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RELIGIOUS FREEDOM DESERVES MORE THAN NEUTRALITY: THE CONSTITUTIONAL ARGUMENT FOR NONPREFERENTIAL FAVORITISM OF RELIGION

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I. INTRODUCTION

Some of the earliest American colonies began as havens for religious believers.[1] Religious institutions operated nearly the entire educational system in eighteenth-century America.[2] The first liberty mentioned in the Bill of Rights is religious freedom.[3] During the eighteenth century, Congress consistently permitted the performance of invocations and religious services in the United States Capitol.[4]

Absolutely no historical evidence suggests that the framers of the First Amendment intended religion to be treated the same as any secular institution or activity. Yet, under the neutrality doctrine currently employed in religion cases, that is exactly how the courts are interpreting the First Amendment. Neutrality has become the preferred approach for dealing with cases involving the Establishment Clause.[5] Given the confusion and contradictions of previous Establishment Clause doctrines, neutrality

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1. *See* Lolita Buckner Inniss, *Dutch Uncle Sam: Immigration Reform and Notions of Family*, 36 BRANDEIS J. FAM. L. 177, 182 (1997-1998); Timothy J. Santoli, Note, *A Decade After* Employment Division v. Smith*: Examining How Courts Are Still Grappling with the Hybrid Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649, 651-52 & n.28 (2001).

2. *See generally* BERNARD BAILYN, EDUCATION IN THE FORMING OF AMERICAN SOCIETY (1960) (discussing the history of education in America); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 309 n.4 (Phillips Bradley ed., 1945).

3. U.S. CONST. amend. I.

4. RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION: A CASE STUDY IN CONSTITUTIONAL INTERPRETATION 66 (1987).

5. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

seems like a long-overdue solution. Yet, while neutrality carries the appeal of simplicity, it does not express the intended spirit of the First Amendment.

Though still a fairly recent doctrine, neutrality has already begun to create a morass of complicated rules. Ensuring that religious groups are not treated differently than secular groups, despite their obvious differences, is no easy task. Contrary to the neutrality doctrine, which seeks to prevent the government from showing any favoritism at all to religion in general,[6] the Establishment Clause model presented in this Article does not forbid the government from conferring special aid or benefits upon religion in general, as long as the aid or benefits are given without preference to any religious denominations. As history demonstrates, the Establishment Clause aims to keep the government from singling out certain religious sects for preferential treatment,[7] but it does not prevent the government from showing favoritism to religion in general. Furthermore, this nonpreferential aid model will not only better fulfill the spirit of the First Amendment, but also will avoid all the complicated and formalistic rules required by the neutrality doctrine.

II. THE LEAD-UP TO NEUTRALITY

A. *A Confused Jurisprudence*

The courts have had an inconsistent track record with First Amendment religion clause cases. Over the past several decades, courts have applied a host of different tests to determine whether some government action has constituted an establishment of religion. The most prominent test was outlined in the 1971 *Lemon v. Kurtzman* decision.[8] But after decades of refinements and modifications, the *Lemon* test and its progeny have failed to provide any consistent basis for evaluating Establishment Clause cases.[9]

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6. *See infra* text accompanying notes 56-65.

7. *See infra* Part II.D.

8. 403 U.S. 602, 612-13 (1971).

9. *See* Russell L. Weaver, *Like a Ghoul in a Late Night Horror Movie*, 41 BRANDEIS L.J. 587, 590 (2003). As Justice William Rehnquist explained in a dissenting opinion in *Wallace v. Jaffree*, the *Lemon* test:

> has simply not provided adequate standards for deciding Establishment Clause cases . . . .
>
> For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it. . . . A State may lend classroom workbooks, but may

Within the span of one year, for instance, student-led prayer at football games was ruled to be an illegal establishment of religion,[10] but a student-delivered religious message at a graduation ceremony was upheld as constitutional.[11] As one legal scholar puts it: "There is no underlying theory of religious freedom that has captured a majority of the Court," and every new case "presents the very real possibility that the Court might totally abandon its previous efforts and start over."[12] According to another scholar, the tests applied by the Court in religion clause cases are "in nearly total disarray."[13]

The *Lemon* test arose out of the "wall of separation" metaphor articulated in *Everson v. Board of Education*,[14] which was the Court's first formal foray into what would become a jungle of Establishment Clause jurisprudence. Ruling on the constitutionality of a program that allowed parents to be reimbursed for the costs of transporting their children to and from parochial schools, the Court stated that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"[15] One year after *Everson*, in *Illinois ex rel. McCollum v. Board of Education*, the Court struck down a public school program that provided for thirty minutes of religious instruction per week by sectarian teachers in public school classrooms.[16] In its decision, the Court maintained that the "wall of separation" articulated in *Everson* "must be kept high and impregnable."[17]

The "wall of separation" metaphor continued to influence the development of First Amendment doctrine throughout the 1960s as the number of Establishment Clause cases reaching the courts increased.[18]

> not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum . . . .

472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (footnotes omitted).

10. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000).

11. *See* Adler v. Duval County Sch. Bd., 250 F.3d 1330, 1332, 1342 (11th Cir. 2001).

12. William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 194 (2000).

13. Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 323 (1995).

14. 330 U.S. 1 (1947).

15. *Id.* at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

16. 333 U.S. 203, 205 (1948).

17. *Id.* at 212.

18. *See* Alberto B. Lopez, *Equal Access and the Public Forum:* Pinette*'s Imbalance of Free Speech and Establishment*, 55 BAYLOR L. REV. 167, 183 (2003).

Then came the 1971 decision in *Lemon v. Kurtzman*,[19] in which the Court examined the constitutionality of two state statutes (Pennsylvania and Rhode Island) that provided public money to parochial schools.[20] In striking down the statutes, the Court articulated what would become known as the three-part *Lemon* test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[21]

Arising as it did out of the "wall of separation" metaphor, the *Lemon* test[22] reflected a certain hostility toward religion, even though the First Amendment obviously embodies a high regard for religious liberty and practice. Consequently, *Lemon*'s hostility has produced an inconsistent legacy.[23] It has "had the profound effect of leading to results which cannot be reconciled with either history or tradition."[24] Although the Court had previously held that states could lend textbooks to religious schools,[25] in *Lemon* the Court ruled that states could not supplement the salaries of religious school teachers who taught the same subjects offered in public schools.[26] Though it later allowed book loans from public to parochial schools, the Court prohibited states from providing religious schools with various instructional materials, such as maps and lab equipment.[27] The Court also allowed states to provide bussing for students to and from religious schools, but it forbade states from paying for the bussing costs of field trips for those same students.[28] In one case, the Court struck down the state's provision of remedial instruction and guidance counseling to

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19. 403 U.S. 602 (1971).

20. *Id.* at 606. The Pennsylvania statute provided money to nonpublic schools by reimbursing the schools for expenses associated with teachers' salaries and teaching materials, including textbooks. *Id.* at 606-07. Under the Rhode Island statute, the state made a supplemental payment of fifteen percent of a teacher's salary directly to teachers in nonpublic schools. *Id.* at 607.

21. *Id.* at 612-13 (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

22. *Id.*

23. Keith Werhan, *Navigating the New Neutrality: School Vouchers, the Pledge, and the Limits of a Purposive Establishment Clause*, 41 BRANDEIS L.J. 603, 610 (2003). From 1971 to 1992, the Supreme Court applied the *Lemon* test in thirty of the thirty-one Establishment Clause cases it decided. *See* Lee v. Weisman, 505 U.S. 577, 603 n.4 (1992) (Blackmun, J., concurring).

24. Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645, 654 (1992). "[E]ach of the three prongs of the test . . . invite[s] distrust of one or the other of the actors in the church-state drama." *Id.* at 656.

25. Bd. of Educ. v. Allen, 392 U.S. 236, 238 (1968).

26. 403 U.S. at 617-22.

27. *See* Wolman v. Walter, 433 U.S. 229, 248-51 (1977); Meek v. Pittenger, 421 U.S. 349, 362-66 (1975).

