State religion, just like they might pass a resolution saying the bolo tie is the State necktie[,]” so long as the legislature added “[w]e’re not going to enforce it.”³³ Cooper replied that it would be permissible “if it is purely noncoercive.”³⁴

Cooper’s answer produced a visible reaction from a number of the Justices, and may well have been the turning point in the case.³⁵ Regardless, the result in *Lee* was a major disappointment to religious conservative groups who had hoped that the Court would adopt a lenient “coercion” test for government speech acknowledging or endorsing religion. In a five-to-four decision, the Court struck down the practice as coercive because high-school students, even though formally allowed to receive their diplomas without attending the ceremony, were subject to peer pressure and other coercive forces sufficient to make them feel obligated to attend, stand, and bow their heads for the prayer, thereby suggesting assent.³⁶ The opinion was written by Justice Kennedy, who had earlier been the apostle of the coercion test,³⁷ and seemed to mark the end of that proposed test as a means of substantially altering the law of the Establishment Clause as it relates to public prayer in schools and elsewhere. A sophisticated, psychological view of coercion would limit many majority practices that might be permitted under a formalistic test that required legal penalty before a government practice crossed the Establishment Clause line.

32. *Id.* at 7–8. Cooper was later asked whether the United States could print “In Jesus Christ We Trust” on its coins, to which he replied: “I don’t think we would put that on the coins, but I think that is because, at this stage, that would not be politically possible . . .” *Id.* at 10.

33. *Id.* at 10–11; see also Linda Greenhouse, *Court Appears Skeptical of Argument for Prayer*, N.Y. TIMES, Nov. 7, 1991, at A22.

34. Transcript of Oral Argument, *supra* note 31, at 11.

35. Greenhouse, *supra* note 33.

36. *Lee*, 505 U.S. at 597–99.

37. See *supra* notes 24–25 and accompanying text.

The decision in *Lee* would repay much more detailed study, particularly given the importance of Justice Kennedy in the evolution of the Court's cases regarding the Religion Clauses. What is most important for purposes of this essay is the remarkable dissent by Justice Scalia, who argued passionately that the prohibition of the graduation prayers was not simply wrong, but actively oppressive to certain religious believers. He noted:

The reader has been told much in this case about the personal interest of Mr. Weisman and his daughter [the plaintiffs], and very little about the personal interests on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is not that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations."

The narrow context of the present case involves a community's celebration of one of the milestones in its young citizens' lives, and it is a bold step for this Court to seek to banish from that occasion, and from thousands of similar celebrations throughout this land, the expression of gratitude to God that a majority of the community wishes to make. The issue before us today is not the abstract philosophical question whether the alternative of frustrating this desire of a religious majority is to be preferred over the alternative of imposing "psychological coercion," or a feeling of exclusion, upon nonbelievers. Rather,

the question is whether a mandatory choice in favor of the former has been imposed by the United States Constitution.³⁸

This was an important claim, one that would echo throughout the upcoming caselaw. It asserted that the religious rights guaranteed under the Constitution are not solely, or even primarily, individual rights, designed to protect the conscience against state imposition, but rather group rights that inhere specially in the majority of the members of a community who wish to order their public ceremonial life in a way that seems religiously appropriate to them. Under Justice Scalia's analysis, the decision in *Lee* actively oppressed the (presumable) majority of high-school graduates and their families by denying them a central practice of their religion.³⁹ Justice Scalia appeared to be implying that the decision denied religious believers, even though they were apparently the majority, their humanity and further stigmatized them. The refusal to allow them to use government occasions for prayer sends a message that their beliefs are shameful, like sexually explicit films.

Such oppression, exclusion, and stigmatization are intolerable for any group, and even less tolerable when imposed, as Justice Scalia's opinion suggests, on a majority by a tiny, elite minority. If that is so, then of course the next question to be faced by the oppressed majority is which alternative they would seek as remedy for their oppression: equality or transformation.

III. THE WOODEN HORSE

The first answer to this question was provided by *Capitol Square Review and Advisory Board v. Pinette*.⁴⁰ For the time being, the key demand was to be equality. *Pinette* concerned the request of a local Ku Klux Klan chapter to be allowed to place a large Latin cross honoring the Christmas season on the lawn of the Ohio State Capitol in Columbus.⁴¹ The lawn was the site of a few displays, including a state Christmas tree, a privately sponsored menorah, and the United

38. *Lee*, 505 U.S. at 645–46 (Scalia, J., dissenting).

