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Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice

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ARTICLES

A CONSTITUTIONAL CASE FOR GOVERNMENTAL CO-OPERATION WITH FAITH-BASED SOCIAL SERVICE PROVIDERS†

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It is often said that America's founding was an experiment in government. Certainly few features of the American constitutional settlement left more to future chance—and were more of a break with existing European patterns—than the Establishment Clause set out in the First Amendment. The new Republic sought to rely on transcendent principles to justify its unprecedented advancements in human liberty.[1] Concurrently, the Founders reject-

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[1] The Declaration of Independence, for example, refers to these transcending principles as "self-evident truths," "Creator-endowed inalienable rights," and "the laws of nature and of nature's God." These higher law principles did not necessarily rest upon a common confession of revealed truth. For some among the Founders, the principles were derived from a faith in reason. But the reliance on transcendent principles, whether extrapolated from reason or revelation, did mean agreement at the level of the moral basis for political action. *See, e.g.*, JOHN G. WEST, JR., THE POLITICS OF REVELATION & REASON: RELIGION & CIVIC LIFE IN THE NEW NATION (1996):

ed any official or fixed formulation of these principles, for no public credo was to be established by law. So it is more than just a little ironic that the nation's most cherished human rights depend upon the continued private faith of innumerable Americans in creeds and confessions that themselves cannot be officially adopted by the Republic, lest the adoption run afoul of the prohibition on laws respecting an establishment of religion. Yet, coming full circle, it is this "no-establishment principle" that allows voluntary religion to flourish, which in turn nurtures belief in God-endowed rights.[2] The resulting

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> The Founders eliminated the problem of dual allegiance to God and government by removing God from the authority of the government. . . .
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> This solution to the theological-political problem in theory, however, required a major corollary to work in practice: a belief that church and state would agree on the moral basis of political action. . . . Only if church and state can agree on the moral standard for political action can [subjugation of religion to state or vice versa] be avoided. In other words, reason (the operating principle of civil government) and revelation (the ultimate standard for religion) must concur on the moral law for the Founders' solution to work.
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> The Founders, of course, agreed with this proposition. . . . This conceit that reason and revelation agree on the moral law so permeated the Founding era that the modern reader may miss it because authors of the period more often assumed this proposition than demonstrated it. When citing authority for fundamental propositions, writers of the Founding era appealed to both reason and revelation as a matter of course.

Id. at 74-75.

[2] See, for example, James Madison's letter wherein he observes how the Virginia churches had greatly expanded in number and reputation since disestablishment. Letter to Edward Livingston (July 10, 1822), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES 273, 276 (1865) ("[in] Virginia . . . religion prevails with more zeal and a more exemplary priesthood than it ever did when established. . . . Religion flourishes in greater purity without, than with the aid of Government").

That keenest of observers, Alexis de Tocqueville, sketched this delicate balance in operation during his visits to the America of the 1830s:

> Religion, which never intervenes directly in the government of American society, should . . . be considered as the first of their political institutions . . . .
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> . . . .
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> I do not know if all Americans have faith in their religion—for who can read the secrets of the heart?—but I am sure that they think it necessary to the maintenance of republican institutions. That is not the view of one class or party among the citizens, but of the whole nation; it is found in all ranks.
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> . . . .
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> For the Americans the ideals of Christianity and liberty are so completely mingled that it is almost impossible to get them to conceive of the one without the other . . . .
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> . . . .
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> The religious atmosphere of the country was the first thing that struck me on arrival in the United States. The longer I stayed in the country, the more conscious I became of the important political consequences resulting from this novel situation.

juggling act is what Dr. Os Guinness aptly describes as the still "undecided experiment in freedom, a gravity-defying gamble that stands or falls on the dynamism and endurance of [the Republic's] unofficial faiths."[3]

This ongoing experiment in human liberty, because of its indeterminacy, has had the unforeseen effect of concentrating intense pressure on a single constitutional restraint on governmental power, namely the Establishment Clause. To the uninitiated, having the cause of this pressure pinpointed goes far toward explaining why the no-establishment principle has become one of the chief battle sites over who exercises cultural authority in this nation.[4] Quite simply, the Establishment Clause has become where Americans litigate over the meaning of America.[5] Thus, it is to the Establishment Clause that we rightly devote so much of our attention and energy.

The United States Supreme Court's modern jurisprudence concerning church/state relations is commonly dated from its 1947 decision in *Everson v. Board of Education*,[6] which embraced a separationist interpretation of the Establishment Clause. Since *Everson*, the Court begins with separatistic as-

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> In France I had seen the spirits of religion and of freedom almost always marching in opposite directions. In America I found them intimately linked together in joint reign over the same land.
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> My longing to understand the reason for this phenomenon increased daily. To find this out, I questioned the faithful of all communions . . . . I found that [American Catholic priests] all . . . thought that the main reason for the quiet sway of religion over their country was the complete separation of church and state. I have no hesitation in stating that throughout my stay in America I met nobody, lay or cleric, who did not agree about that.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 269-72 (J.P. Mayer & Max Lerner, eds., Harper & Row 1966).

[3] OS GUINNESS, THE AMERICAN HOUR: A TIME OF RECKONING AND THE ONCE AND FUTURE ROLE OF FAITH 18-19 (1993).

[4] *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993); JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

[5] Some have puzzled as to why broad coalitions, like that behind the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), can come together over the meaning of the Free Exercise Clause but not the Establishment Clause. The Free Exercise Clause is about protecting religiously informed conscience, especially freedom for religious minorities to continue practices that are out of step with the general culture. Most everyone who cares about religion agrees on the desirability of protecting these matters. This is not the case, however, with the Establishment Clause. Where the stakes are high, as in the culture wars, there can be little coalition building between social liberals and social conservatives or between theological liberals and theological conservatives.

[6] 330 U.S. 1 (1947). While narrowly upholding a state law permitting local authorities to reimburse parents for the cost of transporting children to school, including church-related institutions, the rhetoric and historical method adopted by the Court in *Everson* were separatistic.

sumptions when addressing novel questions that invoke the no-establishment principle. The separationism theory has become so dominant that today, fifty years after *Everson*, courts assume a need to justify holdings that reach results not easily fitting into Jefferson's influential metaphor ("a wall of separation") as allowable departures from the rule first laid down in *Everson*.

This Article will refer to separationism as based on "older assumptions." The Court's presuppositions concerning the nature and contemporary value of religion and the proper role of modern government underlie what will be referred to as a "traditional analysis" of the case law. Part I is a partial overview of the Supreme Court's cases since *Everson*, and has the goal of making the strongest arguments—within the framework of separationism—for the constitutionality of governmental welfare programs that permit participation by faith-based social service providers.

Part II is about separationism's major competitor, a theory centered on the unleashing of personal liberty to the end that, with minimal governmental interference, individuals make their own religious choices. This theory has come to be called the neutrality principle.[7] Neutrality theory surfaced most obviously in 1981 when the Supreme Court handed down its decision in the free speech and religion case of *Widmar v. Vincent*.[8] Religious neutrality as a model for interpreting the Establishment Clause is based on what will be termed "new assumptions." The aim of the new assumptions is to minimize the effects of governmental action on individual or group choices[9] concerning religious belief and practice. When the dispute is over a welfare program

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[7] *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2528 (1995) (O'Connor, J., concurring) (contrasting the "neutrality principle" with the "funding prohibition" view of the Establishment Clause); Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 704 (1994) ("[T]he [neutrality] principle is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided religous groups or individuals in turning aside Establishment Clause challenges."). Bowen v. Kendrick, 487 U.S. 589, 624 (1988) (Kennedy, J., concurring) (characterizing a social service program open to a diverse array of organizations neutral as to religious and nonreligious applicants).

[8] 454 U.S. 263 (1981). *Widmar* held that the Free Speech Clause, with its requirement that there be no content-based discrimination, is not overridden by the Establishment Clause. *Id.* at 271-75. Accordingly, a state university was prohibited from denying a student religious organization the same access to facilities provided to other student organizations, thereby permitting the students to meet, pray, sing, and worship on campus.

[9] Religious choices by an individual believer or by a religious group are not differentiated in this Article. Individual rights are akin to the group rights of a church or religious denomination as long as the organization can show injury-in-fact to the purposes or activities of the group itself, or when the organization has third-party standing to assert a rights claim on behalf of its members pursuant to the three-part test set out in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

in which faith-based social service providers desire to participate, the neutrality principle requires government to follow a rule of minimizing the impact of its actions on religion, to wit: all service providers may participate in a welfare program without regard to religion and free of eligibility criteria that require the abandonment of a provider's religious expression or character. Thus, Part II consists of a realignment of the Supreme Court's cases along a new axis, with the goal of making the strongest arguments—within the framework of these new assumptions—for the constitutionality of governmental programs of aid which permit full and equal participation by faith-based social service providers.

Before turning to the case law, it should be stated candidly and up front that there is no truly neutral position concerning these matters, for all models of church/state relations embody substantive choices. The decisions the Supreme Court handed down in both *Everson* and *Widmar* are not otherwise. Separationism is a value-laden judgment that certain areas of the human condition best lie within the province of religion, while other areas of life are properly under the authority of civil government. Separationism, this most dominant of theories, is in no sense the inevitable product of objective reason unadulterated by an ideological commitment to some higher point of reference. Separationism cannot stand outside of the political and religious milieu from which it emerged and honestly claim to be neutral concerning the nature and contemporary value of religion or the purposes of modern government. The same must be said for its primary competitor, the neutrality theory.[10] Indeed, to demand that any theory of church/state relations transcend its pedigree or its presuppositions and be substantively neutral is to ask the impossible.[11]

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[10] The term "neutrality" can mislead readers into believing that the theory claims to be substantively neutral. It is not. The theory is neutral only in the sense that government minimizes its role in influencing the religious choices of its citizens, thereby leaving persons free to make these choices for themselves. Government does so, for example, by structuring its social welfare programs to give citizens wide choices, with religious choices being among the available selections.

To further confuse matters, courts and commentators sometimes use "equal" as a substitute for "neutral." *See, e.g.*, STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, EDS., EQUAL TREATMENT OF RELIGION IN A PLURALIST SOCIETY (forthcoming 1997). In this context, "neutrality" and "equality" are intended to convey the same meaning.

Whether termed the "neutrality principle" or "equal-treatment review," the theory stakes out substantive positions as to the nature and contemporary value of religion and the purposes of modern government. The theory places a great deal of importance on the religious impulse in human nature. And the theory assigns to government a minimal role in directing religion, seeking to limit government to addressing the reasonable regulatory needs for the protection of organized society.

[11] One of the conceits of modernism is that humankind acting alone, through reason and scientific

I. OLDER ASSUMPTIONS: SEPARATIONISM AND A TRADITIONAL ANALYSIS OF THE CASE LAW

The Supreme Court distinguishes between the direct[12] and the indirect[13] receipt of a government's welfare assistance by social service providers. "Indirect" welfare assistance means that a personal choice by the ultimate beneficiary—rather than by the government—determines which social service provider eventually receives the assistance. Indirect forms of assistance will be discussed first because the current state of the case law is more easily sorted out.

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observation, can determine universal truths. In contrast, the Jewish and Christian traditions will test any such "universals" against the special revelation of Scripture. Postmodernists, like observant Jews and traditional Christians, dismiss the professed objectivity or claimed neutrality of modernists as arrogant pretensions. Without embracing the rest of their philosophy, religionists can agree with postmodernists that human reason—and hence one of its products, the positive law—is contingent on time, place, perception, and culture. *See generally* STANLEY J. GRENZ, A PRIMER ON POSTMODERNISM (1996); GENE EDWARD VEITH, JR., POSTMODERN TIMES: A CHRISTIAN GUIDE TO CONTEMPORARY THOUGHT AND CULTURE (1994). Thus, when engaging the church/state debate, observant Jews and traditional Christians may be disarmingly candid and lose nothing in the bargain by conceding that there is no neutral theory concerning the proper interpretation of the Establishment Clause. Rather, the question for Jews and Christians is to determine which theory of church/state relations most nearly comports with the biblical image of life's purpose, as well as the proper role of the political community.

