

# SECULAR SECTARIANISM, PERILOUS NEUTRALITY

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Sandy Levinson's highly original consideration of attachment, and of various leaps of faith—secular as well as religious—repeatedly has illuminated matters about which few of us feel neutral. His scholarship directly engages core issues that tend to be hard fought—fraught with the danger of encountering and perhaps even becoming true believers. Sandy's impressive work is even deeply provocative regarding what may be contemporary forms of idolatry.

At first glance, for example, neutrality seems appealing and safe. (This is the case notwithstanding what we have learned in recent years about the conduct of Switzerland during the World War II period.) If I read Sandy correctly, however, he points out that the search for neutrality is necessarily quixotic in the context of public space. Legitimacy inscribed via monuments and landscapes inescapably involves the manipulation of a scarce, contested resource. Yet—to push Sandy's point a bit further—it may be that the very concept of neutrality in law tends to transmute detachment into a dangerous, not to say idolatrous, faith. I will suggest at least that recent United States Supreme Court constitutional decisions concerning religion serve to emphasize the perils of neutrality for secular and religious people alike.

## I. FIRST COURSE: CONSTITUTIONAL DISCOURSE, RELIGIOUS ANALOGIES, AND THE AMERICAN CIVIL RELIGION

To Sandy Levinson, constitutional law is a linguistic system or discourse, emphatically *not* written in stone.<sup>1</sup> Throughout his career, Sandy has added significantly to that discourse. In his hands, close attention to various forms of constitutional faith becomes far richer than much of law talk and modern life, neatly described by Clifford Geertz as “marooned in a Beckett-world of colliding soliloquy.”<sup>2</sup>

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1. Sanford Levinson, *Constitutional Faith* 191 (Princeton U. Press 1988) [hereinafter Levinson, *Constitutional Faith*]. As to the meaning of what may not be settled, notwithstanding appearances, see generally Sanford Levinson, *Written in Stone: Public Monuments in Changing Societies* (Duke U. Press 1998).

2. Quoted in Levinson, *Constitutional Faith*, *supra* n. 1, at 7.

To think and to speak (and to listen carefully to others) concerning how we think and talk about the federal constitution is to begin to ponder some basic paradoxes. In *Constitutional Faith*, for example, Sandy offers a four cell diagram of constitutional approaches: a person might be protestant or catholic about textual limits; protestant or catholic about authority and concerning who gets to define the “true Constitution.” He also reminds us that James Madison suggested, in *Federalist 37*, that in contemplating the Constitution, “[i]t is impossible for a man of pious reflection not to perceive in it, a finger of the Almighty hand . . . .”<sup>3</sup> Yet given what the Supreme Court recently has had to say on the subject of the Almighty and the Constitution, at times one wonders which finger the Almighty might be lifting.

Sandy turns out to be someone who likes his paradoxes at least as much as the next person. In fact, he probably agrees with Justice Holmes, at least in Holmes’s belief that “[t]here is nothing like a paradox to take the scum off [the] mind.”<sup>4</sup> To begin, therefore, I focus on a paradox within what Sandy describes as his “principal subject” in *Constitutional Faith*: that is “the implications of religious analogies for understanding the role of the Constitution within the American civil religion.”<sup>5</sup>

It seems to me vitally important that we have a rich pluralism of many constitutional faiths. This may explain why we constantly cast the Constitution in various metaphors of rocks<sup>6</sup> and roles. But I want to question some of the core binary choices behind which we so often take refuge. These include the attachment/detachment and evenhandedness/discrimination distinctions we tend to demand of our judges, as well as key doctrinal dichotomies surrounding church/state choices such as free exercise/establishment.

My central argument is that we should be much more dubious than we generally are when “neutrality” is tossed around within constitutional doctrine or, for that matter, in discourse about the Constitution. In particular, I will criticize “neutrality” as the Court has embraced it in both recent Free Exercise and Establishment Clause claims.

To introduce my approach, I begin with a striking bit of Talmud that is relatively obscure even among those who—unlike myself—really know their Talmud.<sup>7</sup> It will suggest that even within what may seem to some to be the dark heart of religious discourse, there may be no tiebreaker, no clear trump, no neutral principles.

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3. *Id.* at 14.

4. *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935* vol. 1, at 389 (Mark DeWolfe Howe ed., Harv. U. Press 1953).

5. Levinson, *Constitutional Faith*, *supra* n. 1, at 27.

6. “Let he who cast the first stone” seems particularly apropos, but consider, *e.g.*, foundations, bedrock, and similar metaphors, discussed with wisdom in Milner S. Ball, *Lying Down Together: Law, Metaphor, and Theology* (U. Wis. Press 1985).

7. I should note that I am very grateful to Sandy for including me in one of the wonderful, weeklong Talmud study sessions for American law professors held at the Hartman Institute in Jerusalem a number of years ago.