39. *Id.*

40. 515 U.S. 753 (1995).

41. *Id.* at 757–58.

Way “thermometer.”⁴² The state turned down the Klan’s request, however, on the stated ground that allowing its cross to appear temporarily on the lawn would create the impression that the state endorsed this sectarian religious symbol.⁴³

There was no disagreement that the lawn was a public forum, nor that the refusal to allow the cross constituted content-based discrimination. However, the state argued that the Establishment Clause gave it a compelling state interest in maintaining the discrimination.⁴⁴ It placed particular emphasis on the fact that the property at issue controlled the entrance to the very headquarters of state government, thus making any mistaken attribution of state endorsement of the cross particularly troublesome for misled citizens.⁴⁵ The Court gave short shrift to this interest; in essence, the opinion by Justice Scalia suggested that the Establishment Clause could never provide a reason to discriminate against religious speech, even when misperception of government endorsement was likely.⁴⁶

In addition, Justice Scalia made clear that equality between religious and non-religious expression always trumped Establishment concerns, forming a floor of protection below which religious expression could never fall. He noted that religion is truly special under the First Amendment—not subject to special restraints, but in every case a special favorite of the laws.⁴⁷ The desire to protect against public misperception of government endorsement of private religious speech

exiles private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech. It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives than to private prayers. This would be merely bizarre were religious

42. *Id.*

43. *Id.* at 758–59.

44. *Id.* at 761–62.

45. *Id.* at 763.

46. *Id.* at 769 (“[T]he State may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship.”).

47. *Id.* at 767.

speech simply *as* protected by the Constitution as other forms of private speech; but it is outright perverse when one considers that private religious expression receives *preferential* treatment under the Free Exercise Clause.⁴⁸

Once again, the Court's refusal to give special concern to religious speech would stigmatize it, and transform it into lesser-value speech, such as adult films. Equality would not be enough; religious speech was to be elevated to a realm that might be called "more than equality."

The consequences of preferential treatment became more clear a short while later in *Rosenberger v. University of Virginia*,⁴⁹ a case that used equality concepts to make a portentous change in the doctrine of the Establishment Clause. At issue in *Rosenberger* was whether the University of Virginia could maintain a rule denying student activity funds to publications that "primarily promote[d] or manifest[ed] a particular belief in or about a deity or an ultimate reality."⁵⁰ The publication at issue, *Wide Awake*, had as its mission "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means."⁵¹ At the outset, it is important to characterize the University's claim, which was that the desire not to violate the Establishment Clause constituted a "compelling interest" that allowed its admittedly content-based distinction between *Wide Awake* and *The Daily Cavalier* (a secular newspaper) in their eligibility for activity funds.⁵² In his dissent, Justice Souter characterized the issue as whether the Establishment Clause allowed "direct funding of core religious activities by an arm of the State."⁵³ That practice, Souter noted, had been regarded as impermissible throughout the evolution of the Court's Establishment

48. *Id.* at 767–77 (citations omitted).

49. 515 U.S. 819 (1995).

50. *Id.* at 822–23.

51. *Id.* at 826.

52. *Id.* at 837–38. The University backed away from this position when the case reached the Supreme Court, but because the Fourth Circuit Court of Appeals based its decision on the point, the Court proceeded to address the issue. *Id.*

53. *Id.* at 863 (Souter, J., dissenting).

Clause jurisprudence.⁵⁴ Indeed, Souter noted that it had been condemned by Madison himself in his Memorial and Remonstrance, which objected to Virginia's proposed Clergy Assessment on a number of grounds, including that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever[.]"⁵⁵

Justice Souter's point seems both clear and historically irrefutable. It does not, however, mean that the issue raised by *Rosenberger* was not a difficult one. *Wide Awake* and its Christian student editors were undoubtedly excluded from a fee program that allowed student groups not devoted to proselytization to participate. The University's rule also required it to scrutinize the applications of all potential fee recipients, a practice that could give rise to both the potential for prior restraint on speech and the danger of entanglement of the University with religious organizations.⁵⁶