[12] Direct forms of assistance come not just as payments on specified-use grants or purchase-of-service contracts, but in a variety of other forms as well: high-risk loans, low-interest loans, and government-guaranteed loans; tax-exempt low-interest bonds for capital improvements; insurance at favorable premiums; in-kind donations of goods such as used furniture or surplus food; free use of government property, facilities, or equipment; free assistance by government personnel to perform certain tasks; free instruction, consultation, or training by government personnel; and reduced postal rates. OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CATALOG OF FED. DOMESTIC ASSISTANCE xv-xvi (29th ed. 1995). The catalog lists and defines 15 types of federal assistance. As classified by the General Services Administration, federal benefits and services are provided through seven categories of financial assistance (grants, loans, insurance, donated property, etc.) and eight categories of nonfinancial assistance (training, counseling, supplying technical literature, investigation of complaints, etc.). *Id. See also* Douglas J. Besharov, *Bottom-up Funding*, *in* TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY 124 (Michael Novak ed., 2d ed. 1996) (comparing the strengths and weaknesses that arise when funding comes directly and indirectly from government).

[13] Indirect forms of assistance include: individual income tax credits and deductions; student scholarships, fellowships, and guaranteed loans; and educational vouchers and federal child care certificates.

Indirect assistance can be further divided. Vouchers and scholarships, for example, are types of indirect aid where the immediate source of the benefit is the government. On the other hand, indirect benefits such as tax credits and deductions are examples of so called "bottom-up" aid, in which the immediate source of aid is private. The government's role in connection with this second type of indirect assistance is to facilitate the flow of aid by rewarding the private source after the fact. The distinction between these two types of indirect assistance may enter into certain policy debates and decisions made by legislators. However, the Supreme Court has not made use of this distinction for purposes of interpreting the Establishment Clause.

The Court has consistently held that government may design a welfare program that places benefits in the hands of individuals, who in turn have freedom in the choice of service provider to which they take their benefits and "spend" them. It makes no difference whether the chosen provider is governmental or independent, secular or religious. Any aid to religion as a consequence of such a program only indirectly reaches—and thereby only indirectly advances—the religion of a faith-based provider. In situations of indirect assistance, the equal treatment of religion—not separationism—is the Court's operative rule for interpreting the Establishment Clause. As will be shown below, this rule of equality is instrumental to neutrality theory.[14]

The leading cases are *Mueller v. Allen*,[15] *Witters v. Washington Department of Services for the Blind*,[16] and most recently *Zobrest v. Catalina Foothills School District*.[17] Even the more liberal Justices on the Court have acceded to the direct/indirect distinction.[18]

The rationale for this distinction is twofold. First, the constitutionally salient cause of any indirect aid to religion is entirely in the control of independent actors, not in the hands of the government. So long as individuals may freely choose or not choose religion, merely enabling private decisions logically cannot be a governmental establishment of religion. The government is essentially passive as to the relevant decision, and hence not the agent of any resulting religious use. Second, the indirect nature of the aid, channelled as it is through countless individual beneficiaries, reduces church/state interaction and any resulting regulatory oversight. This enhances the nonentanglement that is so desirable from the perspective of the Establishment Clause.

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[14] *See infra* notes 90-100 and accompanying text.

[15] 463 U.S. 388 (1983) (upholding a state income tax deduction conferred on school parents to assist in their children's tuition and other educational expenses).

[16] 474 U.S. 481 (1986) (upholding a state vocational grant program to finance a blind individual's training at a sectarian school to obtain a degree to enter a religious vocation).

[17] 509 U.S. 1 (1993) (providing an interpreter to a deaf student attending a parochial high school does not violate the Establishment Clause). Even *Everson v. Board of Educ.*, 330 U.S. 1 (1947), which upheld a state law allowing local governments to provide reimbursement to parents for the expense of transporting their children by bus to school, including to parochial schools, can also be characterized as having subscribed to this direct/indirect distinction.

[18] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2541 (1995) (Souter, J., dissenting, writing for himself and Justices Stevens, Ginsburg, and Breyer) (acknowledging the rule applied in *Mueller*, *Witters*, and *Zobrest*).

There are a number of familiar programs that illustrate this rule: individual income tax deductions for contributions to charitable organizations, including those that are religious;[19] the G.I. Bill[20] and other federal aid to students attending the college or university of their choice, including those affiliated with a church;[21] federal child care certificates for low-income parents of preschool-age children;[22] and state-issued vouchers permitted under the Temporary Assistance for Needy Families program.[23] Pursuant to this rule of law, vouchers given to welfare beneficiaries that are redeemable by any eligible provider, whether governmental or independent, secular or religious, would be constitutional.[24]

It bears emphasizing that the programs of aid upheld in *Mueller, Witters,* and *Zobrest* were adopted as a matter of legislative discretion or prudence. These cases do not hold that there is a constitutional right to equal treatment between governmental and independent sector providers. Government may

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[19] *See* 26 U.S.C. §§ 170, 501(c)(3) (1994).

[20] 38 U.S.C. §§ 3201-3243 (1994).

[21] *See, e.g.*, Federal Pell Grants, 20 U.S.C. § 1070a (1994); 34 C.F.R. § 690.78. An eligible student for a Pell grant is defined in 20 U.S.C. § 1091 (1994). Students may utilize their grant at an institution of higher education (§ 1088) or other eligible institution (§ 1094). Church-affiliated colleges and universities are not excluded.

[22] The Child Care and Development Block Grant Act of 1990, 42 U.S.C. §§ 9858-9858q (Supp. 1996). The Act allows parents receiving child care certificates from the government to obtain child care at a center operated by a church or other religious organization, including a pervasively sectarian center. *Id.* at §§ 9858n(2), 9858k(a), 9858c(c)(2)(A)(i)(I).

[23] *See* § 104(j) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604a (1996 Supp.). Section 104 is known by the popular name of "Charitable Choice." Charitable Choice permits states to involve faith-based providers in the delivery of welfare services funded by the federal government through block grants to the states. Where the form of the assistance is indirect, such as by means of certificates or vouchers, the faith-based providers are not restricted as to their religious activities.

[24] To be sure, care must be exercised in the design of the welfare program. If only voluntary sector providers are eligible and if most of these providers are faith-based, then the case law may support overturning the program as having a primary religious effect. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (striking down a state educational program that was designed to aid only nonpublic schools); Similar to *Nyquist* is *Sloan v. Lemon*, 413 U.S. 825, 833-35 (1973) (holding unconstitutional a state tuition reimbursement plan available only to parents of nonpublic school students).

Because the plan in *Nyquist* excluded government schools, *Nyquist* is distinguishable from *Mueller, Witters*, and *Zobrest*. *See* Durham v. McLeod, 192 S.E.2d 202 (S.C. 1972), *dismissed for want of a substantial federal question*, 413 U.S. 902 (1973) (decided on the same day the Court decided *Nyquist*). In *Durham*, the state court had upheld a student loan program wherein students could attend the college of their choice, religious or nonreligious. The Supreme Court apparently approved. Likewise, the Court in *Nyquist* said that educational assistance provisions such as the G.I. Bill do not violate the Establishment Clause even when some GIs choose to attend church-affiliated colleges. 413 U.S. at 782 n.38 (leaving open the option of "some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian/nonsectarian, or public/nonpublic nature of the institution benefited").

decide that these indirect benefits are redeemable at its welfare agencies alone,[25] thereby excluding all similarly situated independent sector providers. Should a state decide to provide assistance only through government-operated agencies, it can do so without violating the First Amendment. The caveat is that a state cannot adopt a program of aid that involves all providers of welfare services, governmental and independent sectors, but specifically disqualifies participation by religious providers. The Free Exercise Clause prohibits any such intentional discrimination against religion.[26]

Unlike indirect forms of assistance, when it comes to direct assistance—that is, a government's general program of assistance flows directly to all organizations, including faith-based providers of services—then separationism is the Court's beginning frame of reference. Separationism makes three assumptions. First, it assumes that a sacred/secular dichotomy accurately describes the world of religion and the work of faith-based providers called to minister among the poor and needy. That is to say, the activities of faith-based providers can be separated into the temporal and the spiritual. This assumption, of course, is vigorously challenged by neutrality theorists.[27] Second, separatists assume that religion is private and that it should not involve itself with public matters, with "public" often equated to "political" or "governmental" affairs. The neutrality principle rejects this

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[25] *See* Norwood v. Harrison, 413 U.S. 455, 462 (1973); Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (dictum); Brusca v. State Bd. of Educ., 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd mem.*, 405 U.S. 1050 (1972).

[26] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); McDaniel v. Paty, 435 U.S. 618 (1978).

Should such a case ever arise, separationists will argue that there is a compelling interest in overriding the Free Exercise Clause, namely the "no aid" interpretation of the Establishment Clause. There are no Supreme Court cases on this precise point. However, the recent case of *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995), did uphold direct aid to a publication with an overtly religious viewpoint. The Establishment Clause was found not to prohibit the direct funding. Hence, compliance with the Clause was not a compelling governmental interest. *See infra* notes 112-30 and accompanying text.

A recent case in the Sixth Circuit, citing *Church of the Lukumi*, held that the U.S. Army violated the Free Exercise Clause when it excluded religious but not secular child care providers from operating on its bases and receiving various direct benefits. Hartman v. Stone, 68 F.3d 973 (6th Cir. 1995). The appeals court went on to hold that the governmental assistance did not advance or endorse religion in violation of the Establishment Clause. In all respects, *Hartman* appears to have correctly applied Supreme Court precedent.

[27] The Court has constructed a society in which faith-based providers deliver their welfare services within discrete and clearly defined boundaries easily segregated from the provider's religious beliefs and practices. For a thorough debunking of the Court's sacred/secular dichotomy, see Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837 (1995).

private/public dichotomy as well, insisting that personal faith has public consequences and that the practice of religious faith can lead to cooperation with the government in achieving laudable public purposes.[28] Third, separatists assume that a government's welfare assistance equates to aid for the service provider. Neutrality theories contest this characterization as well, describing the situation as one of cooperation between government and independent sector providers, with the joint aim being society's betterment through the delivery of aid to the ultimate beneficiaries.[29]

As a general proposition, the Supreme Court has said that direct forms of reimbursement can be provided for the "secular" services offered by a religious organization but not for those services comprising the group's "religious" practices. Thus, if an organization's secular and religious functions are reliably separable, direct assistance can be provided for the secular functions alone. But if they are not separable, then the Court disallows the assistance altogether, with the explanation that the Establishment Clause will not allow the risk[30] of governmental aid furthering the transmission of religious beliefs or practices.

The juridical category the Court utilizes to determine whether a general program of direct assistance risks advancing religion is whether the provider is "pervasively sectarian."[31] Should the provider fit the profile of a perva-

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[28] In neutrality theory, the activities of "government" do not monopolize the "public." At present—as well as historically—faith-based charities comprise a large number of the available voluntary sector social service providers, and they operate many of the most efficient and successful programs. As long as the government's welfare program furthers the public purpose of society's betterment—that is, helping the poor and the needy—it is neutral as to religion if the program involves faith-based providers on an equal basis with all others.

[29] In neutrality theory, the independent sector providers of social services who opt to participate in a government's welfare program are not in any primary sense "beneficiaries" of the government's assistance. Because they deliver services to those in need, faith-based providers give far more in value measured by societal betterment than they could possibly receive as an incident of their expanded responsibilities.

[30] The Court has not always required proof of actual advancement of religion. In certain instances, the mere presence of such a risk or hazard has been sufficient to strike down the aid program. *See* Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 385, 387 (1985); Wolman v. Walter, 433 U.S. 229, 254 (1977); Meek v. Pittenger, 421 U.S. 349, 370, 372 (1975); Levitt v. Committee for Pub. Educ., 413 U.S. 474, 480 (1973); *cf.* Bowen v. Kendrick, 487 U.S. 589, 610-12 (1988).

[31] The meaning of the term "pervasively sectarian" can be gleaned from the cases. In *Roemer v. Board of Public Works*, 426 U.S. 736, 758 (1976) (plurality opinion), the Court turned back a challenge to a state program awarding noncategorical grants to colleges, including sectarian institutions that offered more than just seminarian degrees. In discussion focused on the fostering of religion, the Court said:

> [T]he primary-effect question is the substantive one of what private educational activities, by whatever procedure, may be supported by state funds. *Hunt* [*v. McNair*, 413 U.S. 734 (1973)]

sively sectarian organization, then separationist theory prohibits any direct aid to the provider. The one small exception is aid that, due to its form or nature, cannot be converted to a religious use. For example, the Court has allowed independent religious schools to receive government-provided secular textbooks and bus transportation between a student's home and school.[32]

All the Supreme Court's cases striking down direct programs of aid have involved primary and secondary faith-based schools.[33] Contrariwise, in each of the three instances that have come before the Court involving direct aid to colleges and universities, including those which are faith-related, the Court has upheld the financial aid.[34] The Court has received considerable criticism—even ridicule—for the close distinctions it has made in religious school cases between the types of permissible and impermissible aid. However, for present purposes these distinctions are best seen as fact-finding quibbles over

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requires (1) that no state aid at all go to institutions that are so "pervasively sectarian" that secular activities cannot be separated from sectarian ones, and (2) that if secular activities *can* be separated out, they alone may be funded.

