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Recommended Citation

John H. Garvey, *What's Next After Separationism?*, 46 EMORY L. J. 75 (1997).

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WHAT'S NEXT AFTER SEPARATIONISM?†

*John H. Garvey**

Professor Carl Esbeck argues in his article¹ that the traditional theory of separationism is giving way to a theory of equality (or more accurately, protection for religious choice). The argument is very astute, and I agree with much of it. I will give my own perspective on the same two points.

I. SEPARATIONISM

A. *Indirect Aid*

Separationism is a theory about cause and effect.² *Lemon v. Kurtzman*³ states the rule: the government must not cause religious effects. The distinction between direct and indirect aid is one way of implementing this rule. Indirect aid (e.g., vouchers, tax deductions) does not cause trouble for the government because there is an intervening cause: the individual who receives the aid can spend it in a number of different places. Hart and Honoré illustrate this way of thinking in their book *Causation in the Law*:⁴

If a guest sits down at a table laid with knife and fork and plunges the knife into his hostess's breast, her death is not in any context . . . thought of as caused by, or the effect or result of the waiter's action in laying the table. . . .

The Supreme Court in *Witters v. Washington Department of Services for the Blind*⁵ adopted a similar paradigm:

† This Article was first presented at a workshop on the Constitutionality of Governmental Cooperation with Religious Social Ministries, on August 2-3, 1996, sponsored by the Religious Social-Sector Project of the Center for Public Justice, in response to a paper presented by Professor Carl Esbeck, also published in this issue of the *Emory Law Journal*. See *infra* note 1.

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¹ Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997).

² I explain this point at more length in an article entitled *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61.

³ 403 U.S. 602 (1971).

⁴ H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 70 (1959).

⁵ 474 U.S. 481, 487 (1986).

Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.

Suppose now that the government gives the individual recipient aid that can only be used at a religious institution. In this case the outcome has been different. Joel Feinberg explains the distinction in his book *Doing & Deserving*:⁶

If the murder occurred in a prison dining hall . . . where knives are never set on tables and diners may be expected to get violent, then the laying of the table would be the abnormal event of great explanatory power, and the provision of opportunity "the cause." The pertinent principle here is that *the more expectable human behavior is, whether voluntary or not, the less likely it is to "negative causal connection."*

The Court has reached a similar conclusion in cases about tuition grants that can only be used at private schools. Consider *Committee for Public Education v. Nyquist*:⁷ New York gave low-income parents \$50 to \$100 to reimburse them for tuition paid at nonpublic schools.⁸ So as Professor Esbeck correctly observes,⁹ the rule about indirect aid is this: It is permissible if given on equal terms to people who can spend it at religious *and other* institutions.

B. Direct Aid: Separate Secular Services

The Court has sometimes approved even direct aid to religious institutions under the rule of separation.¹⁰ Once again the question has been whether the government causes religious effects. It does not, the Court has said, when the recipient can separate its religious and secular services, and the aid goes strictly to the secular side.¹¹ This requires an effort on both sides—by the recipient and by the government—to keep money out of religious pockets. The recipient must divide its programs and activities into secular ones and religious ones. Think of the institution as a pool table with pockets on each side. You can see the effect of this rule on the campuses of religious colleges: some buildings are swept clean of religious icons, some courses are taught in

⁶ JOEL FEINBERG, *DOING & DESERVING* 166 (1970).

⁷ 413 U.S. 756 (1973).

⁸ *Id.* at 764.

⁹ Esbeck, *supra* note 1, at 6.

¹⁰ See generally Garvey, *supra* note 2.

¹¹ *Id.*

a way that makes no mention of religion. The end result of this process is to put religion off in one place all by itself—like the divinity schools at Harvard, Chicago, and Duke. This is, to my mind, the most pernicious effect of the rule of separation. To obtain government aid, religious institutions will abandon or “privatize” their mission in much of what they do.

As for the government, we must keep an eye on the aid to see which pocket it goes into. This is often just a matter of accounting rules. For example, in *Roemer v. Board of Public Works*,¹² a college aid case, the Court held that a state could give noncategorical grants to private (including religious) colleges, provided the schools segregated the funds, agreed not to spend the money for sectarian purposes, and accounted for the funds at the end of the year.¹³ The government has its accountants watch the ball to ensure it goes into a secular pocket.

A variation on this solution is to provide aid in kind (books, tests, diagnostic services), so it cannot be converted to religious use. This type of aid will fit only in the secular pocket, so we need not watch it.