But what is striking about the majority opinion in *Rosenberger* is not that it held in favor of *Wide Awake*, but that in doing so it pronounced that the issue raised by Justice Souter was really not very important. There was no question, either between the majority and the dissenters or between the Supreme Court and the Fourth Circuit panel that had upheld the University rule,⁵⁷ that the distinction was content-based (though one might differ whether the basis was, as the majority insisted, *Wide Awake*'s viewpoint or its subject matter).⁵⁸ The sole question involved the weight to be given to the Establishment Clause and its hitherto perspicuous bar on direct state financial aid to the propagation of religious faith. The majority found that the Establishment Clause interest was simply not present in these cases because the program was "neutral" toward religion, rather than being "a tax levied for the direct support of a church or group of

54. *Id.* at 873–76.

55. *Id.* at 868 (citations omitted).

56. That means "entanglement" under its old meaning of, well, entanglement, *see* *Aguilar v. Felton*, 473 U.S. 402, 413 (1985), rather than its newspeak meaning of primary effect, *see* *Agostini v. Felton*, 521 U.S. 203, 232–35 (1997).

57. 18 F.3d 269 (4th Cir. 1994).

58. *Rosenberger*, 515 U.S. at 831 ("We conclude, nonetheless, that here . . . viewpoint discrimination is the proper way to interpret the University's objections to *Wide Awake*.").

churches.”⁵⁹ In addition, the Establishment Clause was not violated because the University funds that flowed to the printer of *Wide Awake* did not pass through the editors’ hands, but rather came straight from the University, and because the money came from a mandatory activity fee paid by each student rather than “a general tax designed to raise revenue for the University.”⁶⁰ For those reasons, the subsidy program was “a far cry from a general public assessment designed and effected to provide financial support for a church.”⁶¹

The Establishment Clause thus turned out to be far less serious an obstacle than the dissent perceived it to be. Implicitly, it formed a bar only to programs using general taxation to create programs that benefit either specific religions or all religions, but not non-religious groups. For this reason, the admitted content discrimination in the fee program could not be justified, and *Wide Awake* received its funding.

This was a result grounded in a demand for equality, or, as the majority phrased it, “neutrality.”⁶² But the transformative demand is also lurking in this case, couched in Justice Thomas’ concurrence.⁶³ For Justice Thomas, the correct interpretation of the Establishment Clause would not pose any barrier to the direct award of general tax funds to a religious organization; indeed, the Virginia Assessment that outraged Madison would have been fine, Justice Thomas wrote, if it had only been “a truly neutral program that would benefit religious adherents as part of a large class of beneficiaries defined without reference to religion.”⁶⁴ Analyzing the sparse legislative record of the First Amendment, Justice Thomas concluded that “Madison saw the principle of nonestablishment as barring governmental preferences for *particular* religious faiths.”⁶⁵ Justice Thomas admitted that not every analysis of Madison’s thought would

59. *Id.* at 840.

60. *Id.* at 840–41.

61. *Id.* at 841.

62. *Id.* at 837–46. That the two terms are not always synonymous any second child can tell us.

63. *Id.* at 852 (Thomas, J., concurring).

64. *Id.* at 853 n.1. Justice Thomas reviewed the historical debates surrounding the Virginia “Assessment Controversy,” and concluded that the bill violated the equality principle “not because it allowed religious groups to participate in a generally available government program, but because the bill singled out religious entities for special benefits.” *Id.* at 854–55.

65. *Id.* at 856.

support this narrow reading; indeed, Madison himself seemed to contradict it both in the Remonstrance and in his other works.⁶⁶ But what did he know and who really cares what he said?

[E]ven if more extreme notions of the separation of church and state can be attributed to Madison, many of them clearly stem from “arguments reflecting the concepts of natural law, natural rights, and the social contract between government and a civil society,” rather than the principle of nonestablishment in the Constitution. In any event, the views of one man do not establish the original understanding of the First Amendment.⁶⁷

Rosenberger arguably reached a revolutionary result: when religion demands equal treatment, the special protections placed around it in the Constitution itself are to be given relatively little weight. When a religious activity can be characterized as speech (as opposed to, say, ingesting peyote), it must be protected exactly as non-religious speech is, and indeed it is entitled to subsidy if any non-religious speech receives government funds. This result is key to the revolution thus far, but the concurrence directs our attention to an even more radical position. Under the new disposition, James Madison, author of the Remonstrance and principal sponsor of the First Amendment, is to be regarded as an extremist.