426 U.S. at 755. The Roman Catholic colleges in *Roemer* were held not to be pervasively sectarian. The record supported findings that the institutions employed chaplains who held worship services on campus, taught mandatory religious classes, and started some classes with prayer. However, there was a high degree of autonomy from the Roman Catholic Church, the faculty was not hired on a religious basis and had complete academic freedom except in religion classes, and students were chosen without regard to their religion.

A comparison of the colleges in *Roemer* with the elementary and secondary schools in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 767-68 (1973), clarifies the term "pervasively sectarian." The schools in *Nyquist* that were found to be pervasively sectarian placed religious restrictions on student admissions and faculty appointments, enforced obedience to religious dogma, required attendance at religious services, required religious or doctrinal study, were an integral part of the mission of the sponsoring church, had religious indoctrination as a primary purpose, and imposed religious restrictions on how and what the faculty could teach.

Although the definition of a pervasively sectarian institution has been stated in the foregoing general terms, only church-affiliated primary and secondary schools have ever been found by the Supreme Court to fit the profile. Presumably a church, synagogue, or mosque would also be regarded as pervasively sectarian insofar as it performs sacerdotal functions.

[32] *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (subsidy for state-prepared testing and recordkeeping required by law); Wolman v. Walter, 433 U.S. 229 (1977) (upholding use of public personnel to provide guidance, remedial, and therapeutic speech and hearing services at a neutral site; upholding provision of diagnostic services in the nonpublic school; upholding provision of standardized tests and state scoring); *Meek*, 421 U.S. 349 (loan of secular textbooks); Board of Educ. v. Allen, 392 U.S. 236 (1968) (secular textbooks).

[33] *See* Aguilar v. Felton, 473 U.S. 402 (1985); *Grand Rapids Sch. Dist.*, 473 U.S. 373; New York v. Cathedral Academy, 434 U.S. 125 (1977); *Wolman*, 433 U.S. 229; *Meek*, 421 U.S. 349; *Nyquist*, 413 U.S. 756; *Levitt*, 413 U.S. 472; Lemon v. Kurtzman, 403 U.S. 602 (1971).

[34] *See Roemer*, 426 U.S. 736; *Hunt*, 413 U.S. 734; Tilton v. Richardson, 403 U.S. 672 (1971).

whether the Court rightly determined if the nature of a particular direct benefit can be converted to a religious and, therefore, forbidden use.

On the two occasions the Court has considered the constitutionality of social service direct aid programs, it has sustained both programs. In a turn of the century case, *Bradfield v. Roberts*,[35] the Court upheld a capital improvement grant for a church-affiliated hospital.[36] At present, however, *Bowen v. Kendrick*[37] is the modern and hence more pertinent case. By the narrow margin of five to four, the Court in *Kendrick* upheld "on its face" federal grants for teenage sexuality counseling, including counseling offered by faith-related centers. However, the Court remanded for a case-by-case or "as applied" review in order that teenage counseling centers found to be pervasively sectarian would have their grants discontinued.[38]

Under the Adolescent Family Life Act (AFLA),[39] the Secretary of Health and Human Services authorizes direct cash grants to both governmental and independent sector nonprofit organizations doing research or providing ser-

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[35] 175 U.S. 291 (1899).

[36] In *Bradfield*, a corporation located in the District of Columbia known as Providence Hospital was chartered in 1864 by act of Congress. The enabling act was facially neutral in that it made no mention of religion, nor was the hospital ostensibly controlled by or associated with a church. Nevertheless, all the directors of the hospital and their successors were "members of a monastic order or sisterhood of the Roman Catholic Church," and title to the real estate on which the hospital buildings were constructed was "vested in the Sisters of Charity of Emmitsburg, Maryland." *Id.* at 297. Federal taxpayers challenged as violative of the Establishment Clause an 1897 appropriation to build on the hospital grounds "an isolating building or ward for the treatment of minor contagious diseases," that when completed was to be turned over to Providence Hospital. *Id.* at 293. This arrangement, alleged plaintiffs, was an instance in which "public funds are being used and pledged for the advancement and support of a private and sectarian corporation." *Id.* For consideration of the question before it, the Court assumed, *arguendo*, that a capital appropriation to a religious corporation would violate the Establishment Clause. The Court said plaintiffs' allegations nonetheless failed to show that Providence Hospital was a religious or sectarian body. Merely because the board of directors was composed entirely of members of the same religion did not make the hospital religious. Without additional evidence, the Court was unwilling to assume that Providence Hospital would act otherwise than in accord with its legal charter, in which its powers by all appearances were secular, having to do with the care of the injured and infirm. Although plaintiffs alleged that the hospital's business was "conducted under the auspices of the Roman Catholic Church," there was no evidence that management of the business was limited to members of that faith or that patients had to be Catholic. *Id.* at 298-99.

Bradfield turned on the inadequacies of plaintiffs' pleading and evidence. The Court also had a formalistic view of the importance of separate incorporation by means of a facially neutral charter, notwithstanding that the corporation had a de facto interlocking directorate with a religious order. Accordingly, although the bottom-line result in *Bradfield* was counter to a no-aid view of the Establishment Clause, the Court utilized a separatistic framework for its analysis.

[37] 487 U.S. 589 (1994).

[38] *Id.* at 600-02, 622.

[39] 42 U.S.C. §§ 300z to 300z-10 (1994).

vices in the areas of teenage pregnancy and counseling for adolescents concerning premarital sexual relations. Accordingly, the societal problems addressed by AFLA are a blend of health, economic, and moral issues surrounding teenage sexuality and out-of-wedlock pregnancy. The statute defines an eligible grant recipient as a "public or non-profit private organization or agency," apparently permitting otherwise qualified religious organizations to receive the grants on the same terms as nonreligious agencies.[40] Moreover, language in the Act expressly invites participation by religious organizations and requires certain secular grantees to take into account involvement by religious organizations, along with family and community volunteer groups, in addressing the problem of adolescent sexuality.[41] These provisions were written into the law to ensure that religious groups would be treated in a nondiscriminatory manner when compared with other similarly situated eligible grant recipients. No statutory language specifically barred the use of grant monies for worship, prayer, or other intrinsically religious activities. Finally, other than routine fiscal accountability to ensure that federal funds were not misappropriated, no monitoring or other oversight was made part of the resulting relationship between the Department of Health and Human Services and the participating religious organizations.[42]

After describing the broad outlines of AFLA, the majority spoke in sweeping terms of the Establishment Clause and governmental aid as permitting an equality-based rule. It said that "religious institutions need not be quarantined from public benefits that are neutrally available to all,"[43] and that "this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs."[44] The Court then went on to utilize the three-prong *Lemon* test for its analysis.[45]

Concerning *Lemon*'s first prong, requiring that legislation have a secular purpose, the contending parties in *Kendrick* agreed "that, on the whole, religious concerns were not the sole motivation behind the Act."[46] As usual, the Court's application of the purpose test was highly deferential to the legislature.

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[40] *Kendrick*, 487 U.S. at 593, 608-09.
[41] *Id.* at 595-96, 605-07.
[42] *Id.* at 614-15.
[43] *Id.* at 608 (quoting Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 746 (1976)).
[44] *Id.* at 609.
[45] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
[46] *Kendrick*, 487 U.S. at 602-03.

Lemon's second prong requires that the principal or primary effect of a law not advance religion. There was nothing "inherently religious" or "specifically religious," pointed out the Court, about the activities or social services provided by the grantees to adolescents with premarital sexuality questions and problems.[47] Moreover, simply because AFLA expressly required religious organizations to be considered among the available grantees and demanded that the role of religion be taken into account by secular grantees, that did not have the effect of endorsing a religious view of how to solve the problem.[48] As to grantee eligibility, the Court interpreted AFLA as "religion-blind" when Congress required that all organizations, secular and religious, be considered on an equal footing. Further, the legislation did not violate the Establishment Clause merely because religious beliefs and the moral values urged by AFLA overlap.[49] Critical to the result was that the majority refused to hold that faith-based teenage counseling centers were necessarily pervasively sectarian.[50] Although the form of the assistance was a direct cash grant, the First Amendment was not offended as long as the grantee was not pervasively sectarian.[51] The fact that the ultimate beneficiaries were impressionable adolescents did not, without more, present an unacceptable risk that the no-establishment principle was violated.[52] Although AFLA did not expressly bar the use of federal funds for worship, prayer, or other inherently religious activities, the Court said no explicit bar was required. The Court added, however, that "[c]learly, if there were such a provision in this statute, it would be easier to conclude that the statute on its face" was constitutional.[53]

Under the third prong of *Lemon*, the Court considers whether the statute in question fosters an excessive administrative entanglement between religious officials and the offices of government. Monitoring of AFLA grantees by the Department of Health and Human Services is necessary only to ensure that federal money is not misappropriated. There is no requirement that faith-based grantees follow any federal guidelines concerning the content of the advice given to teenagers or otherwise modify their programs. There are no nondiscrimination requirements as to the beneficiaries served. Because religious grantees are not necessarily pervasively sectarian, the majority conclud-

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[47] *Id.* at 604-05, 613.
[48] *Id.* at 605-06.
[49] *Id.* at 606-07.
[50] *Id.* at 610-11.
[51] *Id.* at 606, 608.
[52] *Id.* at 611-12.
[53] *Id.* at 614.

ed that this limited oversight by the federal agency could not be deemed excessively entangling.[54]

Dividing the analysis between "facial" and "as applied" components places a considerable burden on separationists, like the legal activists behind the *Kendrick* litigation, who rove the country filing suits claiming Establishment Clause transgressions. The aim of these activists is to halt the governmental aid, not on a piecemeal or case-by-case basis, but by enjoining the entire Act insofar as it allows any participation by faith-based providers. This was possible when the Court was willing to overturn legislation on the mere "risk" that the second or third prongs of *Lemon* were violated.[55] After *Kendrick*, a violation of the Establishment Clause must be proved in each case by palpable evidence that confessional religion is being advanced. The only exception occurs when the entire class of religious service providers is pervasively sectarian. Because not all faith-based social service providers are pervasively sectarian, a facial attack will fail.

In a short concurring opinion, Justice O'Connor drew a helpful distinction. She noted that the object of congressional funding under AFLA, namely the moral issue of teenage sexuality, was "inevitably more difficult than in other projects, such as ministering to the poor and the sick."[56] Far easier cases, she opined, would be welfare programs funding faith-based soup kitchens or hospitals.[57] Accordingly, where the object of the governmental aid is clearly addressed to temporal needs (e.g., food, clothing, shelter, health), in Justice O'Connor's view, a social service program that includes religious providers is facially constitutional.[58]

For the Court to require officials to distinguish between "pervasively" and "non-pervasively" sectarian organizations creates a fundamental inconsistency within its own doctrine. The Court had earlier held in *Larson v. Valente*[59] that the Establishment Clause requires that government not intentionally dis-

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[54] *Id.* at 615-17.

[55] *See supra* note 30 and accompanying text.

[56] *Kendrick*, 487 U.S. at 623 (O'Connor, J., concurring).

[57] *Id.* Justice O'Connor went on to warn that evidence of a pattern or practice at HHS of disregarding the concerns of the Establishment Clause on an as-applied basis would, in her view, warrant overturning the entire AFLA. *Id.* at 623-24 (O'Connor, J., concurring).

[58] In making this distinction, Justice O'Connor utilized the sacred/secular dichotomy. See *supra* note 27. But the dichotomy results in AFLA's constitutionality. In fact, the presumption leads to the facial approval of all welfare programs that permit equal participation by faith-based providers.

[59] 456 U.S. 228 (1982).

criminate among types of religions,[60] nor should government utilize classifications based on denominational or sectarian affiliation.[61] Moreover, in order to distinguish between "pervasively" and "non-pervasively sectarian" organizations, as *Kendrick* requires, courts will become deeply entangled in the religious character of these faith-based providers of social services.[62] The Supreme Court, however, has said that whenever possible officials should avoid making detailed inquiries into religious practices, or probing into the significance of religious words and events.[63]

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[60] *Id.* at 244, 246. *See also* Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951). Religious organizations most willing to conform to contemporary culture are less sectarian. Conversely, those organizations more conservative in theology and that have resisted acculturation will inevitably appear to civil judges as more sectarian. To exclude from funding those groups that are more "sectarian" is to punish those religions which are countercultural while rewarding those groups willing to secularize. A sociologist has identified the "pervasively sectarian" groups as "orthodox," and the "non-sectarians" as religious "progressives." HUNTER, *supra* note 4, at 42-46. Hunter says the religious "orthodox" are devoted "to an external, definable, and transcendent authority," whereas "progressives" "resymbolize historic faiths according to the prevailing assumptions of contemporary life." *Id.* From the standpoint of wanting to minimize governmental influence on private religious choices, it is hard to imagine a more detrimental rule than for the Supreme Court to penalize the orthodox while rewarding the progressives.