Although I have been using school aid cases as examples, this way of thinking is also evident in the two direct-aid social services cases that the Court has decided. In *Bowen v. Kendrick*,¹⁴ the more recent decision, the Court upheld a facial challenge to the Adolescent Family Life Act (AFLA).¹⁵ AFLA permitted religious institutions to get federal grants to run programs for the care and prevention of teenage pregnancy.¹⁶ You can imagine the local office of Catholic Social Services doing this. Of course, the counselors at Catholic Social Services might say that the Bible, for a variety of good reasons, frowns on sex before marriage. The Court assumed that if that happened, aid would have gone into the wrong pocket. As I said, however, the suit was a challenge to AFLA on its face, and the Court said that “nothing in our prior cases warrants the presumption . . . that religiously affiliated AFLA grantees are not capable of carrying out their functions under the AFLA in a lawful, secular manner.”¹⁷

¹² 426 U.S. 736 (1976).

¹³ *Id.* at 741-43.

¹⁴ 487 U.S. 589 (1988).

¹⁵ 42 U.S.C. §§ 300z to 300z-10 (1994).

¹⁶ *Kendrick*, 487 U.S. at 593.

¹⁷ *Id.* at 612.

It is possible to read the Court's opinion in *Bradfield v. Roberts*¹⁸ in the same way. That case was a challenge on its face to a law appropriating money to Providence Hospital in the District of Columbia, a hospital run by the Sisters of Charity of Emmitsburg, Maryland. The Court upheld the grant saying, "[t]here is no allegation that its hospital work is confined to members of that church or that in its management the hospital has been conducted so as to violate its charter in the smallest degree."¹⁹

II. EQUALITY

A. *What Is Wrong with Causing Religious Effects?*

Separationism was the rule in Establishment Clause cases for three or four decades, but I think Professor Esbeck is right to suggest that its reign is ending. In fact, I would say that the end of separationism has been coming about since Ronald Reagan's first term. In his article, *The Lingering Death of Separationism*, Professor Ira Lupu gives several examples of this trend:²⁰

1. New History: Since 1947, the official history of the Establishment Clause has been the one Justices Black and Rutledge wrote in *Everson v. Board of Education*.²¹ *Everson* stressed the role of Madison and Jefferson in Virginia's break with the Anglican church. But today we are more aware of the role that Congregationalists in New England and evangelicals in the North and South played in the early constitutional debates. Justice Rehnquist legitimized this history in 1985 in his dissent in *Wallace v. Jaffree*.²²

2. Justiciability Retreat: In the 1960s *Flast v. Cohen*²³ created a special standing rule designed to encourage Establishment Clause claims. In 1982 the Court denied standing to a separationist organization challenging the federal government's transfer of some land to a Christian school for its ministry.²⁴

¹⁸ 175 U.S. 291 (1899).

¹⁹ *Id.* at 298.

²⁰ Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).

²¹ 330 U.S. 1 (1947).

²² 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

²³ 392 U.S. 83 (1968).

²⁴ *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

3. New Symbols: In 1983 and 1984, the Court approved legislative prayer and a municipal nativity scene.²⁵ This has not meant a regime of *laissez-faire*,²⁶ but it is inconsistent with strict separationism.

4. School Aid: The low point undoubtedly came in *Aguilar v. Felton*²⁷ and *Grand Rapids v. Ball*,²⁸ but since 1983 the Court has allowed aid to parochial schools in *Mueller v. Allen*²⁹ and *Zobrest v. Catalina Foothills School District*.³⁰ In addition, I think the Court essentially approved vouchers in *Witters*.³¹

Why is this happening? One part of the answer is that the world has changed. Professor Lupu explains:

Separationism thrived best when white Anglo-Saxon Protestants of low-level religious intensity constituted the bulk of our cultural elite. For members of this group, separationism reflected an attractive mix of privatized (hence unobtrusive) religion, opposition to a public subsidy of the educational mission of the Roman Catholic Church, and support for the mission of socializing Americans in what this elite perceived as the common American culture.³²

Since then, the cultural elite has grown more diverse, America has had a spiritual awakening, and the public schools have lost our confidence.

Another part of the answer is that separationism rests on doubtful axioms. Professor Esbeck puts his finger on the most important one. In nearly all of these cases we are talking about aid that causes religious side effects. The aid is designed to improve math skills or cure hepatitis, but may incidentally help religion because it is given to religious providers. We assume that it is bad for the government to cause religious side effects.³³ But why is it bad? Consider an analogy to equal protection. The Equal Protection Clause—like the Establishment Clause—holds that the government should not give aid to schools, hospitals, or lunch counters that engage in racial discrimination.³⁴

²⁵ *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983).