*Mitchell v. Helms*⁶⁸ advanced the program yet another giant step. Remember that *Rosenberger* allowed state money to flow for a religious publication because (1) it was not tax money, and (2) it was not paid to the organization and thus could not be diverted from the intended purpose.⁶⁹ Under the new doctrine enunciated by four Justices in *Mitchell*, however, equality demands that government aid in a “neutral program” must flow to religious organizations, even if funded from general tax revenues⁷⁰ and even if the program contains no safeguards to protect against their direct use by the religious organization.⁷¹

66. *Id.* at 854–58.

67. *Id.* at 856 (citation omitted).

68. 530 U.S. 793 (2000).

69. *Rosenberger*, 515 U.S. at 841.

70. *Mitchell*, 530 U.S. at 816.

71. *Id.* at 832–35.

At issue in *Mitchell* was a federally funded program that loaned educational materials, such as library books, computers and software, and audio-visual materials, to qualifying schools, both public and private.⁷² The materials themselves were required to be “secular, neutral and nonideological.”⁷³ The Fifth Circuit, though admitting that cases such as *Rosenberger* had scrambled the law of aid to religious organizations, held that provision of these materials to Catholic schools in Jefferson Parish, Louisiana, violated the Establishment Clause.⁷⁴ The Supreme Court reversed this ruling and reinstated the program.⁷⁵ Though the Court could not produce a majority for any opinion explaining the result, Justice Thomas authored an opinion for himself and three others.⁷⁶ Justice Thomas found that the aid at issue flowed to religious schools as a result of “private choices,” even though the aid itself went directly from government to the schools.⁷⁷ This meant the program was neutral, and thus not a violation of the Clause.⁷⁸ The distinction between direct and indirect aid, he wrote, was no longer important.⁷⁹ This case did not concern “direct payments of money,” and so it did not cross the Establishment Clause line.⁸⁰

Justice Thomas conceded that the materials might be diverted from their intended secular use—but so what? There was no longer a rule against divertible aid; the only rule was that aid must be provided by neutral criteria.⁸¹ What happens to it after that was simply no longer an issue. “[A]ny use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern,” he explained, so long as the content of the aid itself is not religious and eligibility for such aid is determined in a

72. *Id.* at 801–02.

73. *Id.* at 802 (quoting 20 U.S.C. § 7372(a)(1) (2000)).

74. *Helms v. Picard*, 151 F.3d 347, 359 (5th Cir. 1998).

75. *Mitchell*, 530 U.S. at 836.

76. *Id.* at 801–36. Justice Thomas was joined by Chief Justice Rehnquist and Justices Kennedy and Scalia. *Id.* at 801.

77. *Id.* at 831 (“Because Chapter 2 aid is provided pursuant to private choices, it is not problematic that one could fairly describe Chapter 2 as providing ‘direct’ aid.”).

78. *Id.* at 829.

79. *Id.* at 818 (“Whether one chooses to label this program ‘direct’ or ‘indirect’ is a rather arbitrary choice, one that does not further the constitutional analysis.”).

80. *Id.* at 819–20.

81. *Id.* at 820.

constitutionally permissible manner.⁸² This is true even when the recipient school is “pervasively sectarian,”⁸³ meaning, in essence, that it teaches every subject and conducts every school activity from a religious point of view. Although the concept of pervasive sectarianism was used by the Court to strike down an aid program as recently as 1985,⁸⁴ Justice Thomas demanded its demise as a constitutional concept. His demand was based in history and grounded in the demand for equality. He noted:

[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Opposition to aid to “sectarian” schools acquired prominence in the 1870’s with Congress’s consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that “sectarian” was code for “Catholic.” Notwithstanding its history, of course, “sectarian” could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in *Hunt v. McNair*, . . . it coined the term “pervasively sectarian”—a term which, at that time, could be applied almost exclusively to Catholic parochial schools and which even today’s dissent exemplifies chiefly by reference to such schools.