[61] Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 702-07 (1994); *see* Larson v. Valente, 456 U.S. 228, 246 n.23 (1982). The rationale, in part, is that the Court wants to avoid making affiliation with a particular denomination or type of religious group more attractive. If this were not the law, then merely affiliating with a particular religious group could result in a civil advantage or disadvantage.

[62] One problem with the requirement of distinguishing between "pervasively" and "non-pervasively" sectarian organizations is that the level of religiousness of faith-based social service providers is a matter of degree, and there are multiple ways to measure religiousness. CARL H. ESBECK, THE REGULATION OF RELIGIOUS ORGANIZATIONS AS RECIPIENTS OF GOVERNMENTAL ASSISTANCE 8-9 (1996). Most providers are neither fully sectarian nor fully secularized. Any multifactor test the courts devise will end up favoring some religions and prejudicing others. Sorting through the array of social service providers would be a veritable briar patch and cause the judiciary to violate its own admonitions concerning entanglement.

[63] *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2524 (1995) (university should avoid distinguishing between evangelism, on the one hand, and the expression of ideas merely approved by a given religion on the other); Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987), and *id.* at 344-45 (Brennan, J., concurring) (recognizing a problem when the government attempts to divine which jobs are sufficiently related to the core of a religious organization as to merit exemption from statutory duties); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (avoiding potentially entangling inquiry into religious practice is desirable); Widmar v. Vincent, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981) (holding that inquiries into significance of religious words or events are to be avoided); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (avoiding entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs is desirable). Likewise, in *Jimmy Swaggart Ministries v. California Bd. of Equalization*, 493 U.S. 378, 396-98 (1990), and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 20 (1989) (plurality opinion), the Court cautioned against unnecessarily making distinctions between core religious practices (e.g., worship, doctrinal teaching, distributing sacred literature) and those activities of religious organizations that are more ancillary (e.g., operating a soup kitchen or hospital). For similar reasons, courts are to avoid making a determination concerning the centrality of the belief or practice in question to an overall religious system. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (rejecting free exercise test that "depend[s] on measuring the effects of a governmental

Justice Kennedy, sensing analytical difficulty with Establishment Clause doctrine whose application requires the Court to discriminate among religious groups, wrote a brief concurring opinion.[64] Stating that he doubted whether "the term 'pervasively sectarian' is a well-founded juridical category,"[65] Justice Kennedy went on to adopt a neutrality-based rule. A social assistance program would be facially constitutional, Kennedy said, as long as its purpose was neutral as to religion and a diverse array of organizations were eligible to participate.[66] Upon remand of the case, for Justice Kennedy the "question in an as-applied challenge is not whether the entity is of a religious character, but how it spends its grant."[67] As long as the grant is actually used for the designated public purpose—rather than to advance inherently religious beliefs or practices—there is no violation of the Establishment Clause.[68] This proposal has the virtue of not violating the rule set down in *Larson*.

In laying down its rules concerning programs of direct assistance, the Supreme Court has adopted a funds-tracing analysis rather than a freed-funds analysis. That is, the Court interprets the Establishment Clause as forbidding the direct flow of taxpayer funds, as such, to pay for inherently religious activities. The Court does not concern itself when governmental funding of a faith-based provider's secular activities thereby frees private dollars to spend on religious activities. In a pervasively sectarian organization, however, in which the mixing of religious and secular activities is complete, the tracing of taxpayer funds will always determine that religious activities are advanced in tandem with the secular. Hence, in a pervasively sectarian organization even a funds-tracing analysis causes the Court to hold that no taxpayer funds can go directly to such organizations.

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action on a religious objector's spiritual development"); United States v. Lee, 455 U.S. 252, 257 (1982) (rejecting government's argument that free exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance"); Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981) (holding that it is not within the judicial function or competence to resolve religious differences); *see also* Employment Div. v. Smith, 494 U.S. 872, 886-87 (1990).

[64] *Kendrick*, 487 U.S. at 624-25 (Kennedy, J., concurring). Justice Kennedy's opinion was joined by Justice Scalia.

[65] *Id.* at 624 (Kennedy, J., concurring).

[66] *Id.* (Kennedy, J., concurring).

[67] *Id.* at 624-25 (Kennedy, J., concurring).

[68] Justice Kennedy's opinion is closest to the view of neutrality theorists. But he too falls short. Justice Kennedy would trace the government's funds and disallow any use for the advancement of religion. The neutrality principle, as will be discussed below, *infra* notes 138-43 and accompanying text, requires only that the Court examine the outcome of the welfare program with an eye to determining whether the public purpose is being served by the social service provider. If so, then the judicial inquiry is at an end, for the government has received full "secular" value in exchange for taxpayer funds.

The harm that separationists fear is not that privately raised dollars are freed as a consequence of the government's program so that they may be reallocated to a religious use. Rather, the feared harm is that governmental monies (collected as taxes, user fees, fines, sale of government property, etc.),[69] may be used to pay for such inherently religious activities as worship, prayer, proselytizing, doctrinal teaching, and devotional scriptural reading. Indeed, separationists on the Court have been most insistent that the Establishment Clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[70]

Although it will scandalize separationists, the rest of us are led to probe below the bluff and bluster and ask the following: "Is the harm resulting from government-collected monies going to religion so self-evident and severe?" As citizens we are taxed to support all manner of policies and programs with which we disagree. Tax dollars pay for weapons of mass destruction that some believe are evil. Taxes pay for abortions and the execution of capital offenders, that some believe are acts of murder. Taxes pay the salaries of public officials whose policies we despise and oppose at every opportunity. Why is religion different? If the answer is that we are protecting a religiously informed conscientious right not to have one's taxes go toward the support of religion, the Supreme Court has already rejected such a claim.[71] It makes no difference to the Court that a taxpayer avers that he or she is "coerced" or otherwise "offended" when general tax revenues are used in a program that involves faith-based social service providers.[72] Accordingly, with reference

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[69] There is no dispute between separationists and neutrality theorists over whether the Establishment Clause prohibits a tax or user fee earmarked for a religious purpose. It clearly does. *See infra* note 127 and accompanying text. What is disputed is whether monies collect by general taxation and appropriated to support a welfare program that does not discriminate against the participation of faith-based social service providers is constitutional. *See infra* notes 131-45 and accompanying text.

[70] Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 385 (1985).

[71] Tilton v. Richardson, 403 U.S. 672, 689 (1971) (rejecting claim by taxpayers challenging use of revenues for funding of a state program to assist institutions of higher education, including church-affiliated colleges); *cf.* United States v. Lee, 455 U.S. 252, 257 (1982) (requiring Amish employer to pay Social Security tax in violation of his religious beliefs); United States v. American Friends Serv. Comm., 419 U.S. 7 (1974) (per curiam) (holding that Quakers facing federal income tax liability did not have free exercise rights that overrode provision in anti-injunction act barring claimants from suing to enjoin government from collecting tax). The Court has never recognized a free exercise right to object when revenues raised by general taxation are used to assist the poor or needy by involving faith-based providers in the delivery of welfare services.

[72] The Court has recognized a strong protection of religious conscience found in the Free Speech Clause. *See* Wooley v. Maynard, 430 U.S. 705, 714-15 (1977) (sustaining claim by Jehovah's Witness chal-

to the Court's interpretation of the Establishment Clause, it must again be asked, "Is the harm that separationists would have us avoid at all cost so self-evident and severe?"

Although a thorough treatment of this question is beyond the scope of this Article, the answer separationists give is that there are two such harms which the Establishment Clause is designed to safeguard against, and history demonstrates that they can be quite severe: first, divisiveness within the body politic along sectarian lines;[73] and, second, the damage to religion itself by the undermining of religious voluntarism and the weakening of church autonomy.[74]

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lenging state requirement that motor vehicle license plate bear the motto "Live Free or Die" was violative of freedom of thought, which includes the "right to refrain from speaking at all"); West Virginia v. Barnette, 319 U.S. 624, 642 (1943) (public school compulsory flag salute and pledge of allegiance "invades the sphere of intellect and spirit"); *see also* United States v. Ballard, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men."). But such protection does not extend to taxpayers objecting to the monies being paid to faith-based organizations.

[73] *See, e.g.*, John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 280-82 (1996) (identifying liberal arguments for church/state separation as, inter alia, the protection of society from political strife); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996) (one reason for no-establishment principle is to minimize the societal conflict that attends use of governmental force to suppress religion); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 360-62 (1996) (no-establishment principle arose in response to the grave risk of political disharmony resulting from uncontrolled religious factionalism).

Typically the concern with religion dividing the body politic is buttressed by reference to European religious wars, which were known to the founding generation, as well as by warnings that point to modern-day Northern Ireland, Bosnia, or Lebanon. These are indeed events worthy of avoidance. But separationists omit an obvious distinction between these instances of sectarian strife and the goal of neutrality theory. The sectarian wars of medieval Europe were wars for religious monopoly. Each side sought to defeat the other so as to establish its own religious hegemony. Neutrality theory has no such goal. Indeed, its goal is just the opposite. If the neutrality principle were to be followed, then government's influence over religion would be minimized and each individual's religious choices would be more fully enabled. *See infra* note 98 and accompanying text.

In their concern for preventing sectarian strife, an additional point overlooked by separationists is that the Establishment Clause (indeed, the entire Bill of Rights) is a check on government—not a check on religion. Thus, the no-establishment principle guards against government's using its power inappropriately by taking sides on behalf of a religion. Simply put, the Clause protects people from government. It does not protect people from other people. It does not protect a minority religion from a majority religion. And it does not protect the nonreligious from the religious. Separationists are prone to assume that religious ideologies are more intolerant and absolutist than secular ideologies; thus, they believe that the Establishment Clause is there specifically to hold in check the excesses of religion. But it is only the excesses of government that the Clause can check. *See* Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1048, 1089-95, 1102 (1996). In the twentieth century, secular ideologies have proven every bit as violent as the sectarianisms of the Middle Ages.

[74] The most compelling argument for a continued strict separation of church and state is the harm that can befall religion itself when faith-based ministries become unduly involved with governmental programs

Separationism has yet to give a convincing argument that these two harms will befall the nation as a result of the equal involvement of faith-based providers in social service programs. The harm of sectarian divisiveness within the body politic is not altogether different in kind or more threatening than tax funding for other ideologies and programs that citizens find disagreeable.[75] And the harm to religion itself when too closely allied with government, while real and threatening, can be adequately protected by writing into the welfare legislation safeguards for protecting the religious character and expression of faith-based providers.[76]

II. NEW ASSUMPTIONS: A PARADIGM SHIFT TO GOVERNMENTAL NEUTRALITY

Neutrality theory approaches the debate over the Establishment Clause from an altogether different point of entry. According to this theory, when govern-

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and benefits. Preserving the autonomy of religious providers is beyond the scope of this Article. This author has touched briefly on the matter elsewhere. *See* ESBECK, *supra* note 62, at 47-51; Carl H. Esbeck, *Religion and a Neutral State: Imperative or Impossibility?* 15 CUMBERLAND L. REV. 67, 80-83 (1984-85). Others have also published on the topic. *See, e.g.*, Besharov, *supra* note 12; Marvin Olasky, *The Corruption of Religious Charities*, *in* TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY ch. 8 (Michael Novak, ed., 2d ed. 1996); Joe Loconte, *The 7 Deadly Sins of Government Funding for Private Charities*, POLICY REV., Mar./Apr. 1997; Amy L. Sherman, *Cross Purposes: Will Conservative Welfare Reform Corrupt Religious Charities?*, POLICY REV., Fall 1995, at 58-63; David Walsh, *Irreducible, Inexplicable: The Effort to Carve Out a Utilitarian, Public-Policy Role for Religion Strikes at the Core of Faith*, WASH. POST, Mar. 1, 1996, at A17. Nonetheless, the available materials are few and anecdotal, and religious autonomy as an important topic warrants more attention by scholars and judges alike.