Next, I briefly consider recent Supreme Court invocations of neutrality in the realm in which neutrality might seem most obviously appealing and most important: the area of church-state relations governed by the First Amendment's Religion Clauses. The Supreme Court's recent "shift to neutral,"<sup>8</sup> I suggest, constitutes an important departure from established constitutional doctrine. On both the free exercise and establishment sides of the ledger, the Court has emphasized neutrality in all the wrong places. In fact, a majority of the Justices has begun to enact an extreme departure from past constitutional faiths. This initiative entails significant new threats to freedom of conscience and a serious menace for religion, as well as for government. The dangers now lurking are indeed of the sort that demonstrably concerned James Madison, Thomas Jefferson, and their peers, as well as numerous thinkers (and judges) before and since.

By focusing on several deep problems within the linked concepts of neutrality and nondiscrimination, I suggest that what the Court is doing now directly undermines the guarantee of "full and equal rights of conscience." That was the phrase for the freedoms James Madison championed in the First Congress in his draft for what became the Religion Clauses of the First Amendment.<sup>9</sup> The current Supreme Court's lack of concern about craftsmanship, coupled with its extreme result orientation, actually is doing far more to "court anarchy" than would any serious, robust version of free exercise protections.<sup>10</sup> Contrary to what the current majority led by Chief Justice Rehnquist insists, moreover, the wall of separation embedded in the Establishment Clause is not some passing metaphor Thomas Jefferson dreamed up for political purposes one fine day when he sat down to write to the Danbury Baptists in 1791. As Roger Williams put the matter almost 150 years before Jefferson wrote, great vigilance is required if there is any "gap in the hedge or wall of separation between the garden of the church and the wilderness of the world . . . ."<sup>11</sup>

In closing, I hint at a better approach to the knotty, fascinating, and inevitable tension within the Religion Clauses of the First Amendment. Analogies drawn from some of the basics of our secular faith, from the way we regulate the process of voting, could prove helpful in thinking about law and religion.

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8. For an important discussion about these recent developments, see Symposium, *Shifting into Neutral? Emerging Perspectives on the Separation of Church and State*, 43 B.C. L. Rev. 1009 (2002).

9. This is discussed in Aviam Soifer, *Full and Equal Rights of Conscience*, 22 U. Haw. L. Rev. 469 (2000).

10. In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 888 (1990), Justice Scalia expressed concern that to apply the established compelling state interest test to alleged intrusions on the free exercise of religion was "courting anarchy."

11. Roger Williams, *Mr. Cotton[']s Letter Lately Printed, Examined and Answered*, in Perry Miller, *Roger Williams: His Contribution to the American Tradition* 89, 98 (Bobbs-Merrill Co., Inc. 1953). For a different view of the implications of the metaphor and many other matters, see Philip Hamburger, *Separation of Church and State* (Harv. U. Press 2002). But see Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 Cal. L. Rev. 673 (2002).

## II. A TALMUDIC INTERLUDE

Talmudic law does not fit neatly within Sandy Levinson's topography of religion and law.<sup>12</sup> If anything, however, the unsettled and unsettling thrust of the following section of the Babylonian Talmud illustrates the complexity of the categories Sandy so usefully has begun to explore. Even a tentative glance reveals intriguingly challenging, destabilizing possibilities.

This little-known and strange little story in the Talmud involves Rabbah bar Nahmani, introduced as someone who "died as a result of persecution, having been informed against to the authorities."<sup>13</sup> The scene opens with Rabbah, seated alone on a palm tree stump, studying the Torah. "At that very time," we learn, "there was a dispute in the Heavenly Academy about a certain matter concerning the disease of leprosy . . ."<sup>14</sup> The controversy was about whether the priest should declare someone ritually pure or not, depending on whether a spot of a certain size or a white hair appeared first. The narrow question is what to do if there is a doubt, *i.e.*, if it is unclear whether the spot or the hair appeared first. We are told that "The Holy One, blessed be He, says that in such a case the afflicted person is still ritually pure."<sup>15</sup> Many would think that this should decide the matter. The problem was, however, that all the Sages of the Heavenly Academy maintained that in such a case, the afflicted person is impure. Even God's vote was not trump. What to do?

It was agreed in Heaven that Rabbah bar Nahmani should be summoned to decide between the two views. (Rabbah previously had claimed great expertise on the subject of leprosy and purity.) Initially, however, the Angel of Death could not grab Rabbah because Rabbah was so deeply absorbed in his learning that he did not interrupt his studies for even a moment. Then the wind was made to howl between the branches of the trees near Rabbah. Distracted, he mistook the sound of the wind for a troop of horsemen and proclaimed that he would rather die than be captured and turned over to the authorities. As Rabbah died, he ruled on the matter and his last words were, "It is pure, it is pure."<sup>16</sup> A heavenly voice proclaimed, "Happy are you, Rabbah bar Nahmani, that your body is pure and your soul departed in purity with the word 'pure' on your lips."<sup>17</sup>

12. In a footnote, for example, Sandy not only concedes that his use of "protestant" and "catholic" may be overly schematic, but also that his own predilection leaning toward a "catholic-protestant" perspective—the joinder of a non-text-identified Constitution with a rejection of judicial supremacy—undoubtedly come from its similarity to the historical development of what I find the most attractive aspects of Judaism." Levinson, *Constitutional Faith*, *supra* n. 1, at 209 n. 161.