²⁶ See *Lee v. Weisman*, 505 U.S. 577 (1992); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

²⁷ 473 U.S. 402 (1985). The Supreme Court has agreed to reexamine its decision this term. *Agostini v. Felton*, Nos. 96-552 and 96-553 (argued April 15, 1997).

²⁸ 473 U.S. 373 (1985).

²⁹ 463 U.S. 388 (1983).

³⁰ 509 U.S. 1 (1993).

³¹ *Witters v. Washington Dept. of Svcs. for the Blind*, 474 U.S. 481 (1986).

³² Lupu, *supra* note 20, at 231.

³³ See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

³⁴ *Norwood v. Harrison*, 413 U.S. 455 (1973); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715

The reason is that aid designed to improve math skills or cure hepatitis at segregated institutions will have the unpleasant side effect of promoting discrimination as well. But there is a difference between the two cases. Religion is not intrinsically evil like race discrimination; quite the contrary. When government aid causes religious side effects, such side effects are not inherently bad, like bigotry. In the case of religion, the harm occurs one step *further* removed. When government aid goes to religion we might then see:

1. Bad secondary effects on the political system. Some people will form religious parties and fight (like "special interest groups") for subsidies. Others will form antireligious parties and fight (like "public interest groups") against aid for principles they oppose.
2. Bad secondary effects on religion. Madison argued in his *Memorial and Remonstrance*³⁵ that aid has a debilitating effect. Religion that does not have to feed itself gets fat and lazy.

But we do not have additional effects like these every time government aid causes religious side effects. Suppose that in *Bradfield* the federal government not only built the isolation ward but also paid \$500,000 to run it for a year. And suppose that the Sisters of Charity who staffed it offered prayers and spiritual comfort to patients who wanted them. This would violate the principle of separation because the nuns have not split apart their secular and religious activities. Therefore, we cannot be sure which ones the federal money is going to pay for. But as long as the nuns must provide what Jesse Choper calls "full secular value"³⁶ we are unlikely to have churches lining up for government subsidies and ministers retiring on government pensions. To get a \$500,000 grant a recipient has to spend at least that much running a hospital. That is not a very attractive proposition for an institution seeking a handout.

Here is a second doubtful axiom behind the rule of separation. We assume that if government and religion are kept separate, religious groups can raise their own money, live their own lives, provide their own services, etc. In an eighteenth-century world of minimalist government this may have been so. But suppose you had a socialist government that taxed people at ninety-five percent and handed out land, money, and jobs according to a ten-year master

(1961); *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963).

³⁵ James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) in 8 THE PAPERS OF JAMES MADISON 301 (Robert A. Rutland & William M.E. Rachal eds., 1973).

³⁶ JESSE CHOPER, SECURING RELIGIOUS LIBERTY 177 (1995).

plan for production and consumption of goods and services.³⁷ In that kind of society churches could not raise money. In fact, they could not even build churches unless the government gave them land and money. I think our Constitution would permit that kind of economy. If it did, I think the Free Exercise Clause would require (not just permit) the government to give money to churches. So what the First Amendment means for government aid depends upon the tax rate: at some point religious groups cannot raise their own money, provide their own services, etc., and the government is responsible for their difficulties because it has absorbed all the available resources. We are not yet at that point. But neither are we in the same place we were during the eighteenth century. The theory of separation must take account of that.

Here is a third and final point about the assumptions of separationism. Suppose that Congress appropriated \$100 million for refurbishing local art galleries throughout the country. To qualify for funding, however, a gallery would have to promise to remove from public display any homoerotic sculpture, paintings, or photographs. This would be challenged, and I think held invalid, as an unconstitutional condition on the exercise of First Amendment rights. The government, we would say, cannot penalize those who take a particular point of view by withholding aid that is available to all other institutions in the same class. It is not a sufficient response to say that the disqualified gallery can still exhibit any art it wishes and raise money privately for its own refurbishing. And yet this is exactly what the theory of separation requires us to say about aid to religious institutions. If Congress gives money for math education, schools cannot qualify for this funding if they offer religion classes.³⁸

B. Equal Aid

If separationism is on the way out, what will replace it? Principles of equality or neutrality will surely play an important part in any eventual solution.