[75] There was a time when the Supreme Court, in its interpretation of the Establishment Clause, sought out political divisiveness along religious lines as a violation of the Clause. However, such evidence as a separate element of Establishment Clause doctrine is now repudiated. Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 339 n.17 (1987); Lynch v. Donnelly, 465 U.S. 668, 684-85 (1984); Mueller v. Allen, 463 U.S. 388, 403-04 n.11 (1983). The foregoing cases essentially rejected broad language in earlier cases. *See* Wolman v. Walter, 433 U.S. 229, 256 (1977) (Brennan, J., concurring and dissenting); *id.* at 258-59 (Marshall, J., concurring and dissenting); Meek v. Pittenger, 421 U.S. 349, 374-77 (1975) (Brennan, J., concurring and dissenting); Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971). Political divisiveness analysis was heavily criticized because it ran counter to the Court's recognition elsewhere that religious persons and groups have full rights of free speech and political participation. *See* Edward M. Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205 (1980).

[76] An example of this is found in § 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604a (1996 Supp.). Section 104, known by the popular name "Charitable Choice," permits the involvement of faith-based providers in the delivery of welfare services funded by the federal government through block grants to the states. For those faith-based providers that choose to participate, § 104(b), (d), and (f) set forth several rights of provider autonomy from excessive governmental regulation.

ment provides benefits to enable activities that serve the public good, such as education, health care, or social services, there should be neither discrimination in eligibility based on religion, nor exclusionary criteria requiring these charities to engage in self-censorship or otherwise water down their religious identity as a condition for program participation.[77] The neutrality model allows individuals and religious groups to participate fully and equally with their fellow citizens in America's public life, without being forced either to shed or disguise their religious convictions or character. The theory is not a call for preferential treatment for religion in the administration of publicly funded programs.[78] Rather, when it comes to participation in programs of aid, neutrality merely lays claim to the same access to benefits, without regard to religion, enjoyed by others.[79] Finally, as noted above,[80] the neutrality principle rejects the three assumptions made by separationist theory: that the activities of faith-based charities are severable into "sacred" and "secular" aspects, that religion is "private" whereas government monopolizes

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[77] To these three requisites (a public purpose of social betterment, nondiscrimination, and religious autonomy), neutrality theory adds the right of the ultimate beneficiaries to obtain their services from a nonreligious provider if they have a sincere objection to a particular faith-based provider. *See infra* note 138 and accompanying text.

[78] Some argue that the Establishment Clause, while prohibiting the establishment of a single national religion, was nevertheless intended to allow Congress to support all religious denominations on a nonpreferential basis. This is unlikely. When drafting the First Amendment the First Congress was almost entirely negative concerning the Amendment's intent, i.e., the new central government was to have no authority concerning religion. Hence, the Establishment Clause detailed what the new central government could not do rather than what it could do. THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 198-222 (1986). The Supreme Court rejected nonpreferentialism in *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor J., concurring); *id.* at 113 (Rehnquist, J., dissenting). *See also* Lee v. Weisman, 505 U.S. 577, 612-18 (1992) (Souter, J., concurring); Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986). For arguments in support of nonpreferentialism, see *Wallace*, 472 U.S. at 98 (Rehnquist, J., dissenting); ROBERT CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1988); MICHAEL MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245 (1991).

For present purposes it is important that the neutrality principle not be confused with nonpreferentialism. The distinction is clearly drawn in Justice Thomas's concurring opinion in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2528-30 (1995) (Thomas, J., concurring).

[79] Although the Supreme Court has never had before it a situation involving a direct program of aid for religious organizations alone, *obiter dicta* in various cases suggest that any such program would be unconstitutional. *See* Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 702-07 (1994) (legislation favoring one religious sect is unconstitutional); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (striking down state aid to private education the benefits of which went almost entirely to religious schools); *cf.* Mueller v. Allen, 463 U.S. at 394, 396 n.6, 398-99 (explaining and distinguishing *Nyquist*).

[80] *See supra* text accompanying notes 27-29.

"public" matters, and that governmental assistance paid to service providers is aid to the providers as well as aid to the ultimate beneficiaries.

Should separationism eventually be dislodged from its place as the controlling paradigm, it will be said that this change began in 1981 with the Supreme Court's decision in *Widmar v. Vincent*.[81] In *Widmar*, a state university permitted student organizations to hold their meetings in campus buildings when the facilities were not being used for other purposes. However, student religious organizations were specifically denied such access. The university maintained that the denial was required because it could not support religion by providing meeting space for worship, prayer, and Bible study, consistent with a no-aid interpretation of the Establishment Clause. A group of students brought suit, first pointing out that the university had voluntarily created a limited public forum generally open to student expression. Having dedicated the forum, the students argued that expression of religious content could not be singled out for discrimination. A near-unanimous Supreme Court agreed. Most significantly, the Court held that the Establishment Clause did not override the Free Speech Clause as long as the creation of the forum had a secular purpose. Religious groups were just one of many student organizations permitted into the forum. As long as the circumstances were such that the university did not appear to be placing its power or prestige behind the religious message, the Establishment Clause was not a problem.[82]

The *Widmar* approach was soon dubbed "equal access," and in 1984 Congress extended the same equality-based right to students enrolled in governmental secondary schools.[83] Following recent free speech victories in *Lamb's Chapel v. Center Moriches Union Free School District*,[84] *Capitol Square Review and Advisory Board v. Pinette*,[85] and *Rosenberger v. Rector and Visitors of the University of Virginia*,[86] equal treatment has indeed become the

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[81] 454 U.S. 263 (1981).

[82] *Id.* at 271-74.

[83] Equal Access Act, 20 U.S.C. §§ 4071-4074 (1994). The constitutionality of the Act was upheld in the face of an Establishment Clause challenge in *Board of Education v. Mergens*, 496 U.S. 226 (1990).

[84] 508 U.S. 384 (1993) (disallowing viewpoint discrimination against a church that had sought to show a film about family life in a forum otherwise open to that subject).

[85] 115 S. Ct. 2440 (1995) (finding content-based discrimination in the refusal to permit a controversial group to sponsor a religious display in a civic park). Because *Pinette* is illustrative of the current divisions within the Court over separationism, the case is further discussed *infra* notes 101-11 and accompanying text.

[86] 115 S. Ct. 2510 (1995) (finding viewpoint discrimination in a public university's denial of printing costs for a student publication postulating religious perspectives on current issues). Because *Rosenberger* involved the Court in requiring a state university to finance a student publication that printed religious

normative rule of law concerning private speech of religious content or view-point.[87] As discussed below, this equality-based rule is instrumental to neutrality theory.[88]

Notwithstanding this unbroken line of victories for the equal treatment of religion, it must be emphasized that in each case from *Widmar* to *Rosenberger*, it was the Free Speech Clause that required nondiscrimination, thereby supplying the victory. It remains to be explored below whether the neutrality principle can make the transition from an equality right in free speech to a right of equal participation in direct financial aid programs.[89]

Before continuing with the argument for neutrality theory based on the most recent Supreme Court cases, a digression is necessary to address the rationale for grounding the major competitor to separationism in the juridical concept of governmental neutrality rather than equality. As it turns out, a rule of equality works quite well when the church/state dispute is over access to benefits.[90] However, when the Establishment Clause challenge is to legisla-

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views—not just the provision of space in a public forum—the case is further discussed *infra* notes 112-30 and accompanying text.

[87] When the expression is not private speech but speech by government, then the controlling norm remains a separationist model. This seems entirely proper. Government may neither confess inherently religious beliefs nor advocate that individuals profess such beliefs or observe such practices. Several cases illustrate this point. *See* Lee v. Weisman, 505 U.S. 577 (1992) (striking down prayer in conjunction with commencement ceremonies at a public junior high); County of Allegheny v. ACLU, 492 U.S. 573 (1989) (disallowing display of nativity scene inside courthouse, but upholding display of menorah outside public building as part of larger holiday scene); Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (striking down state law requiring posting of Ten Commandments in public school classrooms); Epperson v. Arkansas, 393 U.S. 97 (1968) (striking down state law prohibiting teaching theory of evolution in public schools); School Dist. v. Schempp, 374 U.S. 203 (1963) (disallowing devotional reading of Bible and recitation of Lord's Prayer in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (disallowing state requirement of daily classroom prayer in public schools); and McCollum v. Board of Educ., 333 U.S. 203 (1948) (disallowing program in which local volunteers came to public school campus to teach religion).

Lynch v. Donnelly, 465 U.S. 668 (1984), and *Marsh v. Chambers*, 463 U.S. 783 (1983), are two aberrations. But *Lynch* and *Marsh*, while antiseparationist to be sure, are not based on equality either. Rather, in their rationales, *Lynch* and *Marsh* are driven by a desire to cling to historical practices dating from a time when America was less religiously plural.

[88] *See infra* notes 90-100 and accompanying text.

[89] *See infra* notes 133-35 and accompanying text.

[90] A "benefit" means direct or indirect financial assistance for a public purpose. The benefit may be in the form of a subsidy, grant, entitlement, loan, or insurance, as well as a tax credit or deduction.

A tax exemption, such as that upheld in *Walz v. Tax Commission*, 397 U.S. 664, 676 (1970), is to be distinguished from tax credits and deductions. Credits and deductions are government benefits. A tax exemption, however, is the government's election to "leave religion where it found it," rather than the conferring of a benefit. For First Amendment purposes a tax credit or deduction is little different from a direct grant or cash payment. The idea that exemptions, credits, and deductions should all be regarded alike as "tax expen-

tion that exempts religious organizations from regulatory burdens,[91] the normative rule of law continues to follow a separationist model. Accordingly, when the issue is relief from government-imposed burdens, religious groups want to be viewed not as equal to others, but as separate and unique.

As a juridical concept, neutrality integrates into a single coherent theory both (1) allowing religious providers equal access to benefits, and (2) allowing them separate relief from regulatory burdens. The rationale entails distinguishing between burdens and benefits.

The Supreme Court has repeatedly held that the Establishment Clause is not violated when government refrains from imposing a burden on religion, even though that same burden is imposed on the nonreligious who are otherwise similarly situated. *Corporation of Presiding Bishop v. Amos*[92] is the leading case. *Amos* upheld an exemption for religious organizations in federal civil rights legislation. The exemption permitted religious organizations to discriminate on a religious basis in matters concerning employment. Finding that the exemption did not violate the Establishment Clause, the Court explained that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their missions."[93] When the Court permits a legislature to ex-

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ditures," while useful in other areas of fiscal policy, does not make sense in dealing with issues that arise under the Establishment Clause. *See* DEAN M. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 11-13, 47-57 (1977); Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969); Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 345 (1976).

[91] A "burden" means a regulation, a tax, or a criminal prohibition.

[92] 483 U.S. 327 (1987).

[93] *Id.* at 335. *See also* Trans World Airlines v. Hardison, 432 U.S. 63, 90 (1977) (Marshall, J., dissenting) (stating that constitutionality of labor law not placed in doubt simply because it requires religion exemption); Gillette v. United States, 401 U.S. 437 (1971) (religious exemption from military draft for those who oppose all war does not violate Establishment Clause); *Walz*, 397 U.S. 664 (upholding property tax exemptions for religious organizations); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding release time program for students to attend religious exercises off public school grounds); Selective Draft Law Cases, 245 U.S. 366 (1918) (upholding, inter alia, military service exemptions for clergy and theology students).

Estate of Thorton v. Caldor, Inc., 472 U.S. 703 (1985), is not to the contrary. In *Thorton*, the Court struck down a state law favoring Sabbath observance. However, as explained in *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 145 n.11 (1987), the Sabbath law was struck down because the state cannot utilize classifications that single out a specific religious practice, thereby favoring that particular practice, as opposed to language inclusive of a general category of religious observances. For example, if Saturday as a day of rest is legislatively required to be accommodated by employers, all religious practices to be excused (including all religious days of rest) must be required to be accommodated. If a kosher diet is required to be accommodated by commercial airlines, then all religious practices (including all religious dietary requirements) must be accommodated. If a student absence from school is excused for Good Friday,

empt religion from regulatory burdens, it enables private religious choice.

The Court's rationale is twofold. First, to establish a religion connotes that a government must take some affirmative step to achieve the prohibited result. Conversely, for government to passively "leave religion where it found it" logically cannot be an act establishing a religion.[94] Referencing the First Amendment's text, the words "shall make no law"[95] imply the performance of some affirmative act by government, not maintenance of the status quo. Stating the practical sense of the matter, Professor Laycock observed that "[t]he state does not support or establish religion by leaving it alone."[96] Second, unlike benefit programs, religious exemptions reduce civic/religious tensions and minimize church/state interactions, both matters that enhance the nonentanglement so desired by the Establishment Clause.[97]

Should the Court in the future permit a legislature to design welfare programs that confer direct assistance without regard to religion, it would be following a rule of equal treatment as to religion. However, exemptions from burdens and equal treatment as to benefits have a common thread that ties the

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then all absences for all religious holy days must be accommodated. *Id.*

The special needs of national defense make *Gillette* distinguishable from *Thorton*. In *Gillette*, Congress was permitted to accommodate "all war" pacifists but not "just war" inductees because to broaden the exemption would invite increased church/state entanglements and would render almost impossible the fair and uniform administration of the Selective Service System. *Gillette*, 401 U.S. at 450. The only decision that does appear to be at odds with the principle followed in *Amos* and these other cases is *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality opinion) (disallowing sales tax exemption for purchases of religious literature).