13. *The Talmud: The Steinsaltz Edition*, Volume V Tractate Bava Metzia Part V, at 148 (Random House 1992) [hereinafter *The Talmud: The Steinsaltz Edition*]. The charge was that 12,000 Jews did not pay the royal poll tax because they were off at Rabbah's lectures before key Jewish holidays. The Talmud recounts a series of cat-and-mouse adventures as Rabbah moved from town to town, pursued by a royal officer. With the aid of strange happenings, including a wall that collapsed to save Rabbah in answer to his prayers, Rabbah made his escape. *Id.* at 148-49.

14. *Id.* at 149.

15. *Id.* at 150.

16. *Id.* at 151.

17. *Id.* (internal quotation marks omitted).

We are told that over the next few days three notes dropped from Heaven. The first announced that Rabbah had been summoned to the Heavenly Academy; the next two instructed the rabbis as to how long they were obliged to eulogize Rabbah and when they could go home without being subject to a ban. The story ends with an unnamed Arab riding a camel, who is blown from one side of the Pappa River to the other. When the unnamed Arab (understandably) asks what is happening here, he discovers that the great sage Rabbah died, at which point the Arab offers fulsome praise of both God and Rabbah, “[who] is Yours, whether he is in this world or in the world to come.”<sup>18</sup> But why destroy the world, the Arab asks, on account of Rabbah’s death? As a result of the Arab’s appeal, we are told, the storm subsides.

Certainly this story is weird enough on its own terms. But it becomes even more intriguing. According to the rabbis, the more permissive answer to the purity question—the view that, when in doubt, the person whose symptoms are uncertain is presumed to be ritually pure—has not prevailed as a matter of *halakhah* (Jewish religious law).<sup>19</sup> Majority rule actually rejects the more liberal position, *i.e.*, the interpretation adopted by both God and Rabbah. No less a commentator than Maimonides asserted that the matter remains in doubt. To make this claim, Maimonides invoked a familiar trope, insisting that the Torah was given to human beings on earth and is not in Heaven. Therefore, the Torah is to be interpreted by majority rule among human experts, and not even by the views of Heaven.<sup>20</sup> A majority of experts have been stricter than Maimonides. Remarkably, they have decided against the more permissive position, though the Talmud is clear that the position they reject is the position embraced by God and Rabbah.<sup>21</sup>

As a result of an informal sampling, I believe this story from the Talmud is not well known, even among Orthodox Jews, probably because it seems so blatantly subversive. At the very least, the idea that God’s view is not determinative appears to be a striking, deconstructing illustration of the independence of judges within Jewish law. That the view shared by God and Rabbah does not prevail emphasizes the degree to which there is no Archimedean point, at least within the contours of this section of the Talmud. The inadequacy of neutral principles is obvious here as well, as is the lack of any settled prior law that could control the current dispute.<sup>22</sup> By embracing the absence of such benchmarks—even within the context of religious law—the Talmud here seems to

18. *The Talmud: The Steinsaltz Edition*, *supra* n. 13, at 152.

19. *Id.* at 150 (Halakhah Note).

20. *The Talmud: The Steinsaltz Edition*, Volume III Tractate Bava Metzia Part III, at 235-40 (Random House 1992) (Ovens of Akhnai). For first-rate discussions of this intriguing and complex story, see Daniel J.H. Greenwood, *Akhnai*, 1997 Utah L. Rev. 309; Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 Harv. L. Rev. 813 (1993).

21. *The Talmud: The Steinsaltz Edition*, *supra* n. 13, at 150 (Halakhah Note).

22. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959). Charles L. Black, Jr., offered a justly famous, devastating response, directly rooted in facts on the ground, in Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960).

point to a radically open-ended, future-oriented approach to judging and to law itself. On earth and in Heaven, there is no neutral place.

A more familiar Jewish folk tale concerning judges and judgment makes a similar point, albeit in a very different tone. In a small village, two men come to a rabbi's home to ask him to decide their small dispute. The rabbi listens to the first man, and says, "You're right." After hearing the claims of the other party, the rabbi again says, "You're right." Overhearing all this, the rabbi's wife summons the rabbi into the next room and scolds him. She vigorously points out that the parties cannot both be right. "You're right," says the rabbi.

At first glance, the rabbi in this story (or joke) may seem a complete fool. The more closely we consider his role in comparison to other judges, however, the more we might begin to hope to have such a judge if we must appear in court. He listens and he empathizes. He is open-minded. He adjusts to context. He is hardly a hidebound formalist and he understands that determining who is right may be more significant than any reified notion of the law. For a judge, an astute sense of complexity and the future may be preferable to either true belief or faith in the past.<sup>23</sup> There must be human judgment, to be sure, but it takes wisdom and attention to the future as well as to the past if the job is to be done well. Simple binary choices and claims of extrahuman authority do not produce results even approaching justice. If nothing else, both the Talmud's story about a heavenly dispute and the earthy folktale indicate how complex, and important, the very idea of neutrality turns out to be when we get down to cases.