In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.⁸⁵

This passage sounded the trumpet in a way that leaders of the Civil Rights Movement did during the 1960s. Any governmental distinction with a history of oppressive content is now to be regarded

82. *Id.*

83. *Id.* at 826.

84. See *Aguilar v. Felton*, 473 U.S. 402 (1985).

85. *Mitchell*, 530 U.S. at 828–29.

as illegitimate, even if neutrally applicable. It is hard to be unsympathetic with that demand. It is the kind of contextual sophistication missing from decisions such as *Washington v. Davis*⁸⁶ and *City of Richmond v. J.A. Croson*.⁸⁷ But the historical sophistication did not mark a permanent change in the discourse of the conservative majority of the Court. It stands in marked contrast to the bland unconcern of Chief Justice Rehnquist shortly afterwards in his opinion in *Zelman v. Simmons-Harris*.⁸⁸ *Zelman* finally breached the Establishment walls that had allegedly been important in approving the earlier payments of state funds to religious organizations.

Zelman concerned a voucher program by which general tax funds were paid directly to religious schools in the form of tuition vouchers signed over to the schools by parents of children escaping Cleveland's failing public education system.⁸⁹ Chief Justice Rehnquist wrote that there was no Establishment Clause violation because the vouchers were paid as part of a "neutral" program of "true private choice."⁹⁰ The fact that ninety-six percent of the vouchers went to religious schools was hardly worth mentioning;⁹¹ context no longer seemed to matter. "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."⁹² After all, many students did not use the vouchers at all, choosing instead to attend public schools.⁹³ In essence, the history of controversy regarding tuition payments to religious schools was not only irrelevant, but almost nonexistent; ninety-six percent was close enough for government work.

86. 426 U.S. 229 (1976).

87. 488 U.S. 469 (1989).

88. 536 U.S. 639, 643–63 (2002).

89. *Id.* at 644–48.

90. *Id.* at 662–63.

91. *Id.* at 658.

92. *Id.*

93. *Id.* at 655.

Chief Justice Rehnquist's opinion announced that, with the aid of neutrality/equality, a key objective had been reached. What would be the next redoubt, and how would it be stormed?

IV. THE SOUND OF HIS WINGS

Perhaps a portent of the answer can be found in Justice Scalia's dissent in *McCreary County v. ACLU*,⁹⁴ decided at the end of the Court's last term. In *McCreary*, a five-justice majority held that two Kentucky counties violated the Establishment Clause by adorning their courthouses with large displays of the Ten Commandments surrounded by other historical documents purporting to demonstrate that the American legal system flows from Biblical values.⁹⁵ Using the *Lemon v. Kurtzman* test, the majority held that the display in context lacked a secular purpose, and thus could not stand.⁹⁶

Because the fifth vote in *McCreary* was Justice O'Connor's, her retirement may mean that this case will be the last victory for anything approaching separationism, and that the Roberts Court will begin from the forward position secured by the Rehnquist Court and move the church-state line even more radically in the pro-religion direction. If so, Justice Scalia's ferocious dissent in *McCreary* may set forth the new plan of attack.⁹⁷ Justice Scalia announced that, having secured equal access to the public fisc, religious conservatives should not be satisfied with equality any longer. A proper end of repression demanded not only preferential treatment for all religious speech, but also a key governmental role for certain religious beliefs designated as "traditional" or "majority" beliefs.⁹⁸ Justice Scalia suggested that the posting of a Ten Commandments display is permissible not on a principle of neutrality or even "neutrality-plus" for religious speech generally, but because the Ten Commandments are part of the majority religion that the Establishment Clause, in spite of its seemingly prohibitory language, tacitly establishes. He noted:

94. 125 S. Ct. 2722 (2005).

95. *Id.* at 2732 (affirming the Sixth Circuit's opinion).

96. *Id.* at 2732–45.

97. *Id.* at 2748–64 (Scalia, J., dissenting).

98. *Id.* at 2752–53.