[94] The Court was most explicit in making the salient distinction between benefits and burdens in *Amos*. Pointing out that it had previously upheld laws that helped religious groups advance their purposes, the Court explained:

> A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. . . . [I]t must be fair to say that the *government itself* has advanced religion through its own activities and influence.
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> . . .
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> [T]he Court . . . has never indicated that statutes that give special consideration to religious groups are *per se* invalid.

483 U.S. at 337, 338.

[95] U.S. CONST. amend. I. The Establishment Clause, in its entirety, provides:

> Congress shall make no law respecting an establishment of religion . . . .

U.S. CONST. amend. I.

[96] Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 COLUM. L. REV. 1373, 1416 (1981).

[97] *Walz*, 397 U.S. at 676 (It is desirable when government refrains from imposing a burden on religion so as "to complement and reinforce the desired separation insulating each from the other.").

two together. In following an equality-based rule as to benefits, equality is not an end in itself but a means to a higher goal. That goal is the minimization of the government's influence over personal choices concerning religious beliefs and practices. The goal is realized when government is neutral as to the religious choices of its citizens. Thus, whether pondering the constitutionality of exemptions from regulatory burdens or of equal treatment as to benefit programs, in both situations the integrating principle is neutralizing the impact of governmental action on personal religious choices.[98] From that common axis, it makes sense to agree with the Court's holding, in cases such as *Amos*, that religious exemptions from legislative burdens are consistent with the Establishment Clause, and, on the other hand, to insist that the Establishment Clause permits the equal treatment of religion when it comes to financial benefits.[99]

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[98] Unleashing personal religious choice as the core value of the Establishment Clause is not being elevated here as good theology, just good jurisprudence. It is good jurisprudence because religious choice as a core value allows each religion to flourish or die in accord with its own appeal. Choice as the controlling legal standard maximizes liberty of both the individual and the religious community, while neutralizing the impact of governmental action on religious life. In these respects it is biased toward a Western conception of human rights and a limited state. This bias, however, is cause for neither surprise nor apology. It is the Founders' legacy, and they were decidedly Western.

Good theology is another matter; for observant Jews and Christians, religious liberty consists not in doing what we choose, but in the freedom to do what we ought. In Jewish and Christian orthodoxy, belief and practice are understood in terms of truth, not choice. The point here is that it should not be troubling that religious choice is the core value when interpreting the Establishment Clause. There is no reason that law and theology must converge on this point. It is sufficient that law maximizes the individual's freedom to pursue a direction indicated by his or her theology.

[99] In *Dodge v. Salvation Army*, 48 Empl. Prac. Dec. (CCH) ¶ 38,619 (S.D. Miss. 1989), a strange case with an unfortunate holding, a religious social service ministry dismissed an employee when it was discovered she was a member of the Wiccan religion and was making unauthorized use of the office photocopy machine to reproduce cultic materials. When the employee sued, claiming religious discrimination, the Salvation Army invoked the "religious organization" exemption in Title VII, 42 U.S.C. § 2000e-1 (1994). The employee countered that the Title VII exemption should not apply because her salary was substantially funded by a federal grant. The trial court agreed with the employee, holding that the Title VII exemption for religious discrimination by a religious organization was unconstitutional on these facts. The trial court thought the exemption advanced religion in a manner violative of the Establishment Clause when applied to government-subsidized jobs. 48 Empl. Prac. Dec., at 55,409.

The holding in *Dodge* was a mistake. The trial court failed to observe the burden/benefit distinction when it ran together the separate issues of benefits and burdens. The question of whether the Salvation Army may receive a direct benefit consonant with the Establishment Clause is controlled by *Bowen v. Kendrick*, 487 U.S. 589 (1988). The answer to that question, whether "yes" or "no," is entirely independent of the question of whether the Salvation Army may claim the Title VII exemption from the regulatory burden of compliance with the civil rights law. The Court's decision in *Amos* holding that the Title VII exemption did not violate the Establishment Clause had already answered the second question in the affirmative. *Amos*, 483 U.S. 327.

A better reasoned result, one contrary to *Dodge*, was reached by the federal court in *Young v.*

It would be rhetorical, but still a fair comment, to say that in neutrality theory religion gets the best of both worlds: religion is free of burdens borne by others but shares equally in the benefits.[100] However, this observation is not an argument against the neutrality principle but a commendation of it. No one need apologize for a model of church/state relations that maximizes religious liberty (subject, of course, to the reasonable demands of organized society) and limits the power of the modern regulatory state. This combination of liberty and limits is what the First Amendment is about. It was the First Amendment, after all, that expressly singled out religion as an attribute of human nature that called for special treatment.

Previously mentioned were two cases handed down by the Court in late June of 1995: *Capitol Square Review and Advisory Board v. Pinette*,[101] and *Rosenberger v. Rector and Visitors of the University of Virginia*.[102] They represent the Court's most recent pronouncements on the Establishment Clause. Notably, the two newest appointees to the Court, Justices Ginsburg and Breyer, were members of the Court by then and heard both cases.

The prima facie claim in both of these cases was that private religious speech was denied equal access to a public forum, in violation of the Free Speech Clause. The Court agreed. Further, in both cases the government sought to justify its discriminatory treatment of religious speech as being compelled by the Establishment Clause. A majority of the Justices rejected

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Shawnee Mission Medical Center, No. CIV.A. 88-2321-3, 1988 LEXIS 12248 (D. Kan. Oct. 21, 1988) (rejecting argument that Seventh-day Adventist Hospital lost its Title VII exemption because it received federal Medicare funding).

[100] Shifting the analysis from benefits to burdens does not mean moving the baseline from which the neutrality of the government's action is measured. The baseline is not rooted in history or time, but in the principle of minimizing government's impact on personal religious choice. As previously conceded, this choice of baseline is not genuinely neutral. *See supra* notes 10-11. Thus, whether assessing the constitutionality of a benefit or a burden, the location of the baseline is consistent, albeit not neutral.

This combination of receiving equal access to governmental benefits but being specially relieved of burdens carried by others occurred in *Hsu v. Roslyn Union Free School District*, 85 F.3d 839 (2d Cir.), *cert. denied*, 117 S. Ct. 608 (1996). In *Hsu*, a student religious club claimed the right to meet on the campus of a public high school on the same basis as other noncurricular student organizations. The religious club had a right to this benefit under a federal statutory law and the Free Speech Clause. However, when it came to its selection of leaders, the school prohibited the club from selecting only Christians. The appeals court held that as to officers with spiritual functions the club had a right to be relieved of the school's nondiscrimination requirement. Election of leaders sharing the same faith was essential to the club's self-definition, as well as the maintenance of its associational character and continued expression as a Christian club. *Id.* at 856-62. Logically, the same result would be reached under the Free Exercise Clause.

[101] 115 S. Ct. 2440 (1995).

[102] 115 S. Ct. 2510 (1995).

this defense. Hence, the result in both cases is more consistent with a theory of neutrality than of separationism.

In *Pinette*, the Ohio Ku Klux Klan sought a permit to place a display consisting of a Latin cross in Capitol Square, a public area surrounding the statehouse. The square was otherwise open for private displays sponsored by a variety of citizen groups. The State denied the permit, claiming that the cross would be viewed as an endorsement of religion in violation of church/state separation.[103]

By a vote of seven to two the Court sided with the Klan. All of the Justices in the majority believed that placement of the cross by a private group was not barred by the Establishment Clause. However, these seven Justices generated four opinions, none of which commanded a five-vote majority concerning the application of the Establishment Clause to these facts.

Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, believed that the exclusion of a private religious symbol from a public forum could never be justified by the Establishment Clause. Longstanding free speech doctrine required that there be no discrimination as to content, and religious speech was not to be singled out for special scrutiny. The mere fact that onlookers might view a religious display and mistake it for the message of the state was no reason to suppress private speech. Rather, the solution to the problem of the mistaken observer is not to suppress the speech, but to correct the erroneous conclusion concerning the source of the message. So long as the government treats all speakers equally and does nothing to intentionally foster the onlooker's mistake, the government has done all that the Establishment Clause requires.[104]

Justice O'Connor wrote separately about the mistaken observer.[105] Applying an endorsement test, Justice O'Connor said that in some instances the Establishment Clause imposed a duty on the state to take steps to disclaim sponsorship of a private religious message.[106] In her view, a government's formal equality toward religion may not always be enough. In circumstances

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[103] *Pinette*, 115 S. Ct. at 2445.

[104] *Id.* at 2447-50. Justice Thomas wrote separately stating his view that the content of the Klan's message was political rather than religious. *Id.* at 2450-51 (Thomas, J., concurring).

[105] *Id.* at 2455 (O'Connor, J., concurring). Justice O'Connor's opinion was joined by Justices Souter and Breyer.

[106] *Id.* at 2452-53 (O'Connor, J., concurring).

in which, for example, private religious messages "so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval" in the eyes of an objective observer, the Establishment Clause requires the state to take affirmative measures to see to it that religion is not advanced.[107]

Justice Souter, joined by Justices O'Connor and Breyer, wrote separately about the inadequacy of facial equality. Justice Souter agreed that equal treatment of religion should narrowly prevail on these facts. However, this was because his concern for the appearance of state endorsement of religion could be remedied by requiring the affixing of a sign to the cross disclaiming official sponsorship. Such a disclaimer, of course, would be required only when the content of the speech is religious. Hence, the appropriate resonse, in Justice Souter's opinion, is not a facially neutral policy. Rather, the law ought to respond to private religious speech as a "handle with care" item. In Justice Souter's view, an access rule that is nondiscriminatory in purpose is required of the state, but by itself is insufficient. "Effects matter to the Establishment Clause."[108] The tone and content of Justice Souter's opinion left little doubt that in his view church/state separation, rather than even-handed treatment, is the dominant concern of the First Amendment.

Justices Stevens and Ginsburg dissented in separate opinions. Justice Stevens believed that the Establishment Clause created "a strong presumption against the installation of unattended religious symbols on public property."[109] Thus, in his view separationism subordinates the Free Speech Clause and its rule of equal treatment.

Justice Ginsburg was even more extreme, articulating not a presumption but an absolute rule of religious expulsion. She was of the opinion that "[i]f the aim of the Establishment Clause is genuinely to uncouple government from church," then "a State may not permit, and a court may not order, a display of this character."[110] As authority for this absolutist separationism, Justice Ginsburg cited a law review article. The article is openly hostile to the contributions of traditional religion and urges that it be driven out of the public square.[111] It is deeply disturbing that Justice Ginsburg, in her first

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[107] *Id.* at 2454 (O'Connor, J., concurring).

[108] *Id.* at 2458-59 (Souter, J., concurring).

[109] *Id.* at 2464 (Stevens, J., dissenting).

[110] *Id.* at 2475 (Ginsburg, J., dissenting).

[111] *See* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197-214, 222

opinion concerning religion as a Supreme Court Justice, would cite with approval this article with its brutish regard for religion and religious expression.

In *Rosenberger*,[112] decided the same day as *Pinette*, a university-recognized student organization published a newspaper known as *Wide Awake*. The newspaper ran a number of stories on contemporary matters of interest to students such as racism, homosexuality, eating disorders, and music reviews, all from an unabashedly Christian perspective.[113] The university provided student newspapers work space and paid the expenses of printing these publications. The printing costs were paid from a fund generated by a student activity fee.[114] The university refused to reimburse the cost of printing *Wide Awake*. The refusal was pursuant to a policy disqualifying printing costs for groups promoting "a particular belief in or about a deity or ultimate reality."[115] The students sued, claiming this was yet another instance of discrimination against private religious speech in violation of the Free Speech Clause. The university sought to justify its discriminatory treatment as required by a no-aid interpretation of the Establishment Clause.[116]

By a vote of five to four, the Court ruled in favor of the students and directed the university to treat *Wide Awake* the same as other student publications, without regard to the newspaper's religious perspective. Justice Kennedy wrote the majority opinion, and was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas. Justice Kennedy determined that the university had created a limited public forum for student expression on a wide array of topics.[117] Further, the denial of student activity funds to pay for the cost of printing *Wide Awake* was discrimination on the basis of the newspaper's Christian viewpoint concerning topics otherwise permitted in the forum.[118] The university's policy denied funding not because *Wide Awake*

(1992) (the First Amendment's negative bar against an establishment of religion implies an affirmative establishment of a secular public order). To be sure, the Establishment Clause prohibits the establishment of a national church, which of course was no more likely in 1789-91 than it is today. But the Clause does not thereby establish a new religion of Secularism. Rather, no credo is by law established, setting at liberty the hearts of all to embrace any faith or none, as each is persuaded concerning such matters.