### III. SHIFTING INTO NEUTRAL

Neutral in law is different from neutral in a car. In driving a car, finding neutral is really quite mechanical. You've got it in gear or you do not; you are either in or out of neutral. Unfortunately, the current Court has begun to wield a similarly mechanistic conception of neutrality as it construes both of the Religion Clauses of the First Amendment. On one hand, the Court has begun to insist that Free Exercise Clause protections are irrelevant so long as government officials do not act in a way intended to punish or harm religion.<sup>24</sup> On the other, most of the same Justices insist that to exclude religion from participation in various public programs is a form of unconstitutional discrimination.<sup>25</sup> Moreover, government

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23. I think I love these stories—one from the heights of the Talmud and the other from the lowly daily life of the *shtetl*—because I may be more skeptically anarchic than Sandy is. The great Jewish scholar Gershom Scholem, after being pressed by his friend Walter Benjamin to explain why Scholem resolutely resisted commitment to Zionism or to some specific form of Jewish worship, explained that he was committed "to maintain[ing] the anarchic suspension." Susan A. Handleman, *Fragments of Redemption: Jewish Thought and Literary Theory in Benjamin, Scholem, and Levinas* 56 (Ind. U. Press 1991). Scholem observed: "[I]t is precisely the wealth of contradictions, of differing views, which is encompassed and unqualifiedly affirmed by tradition." Levinson, *Constitutional Faith*, *supra* n. 1, at 20. Like my late friend Bob Cover, at times I think of myself as somewhat of an anarchist who still loves law. For a brief discussion of admirable judicial choices made among competing institutional values, see Aviam Soifer, *Rethinking Fairness: Principled Legal Realism and Federal Jurisdiction*, 46 N.Y.L. Sch. L. Rev. 29 (2002-03).

24. *Smith*, 494 U.S. 872.

25. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

aid to religion now has become constitutionally acceptable, so long as that aid is laundered through what the Court perceives as a “genuine and independent private choice.”<sup>26</sup>

#### A. *Free Exercise and Viewpoint Neutrality*

There can be no doubt that these innovative interpretations both the Religion Clauses mark a major departure from decades worth of the Court’s own precedents. In the name of neutrality, the Court sloppily abandoned over forty years of Free Exercise precedents in *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>27</sup> for example. And even when a Free Exercise claim prevails in the post-*Smith* world, as the Santeria religious argument did in *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*,<sup>28</sup> discrimination has become the focal point for the Court’s inquiry.<sup>29</sup> To assess the requisite constitutional neutrality, the Court now says it finds “guidance in our equal protection cases.”<sup>30</sup>

The appealing idea of nondiscrimination has deep roots, of course, within traditional analysis of freedom of expression claims. The Court also has begun to rely on the inherent appeal of “viewpoint neutrality” as a useful freedom of expression bridge between its parsimonious free exercise decisions and its recent holdings gutting the Establishment Clause in the name of aggressive “neutrality.” Long gone is the longstanding recognition—in the context of early school prayer decisions, for instance—that: “Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause . . . .”<sup>31</sup>

In *Good News Club v. Milford Central School*,<sup>32</sup> for example, the Court decided that a public school could not exclude an evangelical Christian club from an after school program aimed at elementary students. Justice Thomas’s opinion for the majority held that the exclusion of even a proselytizing club constituted an unconstitutional form of viewpoint discrimination. Thomas repeatedly extolled the virtues—and constitutional clout—of neutrality. In fact, he scolded the

26. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2467 (2002).

27. 494 U.S. 872 (1990).

28. 508 U.S. 520 (1993).

29. *Id.* at 533. Justice Kennedy’s lead opinion for the unanimous Court emphasized: “At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Id.* at 532. Justice Souter, concurring, made a thoughtful argument that distinguished between formal and facial neutrality and also pointed out that substantive neutrality may be something far different in the context of the Free Exercise Clause. *Id.* at 561-63 (Souter, J., concurring in part and concurring in the judgment). See generally Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 933 (1990). (It probably bears noting that Laycock argued the case before the Supreme Court for the Santeria church.)

30. *Church of the Lukumi*, 508 U.S. at 540.

31. *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (invalidating New York state’s “non-denominational” prayer).

32. 533 U.S. 98.

defendants and particularly the lower courts in the case for their exaggerated Establishment Clause concerns. He also manipulated the usual rules that govern summary judgments in order to avoid confronting facts that supported Establishment Clause concerns, which he reduced to an unsympathetic, unconstitutional caricature: attempts to limit religious expression in public settings are now “a modified heckler’s veto.”<sup>33</sup> Justice Scalia’s concurrence went further in denigrating separation of church and state sensitivity. The case involved “zero” Establishment Clause issues, according to Scalia.<sup>34</sup> He went on to claim, even though the case involved children of elementary school age who were offered candy and other treats to attend club sessions, that giving candy to a child simply triggers that child’s free choice. Scalia observed, “Physical coercion is not at issue here; and so-called ‘peer pressure,’ if it can ever be considered coercion, is, when it arises in private activities, one of the attendant consequences of a freedom of association that is constitutionally protected . . . .”<sup>35</sup>

In the last few years, the Court also has taken the complex, entangled issues of the Establishment Clause and reduced them to a largely formulaic inquiry: (1) Is there genuine and independent private choice? and (2) Can government aid be considered neutral because it passes through an adequate buffer before it reaches religious institutions? The foundation for this approach was solidly in place before the Cleveland school voucher decision, as was the counterargument that there actually are many different meanings of neutrality within Establishment Clause analysis.<sup>36</sup> Yet *Zelman v. Simmons-Harris*<sup>37</sup> erected a formidable and

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33. *Id.* at 119. A year earlier, Thomas began to develop this theme when he wrote for a plurality in *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding federal program funneling funds via state educational agencies to local educational bodies, which in turn lend items such as library materials and computers to both public and private schools). Thomas argued in *Mitchell* that “hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.” 530 U.S. at 828. After mentioning Congress’s near passage of the Blaine Amendment in the 1870s, Thomas proclaimed that a doctrine that excluded pervasively sectarian schools from otherwise permissible public aid was “born of bigotry” and “should be buried now.” *Id.* at 829.