28. *See Wolman*, 433 U.S. at 252-55.

parochial school students,[29] only later to uphold a state's provision of speech and hearing services to such students.[30] Although some cases have permitted states to furnish religious schools with standardized tests and scoring services,[31] and to pay the costs of administering such exams,[32] others have prohibited states from helping finance the administration of state-required exams that religious school teachers prepared.[33] The Court's Establishment Clause decisions also have maintained that the constitutionality of nativity scenes at a city hall depends on whether the display is accompanied by secular symbols or is free standing.[34]

The *Lemon* test became so unpredictable that the Court took the unprecedented step of overruling a decision that it had reached under *Lemon*,[35] on the grounds that later cases undercut its original holding.[36] However, even in its overruling decision, the Court still adhered to *Lemon* as providing the applicable law.[37]

As *Lemon* began to fall into disrepute, the Court experimented with other Establishment Clause tests. In *County of Allegheny v. American Civil Liberties Union*, involving the constitutionality of holiday displays on public property, the Court employed the endorsement test.[38] Then in 1992, in a case involving a rabbi-led prayer at a public high school graduation ceremony, the Court tried out the coercion test.[39] Finally, in *Zelman v. Simmons-Harris*,[40] where the constitutionality of Cleveland's school voucher program was upheld, the Court firmly embraced the neutrality approach.

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29. *See Meek*, 421 U.S. at 367-72.

30. *See Wolman*, 433 U.S. at 241-44.

31. *Id.* at 238-41.

32. *See* Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 648 (1980).

33. *See* Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 481-82 (1973).

34. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984). One scholar has referred to this distinction as "'the two plastic reindeer rule.'" Richard S. Myers, *Reflections on the Teaching of Civic Virtue in the Public Schools*, 74 U. DET. MERCY L. REV. 63, 64 (1996) (quoting Daniel Parish, Note, *Private Religious Displays in Public Fora*, 61 U. CHI. L. REV. 253, 260 n.52 (1994)).

35. *See* Aguilar v. Felton, 473 U.S. 402, 410-14 (1985), *overruled in part by* Agostini v. Felton, 521 U.S. 203 (1997).

36. *See Agostini*, 521 U.S. at 208-09, 237.

37. *Id.* at 222-23.

38. 492 U.S. 573, 592-93 (1989).

39. *See* Lee v. Weisman, 505 U.S. 577, 581, 592-93 (1992).

40. 536 U.S. 639, 643-44, 652 (2002).

B. *The Neutrality Approach to Religion Clause Cases*

In an effort to simplify and clarify the Establishment Clause doctrines, the Court has moved toward a neutrality approach.[41] Neutrality is based upon the principle of equal treatment for religion and nonreligion.[42] In *Good News Club v. Milford Central School*, for instance, a commitment to viewpoint neutrality led the Court to overturn a school board policy excluding religious groups from after-hours use of school facilities.[43] The *Good News* opinion, along with earlier decisions in *Lamb's Chapel v. Center Moriches Union Free School District*[44] and *Rosenberger v. Rector and Visitors of the University of Virginia*,[45] stands for the proposition that the Establishment Clause cannot be used to justify viewpoint discrimination against religious organizations seeking the same kinds of public benefits that secular groups receive.[46]

Compared with previous case law, neutrality appears to be an advantageous doctrine for religion. *Aguilar v. Felton,* in which the Court ruled against parochial school participation in a special education program in the New York City school system, illustrates previous judicial hostility to religion.[47] The program provided remedial English and mathematics assistance to economically and educationally disadvantaged students.[48] By statute, school districts were required to provide comparable services to both public and private school students.[49] In the nineteen-year history of

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41. *See* Werhan, *supra* note 23, at 617-18. In *Zelman*, for instance, the Court took a big step toward adopting formal neutrality as the preferred means of interpreting the Establishment Clause. 536 U.S. at 652 (upholding the Cleveland school voucher system, even though those vouchers were used in parochial schools).

42. *See* Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 2 (2000).

43. 533 U.S. 98, 113-14 (2001).

44. 508 U.S. 384, 395-97 (1993).

45. 515 U.S. 819, 845-46 (1995).

46. A neutrality approach also has allowed the courts to abandon the "no-aid" approach, which prohibited the flow of any governmental benefit to any religious organization. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 254 (1977); Meek v. Pittenger, 421 U.S. 349, 372 (1975); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 798 (1973). A strict no-aid reading of the Establishment Clause would require the exclusion of religious institutions from generally available government aid programs, which would thus constitute a "penalty" on the free exercise of religion. Thomas R. McCoy, *Quo Vadis: Is the Establishment Clause Undergoing Metamorphosis?*, 41 BRANDEIS L.J. 547, 548 (2003). The "no-aid" approach is "responsible for what is perceived to be irreconcilable 'tension' between the Establishment Clause and the Free Exercise Clause." *Id.* at 549.

47. 473 U.S. 402, 404, 414 (1985) *overruled in part by* Agostini v. Felton, 521 U.S. 203 (1997).

48. *Id.* at 404, 406, 422.

49. Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 464, *repealed by* Pub. L. No. 100-297, 102 Stat. 293.

the program, not a single instance of unconstitutional involvement by agents of one school system in the other was documented, even after concerted efforts by the program's opponents to do so.[50] Nonetheless, the Supreme Court still invalidated the program on grounds of excessive entanglement, essentially finding that the proponents of the program, not its opponents, had the burden of proving that there would never be a constitutional problem in the administration of the program.[51]

The height that the "wall of separation" reached in the aftermath of *Lemon* was perhaps best revealed in *Committee for Public Education & Religious Liberty v. Nyquist*.[52] In *Nyquist*, the Court held that aid provided to parents through a tax deduction was legally no different than providing direct aid to religious schools and hence violated the Establishment Clause.[53] The Court purported to "fully recognize . . . the validity of the State's interest in promoting pluralism and diversity among its public and nonpublic schools,"[54] yet it found that the tuition relief in question provided parents with a state-sponsored incentive to send their children to religious schools and thereby to practice religion.[55]

C. *Drawbacks to Neutrality*

Even though neutrality is a better approach for religion than that used in *Aguilar*, it still has its drawbacks. Based on the principle that the government must be "neutral" between religion and non-religion,[56] neutrality prohibits the government from providing any benefits to religion unless they are made equally available to nonreligious groups or individuals. Thus, neutrality prevents the state from accommodating

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50. *Aguilar*, 473 U.S. at 424 (O'Connor, J., dissenting).

51. *See id.* at 414. The Supreme Court abandoned the reasoning of *Aguilar* when it overruled that decision in *Agostini*. In *Agostini*, the Court stressed the importance of formal neutrality in concluding that the Establishment Clause did not preclude publicly funded teachers from teaching secular, remedial courses on the premises of religious schools under a federally funded program that supported teaching at nonreligious schools as well. 521 U.S. at 234-35. Although the Court also relied on other considerations, it suggested that Establishment Clause invalidation would be unlikely when "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* at 231.

52. 413 U.S. 756 (1973).

53. *Id.* at 790-91.

54. *Id.* at 773.

55. *Id.* at 784-87; *id.* at 808 (Rehnquist, J., dissenting in part). This was anything but a decision based on neutrality, unless one sees the baseline for equality as being strictly the secular. If anything, equality means that private schools should get a break to make up for taxes they pay to support public schools.

56. Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 663 (1996).

particular religious practices or from flexibly dealing with the unique problems and needs of religion. For instance, the government cannot grant exemptions to religious organizations from the burdens of generally applicable laws because if the exemption at all favors religion, even religion in general, it will probably violate the Establishment Clause.[57] As one scholar has noted, "the immediate impact of formal neutrality may seem beneficial for religion, but its long-term effect . . . may be to contaminate and secularize religion."[58]

The neutrality doctrine implies that religion is neither distinct nor uniquely important, despite that religious liberty is the first freedom mentioned in the Bill of Rights. Critics of the doctrine argue that it is "inadequately sensitive to religious freedom by flatly prohibiting all religious exemptions from general regulations no matter how greatly they burden religious exercise and how insubstantial the competing state interest may be."[59] By leveling religion to the same plane as the secular, neutrality ignores constitutional text and history. It ignores the unique aspects of religion, as well as the role that the framers envisioned for religion in American society. Furthermore, it downgrades the value that the First Amendment assigns to religious liberty.

III. THE NEUTRALITY DOCTRINE

A. *Neutrality Governs both Free Exercise and Establishment Cases*

Courts have adopted a neutrality approach toward both establishment and free exercise claims.[60] With the Free Exercise Clause, the Court employed neutrality in the landmark *Employment Division v. Smith* decision.[61] In *Smith*, the Court was asked to recognize a religious exemption for the sacramental use of an otherwise illegal drug by members of the Native American Church.[62] The Court not only refused to do so, but

57. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (plurality opinion) (invalidating a Texas sales tax exemption that was granted to religious literature but not to other literature).