[112] 115 S. Ct. 2510 (1995).

[113] *Id.* at 2515.

[114] *Id.* at 2514-15.

[115] *Id.* at 2513.

[116] *Id.* at 2520-21.

[117] *Id.* at 2516.

[118] *Id.* at 2516-18.

was a religious organization, but because of its religious perspective.[119] Justice Kennedy also rejected the argument that providing student groups with a scarce resource such as money differed from providing abundant resources such as classroom meeting space. Whether abundant or in limited supply, the university could not dispense its resources on a basis that was viewpoint-discriminatory.[120]

Justice Kennedy went on to reject the university's argument that providing direct funding for a newspaper with a religious perspective was prohibited by the Establishment Clause. In so doing, Justice Kennedy stated a rule of law consistent with neutrality theory, although he added that compliance with a neutrality rule was a significant factor—but not itself sufficient—in finding that the Establishment Clause was not violated:

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. . . . [I]n enforcing the prohibition against laws respecting establishment of religion, we must be sure that we do not inadvertently prohibit the government from extending its general state law benefits to all its citizens without regard to their religious belief. . . . We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.[121]

Continuing, Justice Kennedy assessed both the purpose and "practical details" of the university's program. The university's purpose was clearly not the advancement of religion. The student activity fee was to promote a wide variety of speech of interest to students. Hence, the fee was unlike an earmarked tax for the support of religion.[122] As to the "practical details" that augured in favor of constitutionality, Justice Kennedy noted that state funds did not flow directly into the coffers of *Wide Awake*; rather, the newspaper's outside printer was paid by the university upon submission of an invoice.[123] Further, Justice Kennedy noted that *Wide Awake* was a student publication, "not a religious institution, at least in the usual sense of that term as used in our case law, and it is not a religious organization as used in the University's

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[119] *Id.* at 2515.
[120] *Id.* at 2519-20.
[121] *Id.* at 2521 (citations and internal quotations omitted).
[122] *Id.* at 2522.
[123] *Id.* at 2523-24.

own regulations."[124]

Although she joined the majority opinion, Justice O'Connor had greater difficulty concluding that the Establishment Clause was not transgressed on these facts. As between separatistic and neutrality models, she declared that *Rosenberger* did not elevate neutrality as the new paradigm:

> The Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence.[125]

Accordingly, separationism appears to be Justice O'Connor's starting point in cases involving direct funding of religious organizations. However, she found several mitigating details which on balance satisfied her that providing assistance in this case did not carry the danger of governmental funds' endorsing a religious message. First, university policies made it clear that the ideas expressed by student organizations, including religious groups, were not those of the university. Second, the funds were disbursed in a manner that ensured monies would be used only for the university's purpose of maintaining a robust marketplace of ideas. Finally, Justice O'Connor noted the possibility that students who objected to their fees going toward ideas they opposed might not be compelled to pay the entire fee.[126]

In addition to joining the majority opinion, Justice Thomas wrote separately to criticize the historical account in Justice Souter's dissent. Justice Thomas agreed with Justice Souter that history indicated that the Founders intended the Establishment Clause to prevent earmarking a tax for the support of religion.[127] However, the equal participation of religious and nonreligious groups in a direct-aid program funded out of general tax revenues was never an issue faced by the founding generation.[128] Hence, in Justice Thomas's view, it is not prohibited by the Establishment Clause.

Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer. Concerning a direct-aid program funded by public monies, Justice Souter

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[124] *Id.* at 2524.

[125] *Id.* at 2528 (O'Connor, J., concurring).

[126] *Id.* at 2526-27 (O'Connor, J., concurring).

[127] *Id.* at 2528 and n.1 (Thomas, J., concurring).

[128] *Id.* at 2528-30 (Thomas, J., concurring). *Cf. id.* at 2536 n.* (Souter, J., dissenting). The Supreme Court has already rejected an argument by federal taxpayers that the Free Exercise Clause is violated should they as contributors to the nation's general tax revenues have to "pay for" benefits provided to religious organizations. *See supra* note 71.

stated that any such program was unconstitutional if it used public monies to support religion.[129] Hence, the four dissenting Justices followed a separatistic model.

Justice Souter severely criticized Justice Kennedy's opinion insofar as it made distinctions based on certain factual peculiarities of the case: the funds going directly to the printer, not to the publication; the funds originating from student fees, not taxes; and the newspaper not being a religious organization, although it espoused overtly religious beliefs.[130] The "practical details" section of Justice Kennedy's opinion does appear to focus on minutiae. These are indeed chimerical distinctions on which the Establishment Clause is seemingly made to turn. In fairness to Justice Kennedy, however, he may have been forced into these rationalizations in order to keep Justice O'Connor with the majority. She supplied the crucial fifth vote. But if keeping Justice O'Connor from separately concurring explains Justice Kennedy's attention to "practical details," it came at a high price: officials and judges who do not like the result in *Rosenberger* have plenty of fine distinctions to manipulate so as to confine the case's holding narrowly to its facts.

In summary, concerning the constitutionality of general programs of direct aid, from *Pinette* and *Rosenberger* we learn that presently four Justices are prepared to allow a rule of neutrality, four Justices remain entrenched in separationism as their theory, and Justice O'Connor is the swing vote. Although it is clear that facial neutrality alone is insufficient, Justice O'Connor was unwilling to commit to any broader statement of general legal principles. It must be conceded that her instinct in these cases is not to begin with neutrality theory, but to follow a weak version of separationism.[131] She starts with a presumption of no aid, but then advises weighing the totality of the circumstances. If the legislation is facially neutral as to religion, if the program is administered so that there is no appearance of official endorsement of religion, and if there are sufficient safeguards against the welfare program's functioning as a subterfuge for channeling tax monies to support religion, then she will allow a rule of neutrality.[132]

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[129] *Rosenberger*, 115 S. Ct. at 2535-39 (Souter, J., dissenting).

[130] *Id.* at 2544-47 (Souter, J., dissenting).

[131] Justice O'Connor's "no endorsement test," was first advanced in the Christmas nativity scene case of *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

[132] In a departure from the separationist view, Justice O'Connor's no endorsement test is not a funds-tracing analysis. Rather, her reliance on the objective observer is an appearance-of-impropriety analysis. Instead of focusing on whether religion is advanced by direct funding, as separationists do, Justice O'Connor

In *Rosenberger*, as in *Widmar, Lamb's Chapel,* and *Pinette*, it was the Free Speech Clause that compelled the equal treatment of religion.[133] In the absence of the free speech claim, there was no indication the Court would have required—as a matter of constitutional right—that religion be treated equally in welfare programs. It is uncertain whether the Court will do so.[134] All that can be said with assurance is that should a legislature choose to treat religion in a nondiscriminatory manner when designing a program of aid, then a slim majority of the present Court will uphold the aid. Accordingly, religious social service providers have no certainty of equal treatment, but it is permitted.[135]

As we look at the progression from *Widmar* to *Rosenberger* in terms of the Court's attitude toward enabling personal religious choice, there is a logical continuum. The Court has moved toward neutralizing government's impact on religious belief and practice. In *Widmar*, the Establishment Clause was not

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is concerned with the civic alienation felt by her observer as she looks at welfare legislation aiding social service providers, including those that are faith-based. Accordingly, the issue for Justice O'Connor is not whether the aid has the effect of advancing religion, but whether it appears to single out religion for favoritism.

[133] *See also* Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir.), *cert. denied*, 117 S. Ct. 360 (1996). Following *Rosenberger* and *Pinette*, the appeals court in *Church on the Rock* struck down a congressional prohibition on private religious speech, thereby permitting access to senior citizen centers funded in part by the federal government. The Free Speech Clause was again the source of the right to equal treatment.

[134] The Free Exercise Clause prevents a legislature from adopting a welfare program in which a broad array of providers, governmental and independent, are eligible, but expressly excluding faith-based providers because they are religious. Thus, equal treatment is commanded by the Free Exercise as well as the Free Speech Clause. *See supra* note 26 and accompanying text.

While admitting to a prima facie violation of the Free Exercise Clause, separationists argue that stopping all funding to religious organizations serves the "compelling interest" of compliance with the Establishment Clause. But this argument was rejected as to the Free Speech Clause in *Rosenberger*, 115 S. Ct. at 2520-25. Moreover, there is nothing in the wording of the First Amendment that suggests that when clauses ostensibly "conflict," the Establishment Clause overrides the Free Exercise and Free Speech Clauses. One could just as easily presume that the Free Exercise and Free Speech Clauses supersede the Establishment Clause. Of course, there is no conflict between these Clauses when the neutrality principle is followed. *See infra* notes 155-57 and accompanying text.

[135] It might be asked whether the Court majority would still have found the Establishment Clause defense unsuccessful in *Widmar, Lamb's Chapel, Pinette*, and *Rosenberger*, in the absence of the claimants' successful free speech claim. The answer is "yes." In each case the free speech and no-establishment questions were considered independently of the other. Never did the Court suggest that the Free Speech Clause overrode the Establishment Clause. In each case the government voluntarily opened a limited public forum, and it was clear the government retained the authority to close the forum to all speakers. Free speech did not add the margin of victory over the no-aid-to-religion defense. What is required of government is that it have a secular purpose for its benefit program. That purpose may be the provision of a forum for a diverse array of speech, but the purpose may also be meeting the welfare needs of the poor.

violated when the government provided a direct benefit in the form of reserved meeting space (classrooms, heat, and light) because of the larger public purpose at issue—enriching the marketplace of ideas. In *Rosenberger*, the Establishment Clause was not violated when the government provided a direct benefit in the form of funding (paid printing costs) for the same reason as in *Widmar*—the larger public purpose of enriching the marketplace of ideas. Both the classroom space and payment of printing costs were valuable benefits to which a sum certain could be assigned. Free access to other forms of valuable direct benefits easily come to mind: bulletin boards, photocopy machines, computers for word processing and e-mail, facsimile machines, organizational mailboxes, organizational office space, and even something as common as use of a telephone. All of these direct benefits when provided to a wide variety of student organizations, including organizations that are either religious or have religious viewpoints, would be permitted by the *Widmar/Rosenberger* interpretation of the Establishment Clause.

Indeed, there is no logical stopping place as the circumstance evolves from funding private expression without regard to religion to funding a social program without regard to religion. The essential requisite, as far as the Establishment Clause is concerned, is that in the case of expression, the creation of the public forum have a public purpose. In the case of a social service program, its enactment must have a public purpose as well.

The general principle of law that emerges is that the Establishment Clause is not violated when, for a public purpose, a program of direct aid is made available to an array of providers selected without regard to religion. In recently enacting the Church Arson Prevention Act,[136] Congress made use of this principle. Section 4(a) of the Act enables nonprofit organizations exempt under § 501(c)(3) of the Internal Revenue Code, which are victims of arson or terrorism as a result of racial or religious animus, to obtain federally guaranteed loans through private lending institutions.[137] This of course means churches can obtain the necessary credit to repair or rebuild their houses of worship at reduced rates. The Act, quite sensibly, treats churches the same as all similarly situated exempt nonprofit organizations. The public purpose is to assist the victims of crime. The federal guarantee represents a form of direct aid to religion, but because the aid is neutrally available to all 501(c)(3) organizations, it does not violate the Establishment Clause.

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[136] Pub. L. 104-155, 104th Cong., (1996), signed into law by the President on July 3, 1996.

[137] *Id.* at § 4(a)(1).

In the context of welfare legislation, the public purpose is for government and the independent sector to engage in a cooperative program that addresses the temporal needs of the ultimate beneficiaries,[138] and to do so in a manner that enhances the quality or quantity of the services to those beneficiaries. If some of the providers happen (indeed, are known) to be religious, and in the course of administering their programs they integrate therein religious beliefs and practices, that is of no concern to the government. As long as the beneficiaries have a choice as to where they can obtain services, thereby preventing any religious coercion of beneficiaries, and as long as the public purpose of the program is met,[139] the government's interest is at an end.[140]

For a welfare program to have a public purpose, more is required than that the program merely be facially neutral as to religion.[141] The legislation must have as its genuine object the pursuit of the good of civil society. Permissible public purposes encompass health (including freedom from addictions), safe-

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[138] *See* § 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604a (1996 Supp.). Known by the popular name of "Charitable Choice," § 104 permits states to involve faith-based providers in the delivery of welfare services funded by the federal government through block grants to the states. Subsection 104(e) provides that if a beneficiary has a religious objection to receiving social services from a faith-based provider, he or she has a right to obtain services from a different provider.