34. *Good News Club*, 533 U.S. at 121 (Scalia, J., concurring) (citations omitted).

35. *Id.* Parental consent forms were required, but the Court precluded inquiry about the context and reliability of such consent. Nor did the majority Justices explore the problematic role of teachers, assigned to supervise but not to influence their young charges as to after school program content. Moreover, neither the appeal of candy to a hungry youngster at the end of a school day nor the suasion of a young child’s friendships figured in the Court’s analysis. Finally, there are potentially devastating implications in importing viewpoint neutrality analysis into an after school program setting. If the Court really means that this limited public forum—a point assumed rather than litigated in the case—is to be treated as if it were a public auditorium, for example, it would seem that any group, no matter how controversial, now can claim constitutional access to a school’s after school program. Rather than allow use of a classroom by some Ku Klux Klan or gay rights or socialist youth group, for example, one can readily foresee a school board choosing to close down an entire program. In part thanks to the Supreme Court itself, even Scout troops have become controversial. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

36. For example, *Mitchell v. Helms*, discussed at *supra* note 33, embraces a version of neutrality and private choices that directly anticipates Chief Justice Rehnquist’s majority opinion in the voucher case. See e.g. *Mitchell*, 530 U.S. at 811-14. Justice Souter’s extensive dissent in *Mitchell* includes a helpful typology of three different meanings of “neutrality” within Establishment Clause analysis. These include: (1) a conclusory description of a state of equipoise for government, functioning as neither ally nor adversary of religion; (2) a synonym for secular, nonideological, or not related to religious education; and (3) evenhandedness. *Id.* at 878 (Souter, J., dissenting).

37. 122 S. Ct. 2460.

remarkably formal bulwark that now protects extensive government aid to religious institutions from constitutional attack.

*B. Choices, Not Echoes*

During the Depression, many states and corporations launched a fierce constitutional attack against the new Social Security system. With some justification, they claimed that states were left with little true choice. They pointed out, for example, that the new-fangled federal unemployment compensation scheme offered a ninety percent federal tax credit for employers, but that to receive it those employers had to make contributions to state unemployment funds which the federal government had certified were in compliance with the Social Security Act.

Writing for a five-to-four majority, Justice Cardozo upheld this element of the federal Social Security Act.<sup>38</sup> He rejected the claim of unconstitutional coercion made by the states. To conflate temptation with coercion, Cardozo argued, would “plunge the law in endless difficulties.”<sup>39</sup> Rejecting “a philosophical determinism by which choice becomes impossible,” Cardozo endorsed the tradition of a “robust common sense which assumes the freedom of the will as a working hypothesis in the solution” of legal problems.<sup>40</sup>

It is worth noting that less than two months before *Steward Machine*, the Court had handed down its famous *West Coast Hotel Co. v. Parrish*<sup>41</sup> decision upholding the State of Washington’s minimum wage law for women. In *West Coast Hotel*, the Court rejected decades of federal court interventions made in the name of freedom of contract. Instead of following the Court’s substantive due process precedents, Chief Justice Hughes’s majority opinion underscored how greatly the inequality of bargaining power faced by many workers rendered their free choices nugatory, thus making their wages, hours, and working conditions appropriate subjects for legislative intervention.<sup>42</sup>

Old constitutional law chestnuts such as *Steward Machine* and *West Coast Hotel* underscore how bitterly ironic it is that, in recent years, the Court has tended to turn the Court’s core assumptions in 1937 entirely upside down. Today the majority has become extremely solicitous of the knowing and voluntary choices of the states. If a state makes a bad deal, for example, the Court is often quite willing to let the state out of the obligations for which the state contracted.<sup>43</sup> Indeed, the very unfairness of the deal the state made—at least in hindsight—may be enough to allow the state to get out from under all its legal obligations.

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38. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

39. *Id.* at 590.

40. *Id.*

41. 300 U.S. 379 (1937).

42. *Id.* at 398-99.

43. See *Pennhurst St. Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 23-27 (1981); *N.Y. v. U.S.*, 505 U.S. 144, 174-77 (1992); *Barnes v. Gorman*, 122 S. Ct. 2097, 2101-02 (2002).