If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word “God,” or “the Almighty,” one cannot offer public supplication or thanksgiving, without contradicting the beliefs of people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation’s historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists. . . . The three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic. All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life. Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.⁹⁹

This is an extraordinary claim. It suggests that the government may disregard the religious beliefs of its citizens who do not share the majority belief system. Note that the permitted disregard extends not only to exotic polytheists, but also to those who believe in a god who “pay[s] no attention to human affairs,”¹⁰⁰ in other words, to the successors of the eighteenth-century Deists who contributed both to the American Revolution and to the content of the Religion Clauses; outnumbered in the 2004 census figures, they simply no longer count.

Once the idea of constitutionalized disregard is admitted to the discourse, a limiting principle seems elusive. The very statistical source that Justice Scalia relies on also suggests that nearly seventy-

99. *Id.* (citations omitted).

100. *Id.* at 2753.

seven percent of the U.S. population is Christian.¹⁰¹ Many historical revisionists now strongly press the claim that our Constitution and the nation it defines are in fact specifically Protestant Christian constructs, owing little or nothing to any other religious faith.¹⁰² What limiting principle would prevent a future Justice Scalia from finding no Establishment violation in the Beatitudes or in John 3:16? As the animal revolution moved into its final phase, the sheep in *Animal Farm* were eventually trained to bleat, “Four legs good two legs better.”¹⁰³ Can the time be far away when we will hear the claim, “One God good, three Gods in One better?” And how far will we be then from the precise kind of establishment that the old extremist, James Madison, sought to forestall?

In the guise of a proper understanding of the past, Justice Scalia, the prophet of *Lee v. Weisman*, now points us toward a somewhat ominous future.

V. THE RETURN OF THE PAST

“I know, and all the world knows,” said William H. Seward in his prophetic “Irrepressible Conflict” speech, “that revolutions never go backwards.”¹⁰⁴ Certainly, victorious revolutionaries seldom moderate their demands or their faith in the rightness of their cause. The Rehnquist Court moved the law of church and state an enormous distance; with the introduction of Chief Justice Roberts, it is hard to imagine that the appetite of the religious conservative movement will be slaked. Justice Scalia has proclaimed the objective of removing “majority” religion from the strictures of the Establishment Clause. How might this be done?

101. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–2005, at 55 (2005), available at <http://www.census.gov/prod/www/statistical-abstract.html>.

102. See, e.g., DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION AND RELIGION (2d ed. 1997) (arguing that the Framers of the Constitution intended political influence and office to be wielded only by Protestants, excluding not only atheists and Deists, but also Catholics and “Hebrews”). Barton might be regarded as a crackpot, but he in fact played a prominent role in the 2004 Bush-Cheney campaign, which paid his way to speak to Christian groups around the country on the “proper” role of religion under the Constitution.

103. ORWELL, *supra* note 9, at 93.

104. William Henry Seward, Speech Delivered at Rochester, N.Y.: On The Irrepressible Conflict (Oct. 25, 1858), available at <http://www.nyhistory.com/central/conflict.htm>.

One possible route is suggested by a recent article by Professor Noah Feldman of New York University.¹⁰⁵ How can we solve the tension between religious conservatives, who seek to enshrine their religion in law, and secularists, who believe that the kind of acknowledgement Justice Scalia proclaimed to be legitimate will in fact exclude and stigmatize those who do not share the official monotheism? Professor Feldman offers a comprehensive solution: “Put simply, it is this: offer greater latitude for religious speech and symbols in public debate, but also impose a stricter ban on state financing of religious institutions and activities.”¹⁰⁶ Moments of silence in public schools, public prayer at Friday night football games, public-school courses in “intelligent design,” and privately funded religious monuments on courthouse greens would be permitted under the Establishment Clause; the kind of subsidies now legitimized by *Mitchell* and *Zellman* might not.

Obviously, this solution would not satisfy those who believe that governmental invocation of the Judeo-Christian God excludes and stigmatizes them. Professor Feldman offers this counsel:

Take the fact that the government treats Christmas as a national holiday. It would be absurd if Jews or Muslims or Hindus or Buddhists felt fundamentally excluded from citizenship by this fact—and I would venture to suggest that very few do. . . . Some members of religious minorities may choose to spend December feeling bad that they are not part of the majority culture—but they would have this same problem even if Christmas were not a national holiday, since Christmas would still be all around them. The answer is for them to strengthen their own identities and be proud of who they are,