[139] This can be accomplished by fiscal audits of monies from governmental sources, as well as by end-result evaluations during performance reviews undertaken to ensure that the needs of the beneficiaries targeted by the legislation are being served. Such intrusions are a tolerable level of interaction between religion and government.

[140] An example of this model is found in the regulations to the federal Child Care Block Grant Act of 1990, providing, inter alia, certificates to low-income parents who may then "spend" the benefit at the child care provider they select for their child. The regulations state that the monies from such certificates:

> (3) May be used for child care services provided by a sectarian organization or agency, including those that engage in religious activities, if those services are chosen by the parent; [and]
>
> (4) May be expended by providers for any sectarian purpose or activity, including sectarian worship or instruction . . . .

42 C.F.R. § 98.30(c).

[141] Inquiry into "purpose" may go beyond the mere text or "face" of a statute. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-35 (1993); *see* Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 699 (1994).

Legislative purpose, however, should not be confused with legislative motive. A judicial inquiry may not go into the subjective motive of each legislator supporting a legislative bill. A motive analysis would not only have implications for the denial of religious freedom (McDaniel v. Paty, 435 U.S. 616, 641 (1978) (Brennan, J., concurring in the judgment)), but also for violating the separation of powers (United States v. O'Brien, 391 U.S. 367, 383 (1968)). *See* Board of Educ. v. Mergens, 496 U.S. 226, 249 (1990) (plurality opinion) ("Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.").

ty, morals, or meeting temporal needs, such as shelter, food, clothing, and employment.

Unlike separationism, in neutrality theory it makes no difference whether a provider is "pervasively sectarian" or whether the nature of the direct aid is such that it can be diverted to a religious use.[142] Most importantly, the courts no longer need to ensure that governmental funds are used exclusively for "secular, neutral, and nonideological purposes"[143] as opposed to worship or religious instruction. Neutrality theory eliminates the need for the judiciary to engage in such alchemy.

For faith-based providers to retain their religious character, programs of aid must be written to specially exempt them from regulatory burdens that would frustrate or compromise their religious character. Not only is this essential to attracting their participation, but it is in the government's interest for these providers to retain the spiritual character so central to their success in rehabilitating the poor and needy.[144] The line of cases typified by the holding in *Amos* gives assurance that the adoption of such exemptions do not violate the Establishment Clause.[145]

In neutrality theory it might be asked, "Just what is left of the Establishment Clause?" The answer is, "Quite a lot!" In addition to the several applications noted elsewhere in this Article,[146] the Establishment Clause continues to prohibit the government from adopting or administering a welfare program out of a purpose that is inherently religious.[147] For example, the

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[142] To require states to distinguish between "pervasively" and "non-pervasively" sectarian organizations would seem to violate one of the venerable rules of the Establishment Clause, to the effect that government is not to intentionally discriminate among religious groups. Larson v. Valente, 456 U.S. 228 (1982). *See also supra* notes 59-63, and accompanying text. Under neutrality theory this inconsistency is avoided.

[143] Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 780 (1973).

[144] *See* HENRY G. CISNEROS, U.S. DEP'T OF HOUS. AND URBAN DEV., HIGHER GROUND: FAITH COMMUNITIES AND COMMUNITY BUILDING 6-12 (1996) (citing studies and examples of the success of faith-based community development activities); NATIONAL INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, AN EVALUATION OF THE TEEN CHALLENGE TREATMENT PROGRAM (1977) (showing a materially higher success rate for faith-based over secular drug treatment programs for youth); *Religious Institutions as Partners in Community Based Development, in* PROGRESSIONS: A LILLY ENDOWMENT OCCASIONAL REPORT (Feb. 1995) (noting success with community-based development that came only after involving the local church).

[145] *See supra* notes 92-97 and accompanying text.

[146] *See supra* notes 59-63, 78-79, 87, 93, *infra* notes 149-51 and accompanying texts.

[147] "Inherently religious" means those intrinsic and exclusively religious activities of worship and the propagation or inculcation of the sort of matters that comprise confessional statements or creeds. In addition, the term includes the supernatural claims of churches, mosques, synagogues, temples, and other houses of

no-establishment principle does not permit as the object of legislation the pursuit of worship, religious teaching, prayer, proselytizing, or devotional Bible reading.[148] Characterizing the purpose of a program of aid as "nonsectarian" or "secular" should be avoided, for that just clouds the issue. Mere overlap between a statutory purpose and religious belief or practice does not, without more, make the legislation unconstitutional.[149] Finally, although the Establishment Clause does require a public purpose, the neutrality principle is not concerned with unintended effects among religions. Accordingly, the Establishment Clause is not offended should a general program of aid affect, for good or ill, some religious providers more than others,[150] as long as any

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worship, using those words not to identify buildings, but to describe the confessional community around which a religion identifies and defines itself, conducts its worship, teaches doctrine, and propagates the faith to children and adult converts.

Although a view of religion and life as an integrated whole is desirable, for purposes of the Establishment Clause it becomes necessary to recognize that some core beliefs and practices are "inherently religious." The necessity of a fixed boundary in church/state relations requires a uniform legal standard in drawing the line of church/state separation. The line of separation cannot be drawn differently for each religious organization based on its own unique definition of religion. That would amount to governmental discrimination among religions (a violation of the rule stated in *Larson*, 456 U.S. 228 (1982)).

This is not to say that the Supreme Court has resolved all the definitional problems by confining Establishment Clause analysis to matters "inherently religious." The Court's determination as to what is "inherently religious" inevitably will favor the philosophy of modern rationalism (its underlying tenets will appear arguably nonreligious) while disfavoring familiar theistic religions such as Christianity, Judaism, and Islam (their tenets and practices appearing inherently religious). *See* Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 834-35 (1984). But as stated above, this is a consequence of the impossibility of the Establishment Clause's being "neutral" as to all world views. *See supra* notes 10-11 and accompanying text.

[148] The Supreme Court has found that prayer, devotional Bible reading, veneration of the Ten Commandments, classes in confessional religion, and the biblical story of creation are all inherently religious. *See* Lee v. Weisman, 505 U.S. 577 (1992) (prayer); Edwards v. Aguillard, 482 U.S. 578 (1987) (creationism); Wallace v. Jaffree, 472 U.S. 38 (1985) (prayer); Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (Ten Commandments); Epperson v. Arkansas, 393 U.S. 97 (1968) (creationism); School Dist. v. Schempp, 374 U.S. 203 (1963) (prayer and Bible reading); Engle v. Vitale, 370 U.S. 421 (1962) (prayer); McCollum v. Board of Educ., 333 U.S. 203 (1948) (teaching religion).

On the other hand, legislation restricting abortion, Sunday closing laws, rules prohibiting interracial marriage, and teenage sexuality counseling are not inherently religious. *See* Bowen v. Kendrick, 487 U.S. 589 (1988) (teenage counseling); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (interracial marriage); Harris v. McRae, 448 U.S. 297 (1980) (abortion restrictions); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing law); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961) (Sunday closing law).

[149] The Establishment Clause is not violated when a governmental social program merely reflects a moral judgment, shared by some religions, about conduct thought beneficial (or harmful) to society. *Kendrick*, 487 U.S. at 604 n.8, 613; *Harris*, 448 U.S. at 319-20; *McGowan*, 366 U.S. at 442; Hennington v. Georgia, 163 U.S. 299, 306-07 (1896); *see Bob Jones Univ.*, 461 U.S. at 604 n.30. Thus, overlap between a law's purpose and the moral teaching of some religions does not, without more, render the law one "respecting an establishment of religion."

[150] The Supreme Court has held that when a law of general public purpose has a disparate effect on

disparate effect is unintentional.[151]

State constitutions also address the matter of church/state relations, sometimes in terms that are more separatistic than the Supreme Court's interpretation of the Establishment Clause.[152] A program of aid that successfully navigates the First Amendment can nonetheless go aground on claims based on state constitutional law. However, if the welfare program is federal or federal revenues are shared with the states, then these state constitutions can be preempted by Congress.

CONCLUSION

As one facet of the nation's overall effort to reform welfare, it is imperative to increase the involvement of the independent sector in the delivery of government-assisted social services. A significant part of the voluntary sector presently engaged in social work consists of faith-based nonprofit organizations. Indeed, these religious charities are some of the most efficient social service providers, as well as among the most successful, measured in terms of lives permanently changed for the better.[153] Although some faith-based providers have been willing to participate in government-assisted programs, many are wary about involvement with the government because they rightly fear the debasing of their religious character and expression.[154] Consequently, what is needed is legislation that invites the equal participation of faith-based organizations as social service providers, while safeguarding their religious character, which is the very source of their genius and success.

Achieving this goal will require change in how Americans conceive of the role of modern government, which fortunately is already underway. For starters, the activity of government must not be thought of as monopolizing the

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various religious organizations, the Establishment Clause is not violated. Hernandez v. Commissioner, 490 U.S. 680, 696 (1989); *Bob Jones Univ.*, 461 U.S. at 604 n.30; *Larson*, 456 U.S. at 246 n.23.

[151] The Supreme Court has held that the Establishment Clause prohibits government from purposefully discriminating among religious groups. *Larson*, 456 U.S. 228; Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951).

[152] *See* F. William O'Brien, *The Blaine Amendment 1875-1876*, 41 U. DET. L.J. 137 (1963); Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625 (1985). Although dated, a useful work in the area of religion and state constitutions is CHESTER JAMES ANTIEAU ET AL., RELIGION UNDER THE STATE CONSTITUTIONS (1965).

[153] *See supra* note 144.

[154] *See* ESBECK, *supra* note 62; STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY (1996).

"public." Rather, civil society is comprised of many intermediate institutions and communities that also serve public purposes, including the independent sector of nonprofit faith-based providers.

Further, independent sector providers that opt to participate in a government welfare program are not in any primary sense to be regarded as "beneficiaries" of the government's assistance. Rather, it is those who are the ultimate object of the social service program—the hungry, the homeless, the alcoholic, the teenage mother—who are the beneficiaries of taxpayer funds. As they deliver services to those in need with such remarkable efficiency and effectiveness, faith-based providers, along with others in the voluntary sector, give far more in value, measured in societal betterment, than they could possibly receive as an incident of their expanded responsibilities. This is not a case of tax dollars funding religion.

Rightly interpreted, the Establishment Clause does not require that faith-based providers censor their religious expression and secularize their identity as conditions of participation in a governmental program. So long as the welfare program has as its object the public purpose of society's betterment—that is, help for the poor and needy—and so long as the program is equally open to all providers, religious and secular, then the First Amendment requirement that the law be neutral as to religion is fully satisfied.

Neutrality theory has the additional virtue of eliminating existing "conflict" among the clauses of the First Amendment. By not discriminating between "pervasively" and "non-pervasively sectarian" organizations, the Court's interpretation of the Establishment Clause is brought into line with the rule of *Larson v. Valente*[155] prohibiting intentional discrimination among religious groups, and avoids as well excessive inquiry into the character of religious organizations.[156] By not discriminating in favor of secular organizations over religious organizations through the funding of only the former, the Court's interpretation of the Establishment Clause is brought into line with the rule of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[157] prohibiting intentional discrimination against religion. And by not discriminating against private religious speech in either content or viewpoint, the Court's interpretation of the Establishment Clause is in line with longstanding free

[155] 456 U.S. 228. *See supra* notes 59-60 and accompanying text.
[156] *See supra* notes 61-63 and accompanying text.
[157] 508 U.S. 520 (1993). *See supra* notes 26 and 134.

speech doctrine as adhered to in *Rosenberger*. The separationist view that when in "conflict," the Establishment Clause subordinates the Free Exercise and Free Speech Clauses has heightened religious tensions over political matters. Contrariwise, the neutrality principle promises to reduce political factionalism along religious lines.

As First Amendment law evolves away from separationism and in the direction of neutrality theory, it is inevitable that there will be setbacks. But the neutrality principle has about it the march of an idea, one that is compelling because it unleashes liberty, limits government, and reinvigorates citizen involvement at the neighborhood level. For the sake of America's poor and needy, we can only hope that the Supreme Court's full embrace of neutrality will come soon.