Simultaneously, however, the Court is quite cavalier in assuming that individuals are bound by agreements they have reached, no matter how limited their options at the time nor how extreme the extenuating circumstances might have been.<sup>44</sup> Less than a fully knowing and voluntary undertaking of legal obligations carries little weight for unrepresented individuals, though the same argument is often a clear winner for states whose many lawyers did not save them from themselves.<sup>45</sup>

It is hardly surprising, therefore, that the *Zelman* majority is so repetitiously and emphatically enthusiastic about the “true private choice” it discerns. Despite the backdrop of a failed public school system and the considerable monetary discrepancies among the few available options, Chief Justice Rehnquist is certain that the parents freely chose to send their children to religious schools. Under the program’s eligibility criteria, the parents involved must be impoverished. Yet they made “genuine and independent private choices,”<sup>46</sup> for example, through which nearly two-thirds of the parents sent their children to the religious schools of religions different from the religions they embrace.<sup>47</sup>

This “genuine and independent private choice” also serves the majority as the crucial buffer establishing the requisite constitutional neutrality. Because parents select the religious schools, “the circuit between government and religion” is broken, “and the Establishment Clause . . . not implicated.”<sup>48</sup>

Therefore, Rehnquist’s syllogism has it, “Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as

44. *Dept. of Housing & Urban Dev. v. Rucker*, 535 U.S. 125 (2002). In *Rucker*, public housing leases required tenants to “assure that the tenant, any member of the household, a guest, or another person under the tenant’s control, shall not engage in . . . any drug-related criminal activity on or near the premises.” *Id.* at 128. The tenants also signed agreements providing that the tenant “understands that if I or any member of my household or guests should violate this lease provision, my tenancy may be terminated and I may be evicted.” *Id.* Four long-term tenants were found to have violated the lease provision and the housing authority began eviction proceedings. *Id.* The tenants obtained an injunction, which the Supreme Court reversed. *Id.* at 136. Two of the tenants had grandchildren who were caught smoking marijuana in the parking lot; another tenant’s daughter was found with a crack pipe and crack cocaine three blocks from the apartment complex. *Id.* at 128. The fourth tenant was disabled; his caregiver and two associates of the caregiver were found with cocaine in the tenant’s apartment. *Id.*

45. Compare e.g. *Wyman v. James*, 400 U.S. 309, 323-24 (1971) (welfare recipient has right to refuse home visit by caseworker, at cost of benefits) and *Fare v. Michael C.*, 442 U.S. 707, 726-27 (1980) (juvenile, aged sixteen and a half, in police custody knowingly and voluntarily waived *Miranda* rights when he tearfully asked for probation officer, not lawyer) with *U.S. v. Morrison*, 529 U.S. 598, 653-54 (2000) (Violence Against Women Act held invalid on federalism grounds despite facts that—as Justice Souter pointed out in a dissent joined by Justices Stevens, Ginsburg, and Breyer—over two-thirds of all states supported the Act and over two-thirds joined an *amicus curiae* brief urging the Court to uphold the Act); *Alden v. Me.*, 527 U.S. 706 (1999) (dignity of state sovereignty precludes Congress’s authority to provide remedies for federal rights in nonconsenting state courts); *N.Y.*, 505 U.S. at 182-83 (principles of federalism invalidate federal law even if there is state consent).

46. *Zelman*, 122 S. Ct. at 2465.

47. *Id.* at 2494-95 (Souter, J., dissenting). Souter also makes the point that the majority’s criterion for true free choice cannot actually screen anything out. *Id.* at 2494. For the parents, what is clearly a Hobson’s choice actually may have been made in the context of a nasty and short Hobbesian choice within an unforgiving range of brutish options.

48. *Id.* at 2467 (following *Zobrest v. Catalina Foothills Sch. Dist.*, 501 U.S. 1 (1993)). In the old hymn, “the circle is unbroken.” In the Court’s view, however, the government and religion circuit is quite easily torn asunder.

one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.”<sup>49</sup> It hardly seems coincidental that this standard seems to echo the permissive standard familiar in assessing rationality within equal protection adjudication. The majority’s bottom line in *Zelman* determines that the challenged program is “entirely neutral” with respect to religion, and it is “a program of true private choice.”<sup>50</sup>

Religious schools ought to beware.

### C. Discretionary Neutrality: Perilous Ground for Religious Groups

The *Zelman* majority is unconcerned about the strings attached when religious schools accept vouchers under the Ohio program. But those who run religious schools should worry about much more than their increased exposure to general state educational regulations. First, in order to receive vouchers under the plan, religious schools must agree to abide by the state’s civil rights statutes, including prohibitions against discrimination “on the basis of . . . religion.”<sup>51</sup> Moreover, the religious schools must agree not to teach “hatred of any person or group on the basis of race, ethnicity, national origin, or religion.”<sup>52</sup> The possibilities are obvious for politically charged state entanglement. There may well be tendentious disputes over when the common “choseness,” the “us” and “them” of a good deal of religious belief may blur into “teaching hatred,” at least within the perception of a disgruntled student, parent, or teacher or a taxpayer unsympathetic with the teachings of a particular religion. Finally, the religious schools are forbidden to “advocate or foster unlawful behavior,”<sup>53</sup> a prohibition that, for example, would have cramped both the style and the message of many of the Freedom Schools during the civil rights movement. Indeed, the religious schools of many denominations seek to educate students to challenge laws they regard as immoral and unconscionable.

There are more basic problems facing religions within the current Court’s general approach. The first is that religions change, of course, and the availability of public funding has a way of altering what previously appeared to be deeply held religious beliefs. James Madison pointed this out in his famous *Memorial and*

49. *Id.* at 2469. The majority’s variation on the “objective observer” approach to Establishment Clause issues, generally associated with Justice O’Connor, seems to render this theoretical “objective observer” someone indistinguishable from the Justices’ understanding of themselves.