58. Conkle, *supra* note 42, at 25.

59. JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 21 (1995).

60. Critics claim that neutrality implies that the Constitution treats religious and secular belief systems "as equally worthy of respect." Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 129 (2002). However, the Constitution's commands regarding religion are "active, separate, and discrete." *Id.* As a "mixture of beliefs, expression, self-defining decisions, rules of conduct, social institutions, and communities of individuals," religion deserves "special constitutional attention." *Id.*

61. 494 U.S. 872 (1990).

62. *Id.* at 878-79. *Smith* involved an Oregon law that criminalized the use of peyote, a drug

also declined to apply the scrutiny that earlier cases had required.[63] In *Sherbert v. Verner*[64] and *Wisconsin v. Yoder*,[65] the Court had held that any state action substantially burdening the free exercise of religion must be strictly scrutinized. Under the doctrinal framework of *Sherbert* and *Yoder*, the Free Exercise Clause provided greater protection for religious practices than that accorded to secular activities. But in *Smith*, the Court declared that neutral laws of general applicability affecting religious practices do not require any form of heightened judicial review and hence do not require religious exemptions.[66] No matter how seriously such laws burdened the exercise of religion, they would be upheld under a rational basis review.[67] Thus, *Smith* essentially reduced the Free Exercise Clause to a prohibition on deliberate governmental discrimination against religion and held that formal neutrality is sufficient to satisfy the demands of the Free Exercise Clause.[68]

In the post-*Smith* era, the right to free exercise of religion exists only to the extent that the exercise does not violate a neutral law of general applicability. Such laws are now essentially free of the burdens of the First Amendment, whereas prior to *Smith* the government could enforce laws of general applicability that burdened religious exercise only so long as it could establish a compelling justification for doing so. This neutrality, by insisting that a law of general applicability applies equally to both

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made from cactus plants. *Id.* at 874. Two members of the Native American Church, which uses peyote as a sacrament, were dismissed from their jobs as drug counselors because of their peyote use. *Id.* When they applied for unemployment benefits, the state denied their claims on the ground that they were terminated for "work-related 'misconduct.'" *Id.* They sued, arguing that the Oregon law violated their right to the free exercise of religion. *Id.* Thus, *Smith* posed the question of whether religious believers could be exempted from neutral laws of general applicability that nonetheless burdened their religious exercise. *Id.*

63. *Id.* at 884.

64. 374 U.S. 398 (1963). In *Sherbert*, a Seventh-Day Adventist was denied unemployment compensation after being fired from her job for refusing to work on Saturday. *Id.* at 399. The Court held that a state unemployment law that provided benefits to only those willing to work on Saturdays violated the Free Exercise Clause because a compelling state interest could not justify it. *Id.* at 408-10. The Court focused on the fact that the state law required some individuals to forego a central tenet of their religion in order to qualify for the state funding. *Id.* at 406.

65. 406 U.S. 205 (1972). The *Yoder* Court reaffirmed the *Sherbert* doctrine when it held that the Free Exercise Clause prevents states from enforcing compulsory school attendance laws. *Id.* at 234. The respondent, an Amish man, claimed that religious beliefs exempted his daughter from such laws. *Id.* at 207-09. The Court required the State of Wisconsin to show a compelling interest behind those laws. *Id.* at 214.

66. *Smith*, 494 U.S. at 876-90.

67. *Id.* at 882.

68. *Smith* is best known for its holding that facially neutral statutes ordinarily do not violate the Free Exercise Clause, but the Court in *Smith* also reiterated the flip-side of neutrality: that laws imposing special disabilities on the basis of religion are presumptively unconstitutional and subject to strict scrutiny. *Id.* at 877.

religious-inspired conduct and all other forms of conduct, appears to be a neutrality that is inconsistent with the Free Exercise Clause,[69] which plainly elevates religious-inspired conduct to the status of a fundamental right.[70] *Smith* actually accords less protection for expressive religious conduct under the Free Exercise Clause than that accorded to expressive political conduct under the Free Speech Clause.[71] Unlike laws of general applicability that inhibit religious exercise, which according to *Smith* do not merit any First Amendment scrutiny, a law of general applicability that incidentally inhibits expressive political conduct is subject to a higher degree of First Amendment scrutiny, requiring the government to justify the regulation as necessary to serve important government interests.[72]

The Court also has applied the neutrality doctrine to cases involving the Establishment Clause. In *Zobrest v. Catalina Foothills School District*,[73] the Court upheld the provision of a publicly funded sign-language interpreter for a deaf student at a religious school, noting that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge."[74] More recently, in *Zelman v. Simmons-Harris*, the Court used the neutrality doctrine to uphold Cleveland's school voucher

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69. Brian J. Serr, *A Not-So-Neutral "Neutrality": An Essay on the State of the Religion Clauses on the Brink of the Third Millennium*, 51 BAYLOR L. REV. 319, 324 (1999).

70. *See* United States v. Ballard, 322 U.S. 78, 86-87 (1944). Yet, the neutrality of *Smith* treats religious-inspired conduct as no more elevated than any other form of conduct when impacted by so-called neutral laws of general applicability. *Smith*, 494 U.S. at 877-79.

71. Serr, *supra* note 69, at 324. Prior to *Smith*, the Court placed religious exercise on a higher plane. Before *Smith*, the government had to establish a compelling interest to justify applying a law of general applicability to a religious practice in a way that substantially inhibited that practice. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

72. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). In *Clark*, the Court required the National Park Service to justify the application of an anticamping regulation to protesters who wanted to sleep in tents in Lafayette Park to demonstrate the plight of the homeless. *Id.* at 289, 291-93. Contrary to the rule in *Smith*, the Park Service had to do more than simply point to the neutral rule of general applicability. Instead, the Park Service showed that the anticamping regulation was a sufficiently important rule backed by sufficiently important reasons to justify applying it to prohibit even the politically expressive camping at issue. *Id.* at 293-99.

In *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997), the Court reaffirmed the *Smith* neutrality doctrine. There, a generally applicable zoning ordinance that required permission to make structural changes in a designated historical area was enforced against a Catholic church wanting to expand so as to accommodate its growing congregation. *Id.* at 511-12. After permission to modify the church building was denied, the church filed suit. *Id.* at 512. Prior to *Smith*, the First Amendment itself would have required the demonstration of a compelling government interest before a zoning ordinance could trump a church's efforts to accommodate the worship needs of its parishioners. But after *Smith*, the First Amendment provided no protection to the church, effectively giving the city council the absolute power to deny the church an exemption from the ordinance.

73. 509 U.S. 1, 3 (1993).

74. *Id.* at 8.

program.[75] It ruled that the vouchers promoted private choice by giving money directly to students for their use at either religious or nonreligious schools.[76] This scheme was found to be neutral because it left the decision of whether to apply funds toward a religious education to private choice and not government action.[77]

The *Zelman* decision capped a trend of case law upholding government aid programs available to students of both public and private schools.[78] For example, the Court has rejected programs that favor students attending nonpublic schools over students attending public schools as an impermissible establishment of religion,[79] but it has upheld programs that distribute funding evenly to students attending public and private schools.[80] *Zelman* indicates that, so long as the programs exhibit governmental neutrality toward religion, indirect aid programs are permissible under the Establishment Clause, regardless of whether or not tuition money is ultimately diverted for religious purposes.[81]

Although *Zelman* involved the issue of public funds going to religious organizations, the courts also have used the neutrality approach in Establishment Clause cases involving religious expression and have ruled that the clause must be interpreted in a way that treats religious groups similarly to secular groups. In *Lamb's Chapel v. Center Moriches Union Free School District*,[82] the Court overturned a school district policy that permitted outside groups to use its facilities after hours for social, civic and political uses, but not for religious purposes.[83] After a local church was denied permission to use school facilities to show a film series that discussed family and child-rearing issues from a religious perspective, the Court ruled that the Establishment Clause could not be used to single out and exclude religious groups.[84] Likewise, in *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court held that a public

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75. 536 U.S. 639, 662 (2002).

76. *Id.* at 662-63. In *Zelman*, the Court's finding that the Ohio program involved true private choice was based upon the determination that the program was neutral toward religion and gave aid directly to a broad class of citizens without consideration of religion, permitting public and both religious and secular private schools to participate. *See id.* at 648-54.