This is certainly true of many cases about religious expression. In a handful of recent cases the Court has applied the First Amendment rule of content

³⁷ Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 522-23 (1968).

³⁸ See *Aguilar v. Felton*, 473 U.S. 402 (1985). See also Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255 (1989).

neutrality to religious speech. Most involved the use of public forums. The trend started in *Widmar v. Vincent*³⁹ in 1981. In the 1990s the trend continued with *Westside Community Board of Education v. Mergens*,⁴⁰ *Lamb's Chapel v. Center Moriches Union Free School*,⁴¹ and *Capitol Square Review and Advisory Board v. Pinette*.⁴² The only doubt I have about this area is that the free speech rule about traditional public forums, enforced in *Pinette*, is in some tension with the Establishment Clause rule about holiday displays.⁴³ There are four votes, led by Justice Scalia in *Pinette*, for the proposition that the no-discrimination rule always trumps the no-establishment rule.⁴⁴ But the fifth vote is Justice O'Connor, and she often engages in ad hoc balancing in these cases to determine whether there is an Establishment Clause violation.

This rule of content neutrality rests on assumptions that are unique to the Free Speech Clause: that truth will prevail over falsehood in a fair fight and that public discussions should be uninhibited because people need information to vote intelligently. For this reason we cannot assume that the principle of neutrality automatically carries over to aid cases. Whether it is a related or an independent development, though, there is a discernible trend toward a rule of neutrality in aid cases too. The principle has been around for a while. It appeared in 1970 in *Walz v. Tax Commission*.⁴⁵ The Court extended the principle to schools in 1983 in *Mueller v. Allen*.⁴⁶ *Walz* and *Mueller* involved tax exemptions and deductions. In 1986 in *Witters*, the Court applied the rule to an outright grant.⁴⁷ One way to explain the result, which appeals to separationists, is to say that the grant was indirect. But another way to see it is that the state made funds available to all blind people and expressed no preference about where they should spend it. This is equal treatment of all institutions. The Court said something similar in *Zobrest* in 1993.

Last year the Court suggested that the government was sometimes required—not just permitted—to give aid to religious groups if it gave aid to

³⁹ 454 U.S. 263 (1981).

⁴⁰ 496 U.S. 226 (1990).

⁴¹ 508 U.S. 384 (1993).

⁴² 115 S. Ct. 2440 (1995).

⁴³ See *ACLU v. Allegheny County*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 688 (1984).

⁴⁴ 115 S. Ct. at 2442 (Scalia, J., dissenting). Justice Scalia was joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas.

⁴⁵ 397 U.S. 664 (1970).

⁴⁶ 463 U.S. 388 (1983).

⁴⁷ 474 U.S. 481, 487 (1986).

similarly situated nonreligious groups. In *Rosenberger v. Rector and Visitors of the University of Virginia*⁴⁸ the Court held that if Virginia intended to pay student fees for the printing of student publications, it could not exclude a publication that took a Christian point of view.⁴⁹ I do not want to overstate the importance of the case. It was about speech, after all, so the principle does not automatically work for aid to hospitals, orphanages, and soup kitchens.

I do not want to suggest that the idea of neutrality, if applied sensitively, will solve all Establishment Clause problems. I think this is unlikely. In free speech law, for example, the rule of content neutrality figures prominently in public forum cases; but we also have rules about prior restraints, overbreadth, commercial speech, libel, obscenity, and so on, and they are not all particular applications of a more general neutrality principle. The same is true here. The religious speech cases I mentioned (*Widmar*, *Mergens*, *Lamb's Chapel*, *Pinette*) were all public forum cases, but religious speech problems can arise in other contexts where neutrality is not the answer.⁵⁰ There is a sense in which regulatory exemptions are not neutral, but they are consistent with the Establishment Clause.⁵¹ And the rules of neutrality that we do use in Establishment Clause cases may differ from one another: the first two aid cases (*Walz*, *Mueller*) held that equal treatment was permitted; the free speech rule of neutrality is mandatory.

I add all this as a caution, rather than to undercut my general agreement with Professor Esbeck. I think he is right that separationism is falling out of favor. And I also think that a principle of equality or neutrality will play an important part in filling the gap that it leaves.

⁴⁸ 115 S. Ct. 2510 (1995).

⁴⁹ *Id.* at 2524-25.

⁵⁰ See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992); *Marsh v. Chambers*, 463 U.S. 783 (1983).

⁵¹ See *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). See generally *Texas Monthly Inc. v. Bullock*, 489 U.S. 1 (1989).