50. *Id.* at 2473.

51. Ohio Rev. Code Ann. § 3313.976(A)(4) (West Supp. 2002). This would seem to prohibit using religion as a criterion for hiring teachers, for example. Another Ohio statute prohibits the use of religion as a criterion for admissions under the voucher plan. For clear and insightful guidance through this tangled area, see Martha Minow, *Partners, Not Rivals: Privatization and the Public Good* 80-93 (Beacon Press 2002). Minow maintains that “public values,” such as a commitment to nondiscrimination, should be made to follow public dollars “even when private providers address public needs.” *Id.* at 105.

52. Ohio Rev. Code Ann. § 3313.976(A)(7). It is significant, of course, that Ohio’s nondiscrimination statute does not cover gender or sexual orientation, but it is likely that other jurisdictions may reach such discrimination and that such coverage will cause difficulties for the hiring practices of Orthodox Jews and observant Catholics, for example.

53. *Id.*

*Remonstrance*,<sup>54</sup> for example, and the Mormon Church found itself tightly squeezed into compliance with federal laws against polygamy.<sup>55</sup> More recently, the Supreme Court has faced religious claims that morphed in the context of available public resources and litigation.<sup>56</sup>

Almost surely more immediately significant, however, is consideration of the kind of judicial review that the Supreme Court actually has applied in deciding cases that allege that government decisionmakers have failed to be neutral in making their decisions. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*,<sup>57</sup> provides a vivid illustration of what turns out to be a widespread phenomenon. Under an executive order, federal employees may use pledge cards to designate contributions they wished to make to specified non-profits during an annual charitable fundraising drive. When legal defense and political advocacy organizations were excluded from participating in the charity drive directed at federal employees, the organizations challenged the exclusion. Though the lower courts found the exclusion unreasonable, Justice O'Connor's majority opinion rejected the organizations' claims.

She first determined that the entire charity drive, the Combined Federal Campaign, was the relevant forum, and then decided that the exclusion of the organizations "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation."<sup>58</sup> By subdividing the general classification containing charities, the Court was able to claim that it saw no viewpoint discrimination. The scheme was neutral enough to satisfy the Court.<sup>59</sup>

There are important implications within the Court's approach in such cases for the inclusion and exclusion of particular religious groups from government funding in "faith-based initiatives" and similar programs. In recent years, the Court repeatedly has stressed in the context of equal protection that legislators and government officials need not be completely neutral. Even if it costs

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54. James Madison, *Memorial and Remonstrance* (Isaiah Thomas 1786) (available in *Everson v. Board of Education*, 330 U.S. 1, 63 (1947)).

55. The story of the Mormon Church is told well in Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (U. N.C. Press 2002).

56. See e.g. *Bob Jones U. v. U.S.*, 461 U.S. 574 (1983) (university lost tax-exempt status under Internal Revenue Code despite its changing but still restrictive policies against interracial dating); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (allowing restriction on mixing gender to be relaxed in the context of funding for special needs children). Bob Jones University later further changed its policies. See Page Ivey, *S.C. School Drops Interracial Dating Ban Controversy: In Wake of Criticism Sparked by Bush Visit, Bob Jones University Changes Its Rule*, L.A. Times A9 (Mar. 5, 2000) (available in 2000 WL 2216894).

57. 473 U.S. 788 (1985).

58. *Id.* at 808 (emphasis in original).

59. The Court similarly upheld discretionary line-drawing between groups, for example, in a different First Amendment context in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983). Stressing that for these purposes advantageous tax treatment and government largess generally are indistinguishable, then-Justice Rehnquist's opinion for a unanimous Court applied extremely deferential review. "It is also not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans' organizations," he wrote. *Id.* at 550. See e.g. *Lyng v. Intl. Union, United Automobile, Aerospace & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 372-73 (1988) (ban on food stamps for strikers or their families upheld as "rationally related to the stated objective of maintaining neutrality in private labor disputes").

taxpayers more money, state and federal legislators are free to subsidize childbirth, for example, but not to pay for abortions.<sup>60</sup> Though individual constitutional rights are embedded within the choices made, the Court repeatedly has held that it does not violate principles of neutrality for politicians to pick and choose among the groups they wish to favor with subsidies or tax breaks.

#### IV. NEUTRALITY RE-EXAMINED

##### A. *The Problem*

Neutrality is an appealing, simple—and wildly misleading—concept once we begin to analyze it in constitutional law terms. Both first amendment and equal protection analyses vividly illustrate the point. It seems particularly ill-advised to attempt to hide the rapidly increasing intertwining of religion with government benefits behind a façade of neutrality that can hardly withstand a soft breeze, let alone careful scrutiny.

Indeed, the very idea of “neutrality” turns out to be a prime example of how “one could get out of a premise all that one had put into it.”<sup>61</sup> As Tocqueville went on to observe a long time ago, however, “Generally speaking, it is only the simple conceptions which take hold of a people’s mind.”<sup>62</sup> Neutrality in law repeatedly and to some extent necessarily entails such fuzziness as “benevolent neutrality,”<sup>63</sup> to be sharply distinguished from “callous indifference.”<sup>64</sup> That fuzziness ought to concern us—particularly among those who care deeply about constitutional protection for religious beliefs.