77. *Id.* at 662.

78. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 396-99 (1983) (approving an aid program benefitting public and private school students).

79. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783, 794 (1973).

80. *See Mueller*, 463 U.S. at 397-98.

81. *Zelman*, 536 U.S. at 662-63. The lower court found that ninety-six percent of the students participating in the voucher program were enrolled in religious schools. *See* Simmons-Harris v. Zelman, 234 F.3d 945, 949 (6th Cir. 2000), *rev'd*, 536 U.S. 639 (2002).

82. 508 U.S. 384 (1993).

83. *Id.* at 388-89.

84. *Id.* at 394.

university's refusal to subsidize a religious periodical published by a recognized student organization constituted viewpoint discrimination because the university provided subsidies to a wide variety of non-religious student periodicals.[85] In *Good News Club v. Milford Central School*, the Court extended its *Lamb's Chapel* ruling when it held that a New York school district's denial of after-hours access to a religious organization constituted viewpoint discrimination.[86]

Although neutrality aided religion in *Rosenberger* and *Good News Club* by eliminating state discrimination, the doctrine does not always work so well for religion. In the Free Exercise realm, for instance, the *Smith* approach can be insufficiently protective of religious liberty. Neutral laws can exert a particularly onerous effect on religion: employment discrimination laws conflict with the Catholic male priesthood; laws against serving alcoholic beverages to minors conflict with the celebration of communion; regulations requiring hard hats in construction areas can effectively exclude the Amish and Sikhs from the workplace; the policies of public hospitals can conflict with the religious scruples of doctors and nurses in such matters as euthanasia and abortion;[87] laws requiring jury service conflict with the tenets of Jehovah's Witnesses; and laws giving historical preservation commissions authority over building expansion or modification can hinder a religious congregation's ability to accommodate its members. Indeed, land-use regulations can be especially burdensome to religion,[88] since ordinances regulating houses of worship rarely

85. 515 U.S. 819, 822-23, 845 (1995).

86. 533 U.S. 98, 102 (2001).

87. In *Brownfield v. Daniel Freeman Marina Hospital*, the California Court of Appeals for the Second District held that a rape victim can bring a cause of action for damages against a hospital that does not provide her with emergency contraception as part of her emergency care. 256 Cal. Rptr. 240, 242 (Cal. Ct. App. 1989). The court so held even though the hospital was a Catholic hospital and even though Catholic beliefs opposed the morning-after pill. In addition to the possibility of this state tort remedy, several states have passed laws requiring hospitals to make emergency contraception more available to rape victims. *See* Heather Rae Skeeles, Note, *Patient Autonomy Versus Religious Freedom: Should State Legislatures Require Catholic Hospitals to Provide Emergency Contraception to Rape Victims?*, 60 WASH. & LEE L. REV. 1007, 1017 (2003). Because the laws do not target religious hospitals and are not the result of any intent to discriminate against any religion, under the *Smith* rule they are both neutral and generally applicable. Nonetheless, providing emergency contraception violates Catholic religious beliefs. *Id.* at 1038. In the Catholic view, requiring hospitals or physicians to supply the morning-after pill is akin to forcing them to perform abortions. *Id.*

88. For instance, under New York's landmarking statute, several religious structures in New York City have been "landmarked" against their will. *See* Dean M. Kelley, *Free Enterprise in Religion, or How the Constitution Protects Religion and Religious Freedom, in* HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM? 129 (Robert A. Goldwin & Art Kaufman eds., 1987). The problem with these laws is that by designating a building as a landmark, the city can require a congregation to maintain the façade at whatever cost, regardless of whether the church has any money left to carry out its religious work. *Id.* at 130; *see also* Soc'y for Ethical Culture v. Spatt,

receive rigorous judicial scrutiny under Free Exercise review.[89] Given the close association between a house of worship and religious expression, explicit restrictions on churches, synagogues, mosques, and temples arguably constitute content-discriminatory regulations of religious expression.[90]

Another problem with the neutrality approach is that it seems easily eroded. In *KDM ex rel. WJM v. Reedsport School District*,[91] the Ninth Circuit conditioned the level of scrutiny on the magnitude of the burden imposed, rather than on the neutrality or general applicability of the law.[92] Even though the court found that a law burdening religion was not a neutral law, it still did not apply strict scrutiny because of its finding that there was no anti-religious motive behind the law.[93] Thus, the Ninth Circuit held that strict scrutiny does not apply even to a facially non-neutral law alleged to burden religion unless there is evidence of an impermissible intent to suppress religion.[94]

Although the neutrality approach attempts to remove subjectivity and uncertainty from religion-clause jurisprudence, it does not entirely do so. In the context of holiday displays of religious symbols, for instance, the Court continues to rule that even if the government has not purposefully endorsed religion, an onlooker's perception of endorsement may be enough to have that display removed.[95] Yet despite these drawbacks, after decades of religion-clause confusion, courts have eagerly embraced the doctrine of formal neutrality[96]—a doctrine that reflects the concepts of equality and

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415 N.E.2d 922 (1980).

89. Brownstein, *supra* note 60, at 147, 151.

90. *Id.* at 148.

91. 196 F.3d 1046 (9th Cir. 1999).

92. In *KDM*, a legally blind schoolchild with cerebral palsy received special equipment from a publicly funded vision program while enrolled in a public school. *Id.* at 1048. However, the public school district refused to provide a vision specialist to meet with the student at the student's religious school. *Id.* After the parents sued, the Ninth Circuit upheld this refusal, citing an Oregon regulation requiring that special education and related services be provided in "a religiously-neutral setting." *Id.* at 1049. The court held that the regulation did not "impose an impermissible burden on their free exercise of religion." *Id.* at 1051. Even though the court determined that the regulation was not neutral because it restricted the provision of services to religiously-neutral settings, it did not impermissibly burden religion because "it does not have the object or purpose . . . [of] suppression of religion or religious conduct." *Id.* at 1050 (alterations in original).

93. *Id.* at 1051.

94. *Id.* at 1050. While this rationale obviously curtails the ability of courts to protect the free exercise of religion, it seems to contradict the applicable law, as laid down in *Smith* and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Hialeah* requires that non-neutral laws burdening religious practice undergo strict scrutiny. *Id.* at 546. Although a plaintiff challenging a facially non-neutral law must still demonstrate that it burdens free exercise, the court is supposed to examine the burden within the context of strict scrutiny. *Id.*

95. *See* County of Allegheny v. ACLU, 492 U.S. 573, 598-602 (1989).

96. Conkle, *supra* note 42, at 14. Formal neutrality also honors judicial restraint by limiting

nondiscrimination so ingrained in the legal culture of contemporary America.[97] Ever since the Supreme Court's 1954 decision in *Brown v. Board of Education*, the importance of formal equality under the Equal Protection Clause of the Fourteenth Amendment and in the legal culture generally has been ever-increasing.[98] Consequently, within such a legal environment, any preferential treatment for religion is classified as discriminatory and hence automatically suspect. Contradicting the contemporary urge toward equality, however, is the historical record. Those who wrote the First Amendment did not think that the government should adopt a position of indifference or neutrality toward religion.[99]

IV. RELIGION AND GOVERNMENT DURING THE CONSTITUTIONAL PERIOD

A. *Eighteenth-Century Views on the Role of Religion in a Democracy*

In deciding Establishment Clause cases, courts in the modern era have been strongly influenced by the separationist view articulated by Justice Black in *Everson*.[100] More than any other single concept or doctrine, the "wall of separation" metaphor has shaped the direction of religion-clause jurisprudence. However, the metaphor not only has almost no historical basis, but also actually contradicts the relationship between religion and government in eighteenth-century America. Religion and the quest for religious expression have been among the most influential factors in American political history.[101]

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the court's role in certain questions. Neutrality, for instance, permits courts to stay out of questions involving the sectarian degree or nature of religious groups' publicly funded activities.

97. Under the *Smith* progeny, the Free Exercise Clause essentially has been transformed into a subspecies of equal protection. Religious exercise is viewed through the lens of equality and discrimination. The sights are not on the religious practitioner and believer, but on whether the government is employing some forbidden classification. Thus, religion becomes a suspect class, similar to race and gender. But the religious practitioner is downgraded in the analysis. Yet, a person punished by a neutral law is just as punished as one targeted by a non-neutral law.

98. 347 U.S. 483, 495 (1954).