105. Noah Feldman, *A Church-State Solution*, N.Y. TIMES, July 3, 2005, available at 2005 WLNR 10446246. I do not mean to suggest that Professor Feldman is somehow in league with Justice Scalia, or that his suggestions are part of a Scalian program. There is a difference between a revolution and a conspiracy. In the former, each victory fuels a new demand, often unforeseen by anyone involved beforehand. The typical response from the non-revolutionary side is a kind of temporizing, a disposition to compromise, to give up some ground hitherto thought sacrosanct in order to defend other territory. Every revolution has its Kerensky, its Bani-Sadr; and their efforts at compromise are usually not made more effective by the simple fact that they are sincerely meant.

106. *Id.*

not to insist that the majority give up its own celebration to accommodate them.¹⁰⁷

This “solution” is offered in good faith and with good will. But I must respectfully suggest that there are several things wrong with it. First, am I the only one to hear in the admonition to minorities that they should “strengthen their own identities and be proud of who they are” an unintentional echo of some famous words from a now overruled case? In 1896, a majority of the Court responded to another claim of exclusion and stigmatization by noting:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.¹⁰⁸

Whatever may have been the case in 1896, today we know that recognizing human inequality under law rarely strengthens those denoted as less worthy of concern than the majority; instead, the opposite is more often true. Designating winners and losers in this way usually whets the appetites of winners for more superiority and privilege; this is the second flaw in Professor Feldman’s proposed solution. Revolutions do not go backwards. If the “majority” agrees to such a “compromise,” as Feldman proposes, history suggests that there is little reason to believe that the “compromise” will hold.

I recently completed a lengthy study of the years before and after the Civil War.¹⁰⁹ One of the most striking events in that period was the rapid abandonment by the South and its allies of the famous Compromise of 1850. At a time when “compromising” promised to win the South what it wanted—a vastly strengthened Fugitive Slave Law,—its leaders solemnly intoned that the Missouri Compromise

107. Feldman, *supra* note 105.

108. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

109. By “lengthy study,” I mean “a long period devoted to study.” However, given the opportunity, I will cite the fruits of that “lengthy study.” GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR CIVIL RIGHTS IN POST-CIVIL WAR AMERICA* (2006).

line (slavery permitted to the South and prohibited to the North) was part of a covenant secured by the region's word of honor.¹¹⁰ Scarcely four years later, sensing an opening, the South repudiated the compromise and demanded "popular sovereignty" in Kansas (well north of the "compromise" line) so that slave-owners could take their chattels there and set up a slave system.¹¹¹ It is not unreasonable to surmise that the winners in Professor Feldman's "compromise" will take the real advantage they gain under the Establishment Clause and use it to bolster their case for subsidy and public acknowledgement.

The third problem with Feldman's solution is the idea that a core constitutional issue such as the Establishment Clause can be treated as a bipolar dispute between warring parties to be "settled" by dividing the First Amendment up like the West Bank of the Jordan. All of us have a stake in the Constitution, whether we are "values evangelicals" or "secularists" (to use Professor Feldman's terms), or whether we simply do not adhere to either of his two positions. It is not the job of judges to sit down and dole out the territory. Instead, constitutional adjudication is (in some admittedly hard-to-define way) supposed to emanate from the text, history, structure, values and caselaw originating in the document itself. Sometimes that means denying even half a loaf to majorities.¹¹² Nowhere does that seem more salient than in the area of the Establishment Clause, which, at its conception no less than today, emanates precisely from a desire to limit the extent to which majorities may impose their preferred religious identities on minorities. As we look back on the religious ill will generated by the election of 2004, we should surely conclude that a sea-change in the Establishment Clause and a new empowerment of the majority bodes ill for the civic peace. The potential radicalism of the latest prophecy is so sweeping that one is moved to sympathize with Justice O'Connor, who wrote her valedictory in *McCreary* to emphasize her concern over the way things were moving in the church-state area: "Those who would renegotiate the boundaries between church and state must therefore

110. See JAMES M. MCPHERSON, *BATTLE-CRY OF FREEDOM: THE CIVIL WAR ERA 70-77*, 117-18 (1988).

111. *Id.* at 121-23.

112. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?”¹¹³

113. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2746 (2005) (O'Connor, J., concurring).