In addition to some of the analytic difficulties and the practical pitfalls mentioned above, there are several other good potential reasons to be skeptical of the current Court’s neutrality stance:

First, religions tend to be hypersensitive about discrimination. At a basic level, religious groups tend to challenge rather than to accept that all other religious groups are similarly situated. The past strongly suggests, moreover, that perceived and real discrimination almost surely will accompany any new government subsidization of pervasively sectarian institutions.

Second, many religious people who now seek entrance or better access to the public square are likely to find that it is hardly a quiet place that lends itself to civil discourse among talkers and walkers. In fact, the breakdown of the old separationism is likely to produce a very dangerous intersection. The collision of rapidly moving religions and changing government concerns and capabilities may prove very frightening, even if the intersection is within a no-fault jurisdiction.

60. *Harris v. McRae*, 448 U.S. 297, 326 (1980); *Maher v. Roe*, 432 U.S. 464, 480 (1977).

61. Alexis de Tocqueville, *Democracy in America* 164 (J.P. Mayer ed., Doubleday 1969).

62. *Id.*

63. *Walz v. Tax Commn. of N.Y.C.*, 397 U.S. 664, 669 (1970). Benevolent neutrality is not synonymous with “benign neglect,” however.

64. *Grumet*, 512 U.S. at 744 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

Third, in matters religious and political, it may be that—in the words of the old union song about Harlan County, Kentucky—“There are no neutrals there.”

### B. *Refining the Problem*

Rather than despair or become jaded about the entire enterprise, however, it seems to make sense to circle back in the direction from which we started. To catch up with neutrality, we may have to slow down and look within. For example, shortly before he was murdered along with five other Jesuits, their housekeeper and her daughter in El Salvador in 1989, psychologist and activist Ignacio Martín-Baró observed: “Objectivity is not the same as impartiality with regard to the processes that necessarily affect all of us. Thus . . . it is more useful to become conscious of one’s own involvements and interests than to deny them and try to place oneself on a fictitious higher plane ‘beyond good and evil.’”<sup>65</sup>

The constitutional and religious faiths that Sandy Levinson describes, compares, and contrasts so provocatively tend to be little recognized but ineluctable forces that embed judges and the rest of us willy-nilly, like it or not. If we cannot escape, we still are wise to consider their profound, sometimes unyielding impact upon ourselves as well as our fellows.

Sandy seems to embrace Clifford Geertz’s observation that “*all* aspects of social life are pervaded by decidedly non-neutral assumptions whose acceptance by a member of the culture defines what is ‘possible’ for that person.”<sup>66</sup> To explore those possibilities within the contact zone between law and religion, it may prove useful to take a peek at another legal realm.

### C. *Possible New Directions: Analogies from the Protection of Voting and Campaigning*

In particular, we might think about the Free Exercise Clause in terms of the ways that we regulate polling places,<sup>67</sup> and the Establishment Clause could evoke useful thoughts about the role of government vis-a-vis political speech.<sup>68</sup> In the tightly controlled realm of how we cast our votes, for example, we have made great progress toward guaranteeing equal access to the ballot. Paradoxically, this entails treating some voters unequally, including providing accommodations for those who need it. On the other hand, even within the intensely contested and largely uncontrolled world of political debate, the government must provide police protection to avoid allowing a real heckler’s veto. Yet it is also obvious that the government may not put a thumb on the scale to subsidize one party or another, nor may it even provide grants so that citizens will buy from a limited range of

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65. *Religion as an Instrument of Psychological Warfare*, in Ignacio Martín-Baró, *Writings for a Liberation Psychology* 149-50 (Adrienne Aron & Shawn Corne eds., Harv. U. Press 1994).

66. Levinson, *Constitutional Faith*, *supra* n. 1, at 156 (emphasis in original).

67. *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding regulation of expression within one hundred feet of polling station).

68. Compare e.g. C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 Harv. Civ. Rights-Civ. Libs. L. Rev. 1 (1998) with Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311.

newspapers or politicians' offerings. The government thus is directly involved with protecting political speech and freedom of the press, but it nonetheless must not try to wield influence in either realm. If government officials did try to intervene, of course, few would maintain that citizens-as-buffers could cure such a stark constitutional problem.

#### V. CONCLUSION

Charles L. Black, Jr., liked to describe law as "reasoning from commitment."<sup>69</sup> As Black did so vividly, Sandy Levinson effectively reminds us that law ought to have a point. In interpreting some of the basics of our constitutional law, we also would be wise to keep in mind Gershom Scholem's complex and wise point that a legal tradition need not focus blindly on simple authority. Rather, law actually can encompass and affirm a wealth of contradictions and differing views. The Court's recent devotion to a rigid formalism of false neutrality in construing the Religion Clauses does not even satisfy minimal standards of reasoning and commitment. Both law and religion deserve more.

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69. Charles L. Black, Jr., *A New Birth of Freedom: Human Rights, Named and Unnamed* 5 (Grosset/Putnam 1997).