99. *See* CHESTER J. ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 187-88 (1964) (describing the framers' understanding of the presence of religious ideals in governmental institutions). Some critics claim that neutrality is a ploy by which religious influences, implicitly recognized by the First Amendment, are rejected in favor of an opposing establishment such as secularism. *See* DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT 73 (1987). They see neutrality as a mythical construct meant to advance the court's "religious" bias toward secularism. *Id.* at 106.

100. Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947).

101. Massachusetts, Rhode Island, Pennsylvania, and Maryland were all founded for religious

To Americans of the constitutional period, religion was an indispensable ingredient of self-government. Political writers and theorists emphasized the need for a virtuous citizenry to sustain a democratic government.[102] The framers of the Constitution recognized this need and believed that religion contributed to the moral well-being of the nation. They "saw clearly that religion would be a great aid in maintaining civil government on a high plane" and hence would be "a great moral asset to the nation."[103] The prevailing view during the constitutional period was expressed by a 1788 New Hampshire pamphleteer: "Civil governments can't well be supported without the assistance of religion."[104] According to the framers, only within a religious congregation would people develop the civic virtue necessary for self-government.[105] This was why George Washington urged his fellow Virginians to appropriate public funds for the teaching of religion.[106] His objective was not to establish a religion, but to maintain a democratic government.[107]

Washington was committed to the notion of religion being an incubator for the kind of civic virtue needed to serve as a foundation for democratic government.[108] As a general in the revolutionary army, he required his soldiers to attend church.[109] At his urging in 1777, Congress approved the purchase of twenty thousand Bibles for the troops.[110] In his Farewell Address to the nation at the end of his presidency, he warned that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."[111] This had been a popular theme of the early national period: that divine law and biblical morality, facilitated by the free exercise of religion, were not only beneficial to the citizenry, but also essential in preserving the republican virtues of self-government.[112]

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reasons by founders seeking religious freedom and religious identity for their state. *See* Inniss, *supra* note 1, at 182; Santoli, *supra* note 1, at 651-52 & n.28.

102. For a discussion on the influence of republican thought on the writing of the Constitution, see generally THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE (1988).

103. 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 515 (1950).

104. THE COMPLETE ANTI-FEDERALIST 4:242 (Herbert J. Storing ed., 1981).

105. JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 127 (1999).

106. *Id.* at 123.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*; *see* A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 99 (1985).

111. 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 220 (James D. Richardson ed., 1899).

112. *See* ANTIEAU ET AL., *supra* note 99, at 206.

Late eighteenth-century Americans generally agreed that "republican government required a virtuous citizenry, and a virtuous citizenry required morality, with religious observance the only sound ground for morality."[113] Consequently, it was expected that the state "would treat religious questions as issues of civil order," and that "the courts would foster the observance of religion."[114] As Professors Richard Vetterli and Gary C. Bryner have explained:

> There was a general consensus that Christian values provided the basis for civil society. Religious leaders had contributed to the political discourse of the Revolution, and the Bible was the most widely read and cited text. Religion, the Founders believed, fostered republicanism and was therefore central to the life of the new nation.[115]

The notion that the religion clauses were intended to foster a strict policy of state neutrality toward religion would have been met with, to use Justice Story's words, "universal disapprobation, if not universal indignation."[116] Historian Rousas John Rushdoony contends that the emphasis of the First Amendment was on a separation of a specific church from the state, not on the separation of all religion from the state.[117] Because eighteenth-century Americans believed that law was an expression of morality and that morality derives from religion, Rushdoony argues that in fact it was impossible to completely separate the state from religion.[118]

B. *Government Support of Religion*

Government during the founders' generation constantly supported religion. In its constitution of 1780, Massachusetts provided for the "support and maintenance" of teachers of "piety, religion and morality."[119]

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113. J. William Frost, *Pennsylvania Institutes Religious Liberty 1682-1860*, *in* ALL IMAGINABLE LIBERTY: THE RELIGIOUS LIBERTY CLAUSES OF THE FIRST AMENDMENT 45 (Francis Graham Lee ed., 1995).

114. *Id.* at 45-46. Blasphemy laws, for instance, were predicated on the widespread belief that to attack the basics of Christianity was to endanger the foundation of society. *Id.* at 48. Further, "[v]irtually no one opposed some kind of a sabbatarian law in either the colonial or early national period, and every state had such a law." *Id.*

115. Richard Vetterli & Gary C. Bryner, *Religion, Public Virtue, and the Founding of the American Republic*, *in* TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 92 (Neil L. York ed., 1988).

116. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1865 (1833), *quoted in* ANTIEAU ET AL., *supra* note 99, at 160.

117. DREISBACH, *supra* note 99, at 72.

118. *Id.*

119. Edwin S. Gaustad, *Religion and Ratification*, *in* THE FIRST FREEDOM: RELIGION AND THE

Congress appointed chaplains who offered daily prayers, presidents proclaimed days of prayer and fasting, and the government paid for missionaries to the Indians.[120] As of 1789, at least six of the thirteen states allowed or mandated some form of government support to churches.[121] The Northwest Ordinance even set aside land to endow schools that would teach religion and morality.[122]

Although the framers rejected the idea of an established church, they did not see a problem with connections between government and religious organizations, at least not to the extent that strict separationists do today.[123] To the contrary, the Bill of Rights was ratified in an age of close and ongoing interaction between government and religious institutions.[124] The educational system was largely overseen by the clergy, usually with the support of local taxes.[125] In 1833, de Tocqueville observed that in America, "[a]lmost all education is entrusted to the clergy."[126] Indeed, through the middle of the nineteenth century, it was common practice for religious schools in New York, New Jersey, Connecticut, Massachusetts, and Wisconsin to be supported by state-generated revenue.[127] In 1850, the California legislature gave religious organizations control over a large part of the state's education budget because it was relying on religious schools to educate the burgeoning immigrant population.[128]

But education was not the only public function in the hands of churches.[129] There also was a strong religious character to whatever social welfare systems existed in the community.[130] Even by the end of the nineteenth century, the federal government was financing the construction of religiously affiliated hospitals.[131] Consequently, government as a public

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BILL OF RIGHTS 41, 53 (James E. Wood, Jr. ed., 1990).

120. *See infra* notes 140-44 and accompanying text.

121. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32-33 (1998).

122. The Northwest Ordinance is reprinted in a footnote to Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.(a). *See also* Gaustad, *supra* note 119, at 40-59.

123. *See* VITERITTI, *supra* note 105, at 16.

124. *See generally* PATRICIA U. BONOMI, UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY, AND POLITICS IN COLONIAL AMERICA (1986); ELLIS SANDOZ, A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING (1990).

125. *See generally* BAILYN, *supra* note 2 (discussing the history of education in America).

126. 1 DE TOCQUEVILLE, *supra* note 2, at 309 n.4.

127. *See* CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860, at 166-67 (1983).

128. *See* DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954, at 90 (1987).

129. *See* WILLIAM CLAYTON BOWER, CHURCH AND STATE IN EDUCATION 23-24 (1944) (stating that "the earliest education in America was predominantly religious").

130. *See* PHILIP R. POPPLE & LESLIE LEIGHNINGER, SOCIAL WORK, SOCIAL WELFARE, AND AMERICAN SOCIETY 179-82 (5th ed. 2002).

131. *See* Bradfield v. Roberts, 175 U.S. 291, 295-96 (1899).

institution "depended on the support of the churches for stability, a sense of shared morality among the citizenry, and a common commitment to the protection of the greater good of the community."[132]

C. *Public Expression of Religious Views*

Religious views and beliefs found frequent expression in the acts and documents of early American legislative bodies. Four references to God appear in the Declaration of Independence. In the Northwest Ordinance of 1789, the First Congress declared that religion and morality were "necessary to good government."[133] This language was taken from the Massachusetts Constitution of 1780 and later copied into the New Hampshire Constitution of 1784.[134] In 1782, even before the Northwest Ordinance, the Continental Congress had supported "the pious and laudable undertaking" of printing an American edition of the Scriptures.[135] Congress also permitted religious exercises to be conducted in government buildings.[136]

On September 25, 1789, the day after Congress adopted the final language of the First Amendment and while Congress was in a spirit of jubilation over passage of the Bill of Rights, the House and Senate both adopted a resolution asking the President to "recommend to the people of the United States, a day of public fasting and prayer, to be observed, by acknowledging with grateful hearts, the many signal favors of the Almighty God."[137] Thus, the First Congress obviously did not intend to render all public prayer unconstitutional under the Establishment Clause.[138] Moreover, during the Constitutional Convention itself, Benjamin Franklin moved on June 28, 1787 that the Convention resort to prayer to overcome an impasse on certain divisive issues.[139]

In the years following ratification of the First Amendment, Presidents George Washington and John Adams continued to issue broad

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132. Chopko, *supra* note 24, at 647.

133. *See* Thomas Nathan Peters, Note, *Religion, Establishment, and the Northwest Ordinance: A Closer Look at an Accommodationist Argument*, 89 KY. L.J. 743, 746 (2000-2001). The Northwest Ordinance was originally enacted by the Continental Congress in 1787 and then re-enacted and adopted in 1789 by the First Congress. *Id.*

134. *See* TYACK ET AL., *supra* note 128, at 26-27.

135. SMITH, *supra* note 4, at 66.

136. *Id.* at 103.

137. 1 ANNALS OF CONG. 451 (Gales & Seaton 1834).

138. Beginning with the first session of the Continental Congress in 1774, the legislature opened its sessions with prayer; and the First Congress in 1789 established the office of Congressional Chaplain. *See* Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1132-33 (1998).

139. CHARLES E. RICE, THE SUPREME COURT AND PUBLIC PRAYER 36-37 (1964).

proclamations for days of national prayer.[140] James Madison likewise recognized that the government could designate days of solemn observance or prayer.[141] When he served in the Virginia Legislature, he sponsored a bill that gave Virginia the power to appoint "days of public fasting and humiliation, or thanksgiving."[142] Later, during his presidential administration, he issued at least four proclamations recommending days of national prayer and thanksgiving.[143] He also oversaw federal funding of congressional and military chaplains, as well as missionaries charged with "teaching the great duties of religion and morality to the Indians."[144]

D. *The Tradition of Nonpreferentialism*

During the constitutional period, there was a split of opinion on whether states could support and promote an individual Christian denomination. However, there was overwhelming agreement that government could give special aid to religion, as long as there was no discrimination among sects.[145] Catholics in Maryland, for instance, opposed any state-established religion, yet supported state aid to religion if conferred without discrimination.[146] The clause was not a prohibition on favoritism toward religion in general.[147] The post-ratification generation firmly embraced the nonpreferentialist tradition.[148] This tradition reflected the belief that the religion clauses were designed to foster a spirit of accommodation between religion and the state, as long as no single church

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140. 2 ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES, 87-88 (1964). Public religious proclamations were common in the post-constitutional period, from George Washington's first inaugural address in which he referred to the role of divine providence in guiding the formation of the United States, *see* Washington's First Inaugural Address, *reprinted in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, *supra* note 111, at 52, to opening sessions of Congress with a prayer, SMITH, *supra* note 4, at 103.

141. DREISBACH, *supra* note 99, at 150.

142. 2 THE PAPERS OF THOMAS JEFFERSON 556 (Julian P. Boyd ed., 1950).

143. DREISBACH, *supra* note 99, at 151.

144. James M. O'Neill, *Nonpreferential Aid to Religion is Not an Establishment of Religion*, 2 BUFF. L. REV. 242, 255 (1952-1953).

145. Patrick W. Carey, *American Catholics and the First Amendment*, *in* ALL IMAGINABLE LIBERTY: THE RELIGIOUS LIBERTY CLAUSES OF THE FIRST AMENDMENT, *supra* note 113, at 115. Even in Virginia, with the established Anglican Church, the growing sentiment in the late eighteenth century was that, while government could indeed give aid to religion, there should be equal treatment in such aid. *See* SMITH, *supra* note 4, at 45.

146. MARY VIRGINA GEIGER, DANIEL CARROLL: A FRAMER OF THE CONSTITUTION 83-84 (1943). This nonpreferentialist tradition approves of government aid to religion generally, so long as the distribution of that aid is not done in a manner that discriminates against particular sects. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 91 (1986).

147. DREISBACH, *supra* note 99, at 70.

148. JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 129-42 (1971).

was officially established and governmental encouragement did not deny to any citizen freedom of religious expression.[149] The very text of the First Amendment supports this view. The use of the indefinite article "an," rather than the definite article "the," before "establishment of religion" indicates the drafters were concerned with governmental favoritism toward one sect, rather than with favoritism of religion over nonreligion.[150] The debates over the Establishment Clause further support this notion. On August 15, 1789, Madison stated that he "apprehended the meaning of the words to be, that Congress should not establish *a* religion, and enforce the legal observation of it by law."[151] The use of the indefinite article also suggests that although Congress could not establish a religion, it could accommodate religious exercise generally, provided that it did so in a nonpreferential manner.[152]

James Madison repeatedly stressed that government could accommodate or facilitate religious exercise, so long as it did so in a nonpreferential manner.[153] This view that no single religion should be aided to the exclusion of others existed side-by-side during the founding era with the view that Christianity should be exclusively aided, though in a nondenominational sense and with tolerance toward other beliefs.[154] However, the strict separationist view was almost nonexistent and did not gain any significant acceptance until the second quarter of the twentieth century.[155] The separationist view, in fact, was wholly rejected by "every justice on the Marshall and Taney courts."[156]

The eighteenth-century adherence to nonpreferentialism hinged on the belief that the Free Exercise Clause is pre-eminent to the Establishment Clause.[157] During the debates on the First Amendment, the prevailing view

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149. DREISBACH, *supra* note 99, at 54.

150. MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 89 (1996).

151. 1 ANNALS OF CONG. 730 (Gales & Seaton 1834) (emphasis added).

152. SMITH, *supra* note 4, at 92.

153. *Id.* at 56. What Madison opposed was government promotion of religion in a manner that would compel individuals to worship contrary to their conscience. *Id.* at 82. He feared that one sect might obtain pre-eminence and establish a religion to which it would compel others to conform. *See* Laurie Messerly, *Reviving Religious Liberty in America*, 8 NEXUS 151, 153-54 (2003). Long after the adoption of the First Amendment, Madison quoted the Establishment Clause as if it outlawed "religious establishments," as in particular sects, rather than outlawing *an* establishment of religion, as in making any laws on the subject of religion in general. *See* SMITH, *supra* note 4, at 52-53.

154. SMITH, *supra* note 4, at 56.

155. *Id.* Strict separationists have ignored the historical data in their effort to build their case. *Id.* at 55. They have used snippets of history selectively to justify an otherwise historically unsupportable position. *Id.*

156. MCCLELLAN, *supra* note 148, at 136. On the other hand, the more separationist view espoused by Jefferson "was clearly not shared by a large majority of his contemporaries." *Id.*

157. James Madison agreed with Justice Story's articulation of the intent of the framers: that

was that "the [E]stablishment [C]lause should not be considered more important than the exercise of one's equal rights of conscience; rather, [the Establishment Clause] was to be treated merely as a means of facilitating the free exercise of one's religious convictions."[158] The pre-eminence of the Free Exercise Clause was also reflected in the belief that government should not be hindered in accommodating individuals in their efforts to exercise their religious beliefs in public.[159] Daniel Webster, for one, believed that government could not only permit but also promote religious exercise in the public square.[160]

From the history of the First Amendment, one can infer that the framers intended to promote religious exercise in the public sector.[161] They were almost universally opposed to the kind of strict separation of church and state that twentieth-century separationists would later espouse, because in the eighteenth-century view such separation would hinder the free exercise of religion.[162]

Before 1947, the "wall of separation" metaphor coined by Thomas Jefferson in 1802 had never appeared in Establishment Clause jurisprudence.[163] Then, with its introduction in *Everson*, the phrase was misused.[164] Jefferson had used it not to diminish public support for religion generally, but to agree with the Baptists that the establishment of the Congregationalist Church in Connecticut should not threaten their religious beliefs.[165] Furthermore, Jefferson is not an appropriate authority for stating the intended meaning of the Establishment Clause,[166] since he was not even

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the right of free exercise was the pre-eminent right protected by the First Amendment. SMITH, *supra* note 4, at 111.

158. *Id.* at 79. Professor Tribe likewise agrees that the framers intended for the protection of free exercise to be considered pre-eminent with the establishment clause merely promoting that end by precluding the national government from establishing a religion. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 819 (1978).

159. SMITH, *supra* note 4, at 84.

160. *See* 6 WORKS OF DANIEL WEBSTER 176, *cited in* Carl Zollman, *Religious Liberty in the American Law*, 17 MICH. L. REV. 355, 370 n.88 (1919).

161. SMITH, *supra* note 4, at 107.

162. *Id.* at 108; *see also* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 593-97 (2d ed. 1851) (arguing the Establishment Clause merely helped to effectuate the inalienable right of free exercise by preventing any particular sect from being established at the national level).

163. The "wall of separation" phrase made its first appearance in a Supreme Court opinion on Free Exercise in *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

164. *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947); Thomas Jefferson, *Reply to a Committee of the Danbury Baptist Association* (Jan. 1, 1802), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 281, 281-82 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

165. Jefferson, *supra* note 164; DOUGLAS W. KMIEC & STEPHEN B. PRESSER, THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY 196 (1998).

166. *See Reynolds*, 98 U.S. at 164.

present at the convention preparing the Constitution.[167] As Justice Rehnquist later argued: "[T]he greatest injury of the 'wall' notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. . . . The 'wall of separation between church and State' is a metaphor based on bad history . . . ."[168]

E. *The Framers' Intent on the Religious Presence in Public Life*

The religion clauses provide for a legal separation between church and state, not a moral separation.[169] According to the most eminent nineteenth-century constitutional scholars, the framers did not intend to expunge religious influence from society or even foster a climate of detached neutrality toward religion.[170] The primary objective of the First Amendment was not to insulate society from religion but to advance the interests of religion.[171] With the Free Exercise Clause, the framers wanted to create an environment in which the strong moral voice of religious congregations would be free to judge the actions of the federal government and where the clergy could speak out boldly, without restraint or fear of

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167. *See id.* at 163 ("Jefferson was . . . absent as minister to France."); 1 STOKES, *supra* note 103, at 335.

168. Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

169. J. MARCELLUS KIK, CHURCH AND STATE: THE STORY OF TWO KINGDOMS 116 (1963) (arguing that "[t]here is no reason, under the Constitution of the United States, why the principles of Christianity cannot pervade the laws and institutions of the United States of America").

170. *See* 2 STORY, *supra* note 162, at 593 (stating that "at the time of the adoption of the [C]onstitution, and of the [first] amendment to it," "the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship"); *see also* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 224-25 (Alexis C. Angell ed., 2d ed. 1891). Cooley stated that:

> It was never intended by the Constitution that the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects.

Id.

171. MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 31 (1965); *see also* LEONARD W. LEVY, CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 142 (1986) (observing that "[m]any contemporaries [of the Constitutional Convention] believed that governments could and should foster religion").

retribution, on matters of public morality and the nation's spiritual condition.[172]

The Establishment Clause, according to many historians, was actually intended to serve a very narrow role. It was intended more to protect existing state religious establishments than to eliminate government aid to religion.[173] For many members of that First Congress, the Establishment Clause was merely jurisdictional in that the federal government was barred from interfering with religion, an area considered to be under the exclusive power of the states.[174] Even after ratification of the First Amendment, James Madison continued to publicly declare that the Establishment Clause applied only to the federal government and not to the states.[175]

V. THE REACTION AGAINST RELIGION

A. *The Judicial Shift with* Lemon

Beginning with *Everson* and its "wall of separation," and intensifying with *Lemon* and its progeny during the 1970s, the Court began taking a view of religion that was sharply contradictory to the nation's historical experience.[176] As the reach of the Establishment Clause broadened to curtail the public presence of religion and to limit the amount of interaction between government and religion, the case law seemed to reflect certain political attitudes toward religion more than it did historical precedence or constitutional principles. The theory arose that the Establishment Clause existed to create a secular state, that under the First Amendment nonreligion was just as important as religion, and that religion should be confined to the private realm.

There had existed until the 1960s a sweeping recognition of the religious presence in American public life. In 1931, the Supreme Court

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172. DREISBACH, *supra* note 99, at 84; *see also* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791, at 127, 166-67, 184, 209 (1955) (discussing the public concern over a lack of a bill of rights to protect religious freedom).

173. *See* Morton Borden, *Federalists, Antifederalists, and Religious Freedom*, 21 J. CHURCH & ST. 469, 477-78 (1979).

174. *See* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 18-34 (1995).

175. MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 6-11 (1978).

176. One year after *Everson*, the Court decided *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 205 (1948), striking down a public school program that provided for one hour of religious instruction per week by sectarian teachers in public school classrooms. In its decision, the Court maintained that the "wall of separation" articulated in *Everson* "must be kept high and impregnable." *Id.* at 212.

declared that Americans were a religious people.[177] In the public schools, prayers and Bible readings remained common until the Supreme Court banned them in the early 1960s.[178] Then, with *Lemon v. Kurtzman*, the Court became sharply separationist in its opinions regarding public aid or accommodation of religion.

In *Sloan v. Lemon*,[179] for instance, the Court's opinion tended to see any sign of the slightest, secondary benefit derived by a religious institution from a publicly funded program as evidence that such a benefit was the primary motivation of the program in question.[180] Whether the program helped children, parents, or society as a whole seemed to be an irrelevant consideration. The only thing that mattered was that religion not be allowed to receive any publicly funded benefit.[181] This hostility to religion persevered in *Aguilar*,[182] where the Court addressed the constitutionality of a special-education program providing both public and private schools with remedial assistance for economically disadvantaged students.[183] In the nineteen-year history of this program, there was not a single instance documented of impermissible involvement of a publicly funded instructor in a religious school, even after concerted efforts by the program's opponents to do so.[184] Nonetheless, the Court invalidated the program on grounds of excessive entanglement,[185] implying that the proponents of the program, not its opponents, had the burden of proving that there would never be a problem in the administration of the program. The Court's assumptions about the inability or refusal of religious schools to separate the secular from the religious were not grounded in reality but seemed primarily influenced by a latent suspicion of Catholic schools.[186] This

177. *See* United States v. MacIntosh, 283 U.S. 605, 625 (1931); *cf.* Harold Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 779 (1986) (suggesting that prior to the mid-twentieth century, the United States thought of itself as a Christian country).

178. *See* Conkle, *supra* note 42, at 5; *see also* Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963); Engel v. Vitale, 370 U.S. 421, 433 (1962).

179. 413 U.S. 825 (1973).

180. *Id.* at 830-32.

181. *Id.* at 832.

182. Aguilar v. Felton, 473 U.S. 402 (1985), *overruled in part by* Agostini v. Felton, 521 U.S. 203 (1997).

183. *Id.* at 404. The programs were provided as a part of a break-out session during the curriculum day in schools. *Id.* at 406. Public school instructors were assigned separate classrooms in the nonpublic school. *Id.* At various times during the day, students were sent to that classroom for special instruction. *Id.* The courses were not integrated into the nonpublic school.

184. *Id.* at 424 (O'Connor, J., dissenting).

185. *Id.* at 412-13.

186. *Cf.* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 58 (1997).

suspicion was also reflected in *Bowen v. Kendrick*,[187] in which the Court declared that direct governmental aid violates the Establishment Clause if it goes to "pervasively sectarian" institutions.[188] A "pervasively sectarian" school was deemed to be one "in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."[189]

The suspicion toward religion that was manifested in *Aguilar* and *Bowen* flowed inevitably from earlier cases. In *Hunt v. McNair*, the Court handed down the rule that:

> [a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.[190]

This rule incorporated the presumption that secular instructional materials would be impermissibly used for religious indoctrination whenever religious institutions obtained public funds.[191]

Judicial suspicion of religion is not just a relic of the past; it continues to assert itself. In *Freedom from Religion Foundation, Inc. v. Bugher*,[192] the Seventh Circuit addressed an Establishment Clause challenge to Wisconsin's telecommunications access program, which provided grants to both public and private schools for video and data link-ups.[193] Even though the grants were accompanied with instructions that the funds were to be used only for educational technology purposes, the statute itself imposed no restrictions on the schools' use of the grant money.[194] Not trusting the religious schools to abide by the nonstatutory instructions, the court overturned the program, emphasizing that the Establishment Clause

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187. 487 U.S. 589, 610 (1988).

188. *Id.*

189. *Id.* (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)). In a dissent in *Good News Club v. Milford Central School*, Justice Stevens restated this suspicion of anything pervasively religious. 533 U.S. 98, 130-34 (Stevens, J., dissenting). He argued that some religious groups that employ overtly religious speech could be excluded from access to public facilities, and that speech amounting to "proselytizing" or "worship" also did not warrant protection under the speech clause. *Id.* (Stevens, J., dissenting).

190. 413 U.S. 734, 743 (1973).

191. This presumption seemingly was abandoned in *Mitchell v. Helms*, 530 U.S. 793, 851-52 (2000) (O'Connor, J., concurring in the judgment). But the future of the "pervasively sectarian inquiry" remains unclear.

192. 249 F.3d 606 (7th Cir. 2001).

193. *Id.* at 608-09.

194. *Id.* at 609.

only permits direct public grants to the "secular educational programs of non-pervasively sectarian religious colleges where there is a statutory prohibition against sectarian use and an administrative enforcement of that prohibition."[195] Without statutory prohibitions or administrative enforcements in place, the court speculated that the religious schools might divert the government money "for maintenance of the school chapel or for the religious instruction classrooms or for connection time to view a religious website, instead of payment for the telecommunications links."[196]

A strain of hostility toward religion has persisted throughout the post-*Lemon* case law. In Dickson, Tennessee, public school officials refused to let a student submit a paper on the life of Jesus Christ for a ninth-grade English class.[197] Elsewhere, school authorities directed a fifth-grade teacher to remove religion-oriented books from a classroom library and to keep his personal Bible out of sight at all times.[198] In Albuquerque, New Mexico, administrators of a city-owned senior center prohibited a church from showing a film on the Christian faith.[199] New Jersey school officials removed a kindergartner's drawing of Jesus Christ from a display of student posters depicting things for which they were grateful.[200] The following year, that same student was prohibited from reading his favorite story to the class because the story came from the Bible.[201] In Pennsylvania, a teacher's assistant filed suit after she was suspended for failing to remove a cross that she wore on a necklace.[202] Another case arose out of a school district's refusal to allow the distribution of brochures

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195. *Id.* at 613.

196. *Id.* The Court has shown an antireligious bias in the "pervasively sectarian" inquiry. Justice Souter's dissent in *Mitchell*, for instance, argued that government aid should not go to schools that were "pervasively sectarian" because there the risk of impermissible diversion of public funds for religious uses was the greatest. *See* 530 U.S. at 904-06 (2000) (Souter, J., dissenting). Justice Thomas rejected this view, stating that the traditional exclusion of pervasively sectarian schools from neutral aid programs had been nothing more than a manifestation of hostility to Roman Catholicism. *Id.* at 828. He concluded his response to the Souter dissent by declaring that "[t]his doctrine, born of bigotry, should be buried now." *Id.* at 829. The *Agostini* decision implicitly called the entire "pervasively sectarian" inquiry into doubt, and Justice Thomas flatly rejected the inquiry in his plurality opinion in *Mitchell*. *Id.* at 828-29. However, *Agostini* did not overrule *Nyquist*. *Nyquist* was predicated on the absence of appropriate safeguards to prevent government money from being used to further sectarian objectives. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 775-82 (1973). But efforts to prevent the diversion of public funds for religious purposes may lead to the exclusion of pervasively sectarian institutions from neutral direct aid programs, thereby requiring courts across the country to engage in the offensive practice of trolling through the religious doctrines of various schools.

197. *See* Settle v. Dickson County Sch. Bd., 53 F.3d 152, 154 (6th Cir. 1995).

198. *See* Roberts v. Madigan, 921 F.2d 1047, 1049 (10th Cir. 1990).

199. *See* Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1276-79 (10th Cir. 1996).

200. *See* C.H. v. Oliva, 990 F. Supp. 341, 346 (D.N.J. 1997).

201. *Id.* at 346-47.

202. *See* Nichol v. Arin Intermediate Unit 28, 268 F. Supp. 2d 536, 541 (W.D. Pa. 2003).

advertising a summer Bible camp.[203] In yet another case, a Punxsutawney school board claimed the Establishment Clause forced them to prohibit a high school student from convening a Bible club during "non-instructional" time.[204] In still another, the American Civil Liberties Union claimed an Establishment Clause violation when the Ten Commandments appeared in a public display of such documents as the Mayflower Compact, the Declaration of Independence, the Magna Carta, and the Bill of Rights.[205]

B. *Cultural Critics*

Since the 1960s, critics in the media and academia have argued that religion should not be allowed to have any public presence.[206] In stark contrast to the views of the constitutional period, these critics have pushed for complete separation of church and state on the grounds that religion should be an entirely private matter.[207]

An antireligious secularism was revealed in the wake of the September 11, 2001 terrorist attacks. A call went out for intellectuals to adopt a "secular consciousness" that would serve to mute the religious fanaticism that produces such terrorism.[208] To many secularists, it was religion—"religious or moral fundamentalists"—that had prompted the attacks.[209] As philosopher Richard Rorty sees it, religion fosters intolerance and extremism.[210]

Critics claim that religion is undemocratic and encourages a blindly obedient, herd-like mentality. According to Professor Lupu, religion does not foster a citizenry capable of exercising independent and critical

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203. *See* Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1046-48 (9th Cir. 2003).

204. *See* Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 214 (3d Cir. 2003).

205. *See* ACLU v. Mercer County, 240 F. Supp. 2d 623, 623-24 (E.D. Ky. 2003).

206. For a history of religious animosity toward Catholics and the motivations behind the Blaine Amendments, see Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice*, 59 N.Y.U. ANN. SURV. AM. L. 413 (2003).

207. The privatization of religion can serve to eliminate religion totally from the private sphere. *Sechler v. State College Area School District*, 121 F. Supp. 2d 439 (M.D. Pa. 2000), shows how far schools have gone to rid holiday celebrations and displays of any Christian religion. During the school's winter holiday program, the program was filled with symbols for Kwanzaa, Chanukah, and the Swedish festival of St. Lucia, but no "Christian symbols" were displayed. *Id.* at 444. Further, as a demonstration of how a once-religious holiday has been consumerized, a song sung during the program was called "Bruno's Christmas at the Mall." *Id.*

208. Edward Said, *Islam and the West Are Inadequate Banners*, OBSERVER (London), Sept. 16, 2001, at 27.

209. *Id.*

210. *See* RICHARD RORTY, PHILOSOPHY AND SOCIAL HOPE 168-74 (1999). Also, secularists use the mass suicide in Jonestown and the suicidal fanaticism of the Branch Davidians in Waco, Texas to paint a negative picture of all religions as prone to such extremist and violent tendencies.

judgment.[211] Religious institutions "undermine rather than mutually reinforce habits of mind necessary for democratic decisionmaking."[212] In a similar vein, Professor Gey states that religion is "fundamentally incompatible" with the "intellectual cornerstone of the modern democratic state," which is the realization that "there can be no sacrosanct principles or unquestioned truths."[213] Religion, according to Professor Gey, fails to inculcate the "anti-authoritarian mindset" on which democracy depends.[214]

Political theorist Amy Gutmann, now the president of the University of Pennsylvania, argues that education must serve as a mechanism to "convert children away from the intensely held [religious] commitments of their parents."[215] Educator John Goodlad similarly agrees that schools should strive to free students from the grip of religious beliefs and ways of thinking.[216] These views, according to Frederick Mark Gedicks, reflect those of an "American cultural elite, who . . . have long thought . . . that individuals should be shielded from the regressive and superstitious influence of traditional religious beliefs and practices."[217] Gedicks attributes to secular individualism a view of religion as "a cynical, disintegrating force bent on subverting"[218] the civil rule of law through "the irrational, passionate, and violent overthrow of rationality, reason, and peace."[219] Secularists often see religious adherents as violent revolutionaries.

These secularist accusations reflect an intolerance toward religious fundamentalists—an intolerance that is especially striking since it occurs during an age of mandated tolerance toward every other kind of social,

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211. Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 597 (1991).

212. *Id.* at 598. On the other hand, there are those who say that religion, instead of creating an obedient, passive society, fosters one in which dissent from the prevailing secular norms is nourished. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 37 (1993) (arguing that the "power of resistance . . . is part of what religions are *for*"). Carter bases his view of religion as a force of dissent in part on religion's role in such social revolutionary causes as the civil rights movement. *Id.* at 48-49, 63-64.

213. Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 174 (1990).

214. *Id.*

215. AMY GUTMANN, DEMOCRATIC EDUCATION 121 (1987).

216. *See generally* John I. Goodlad, *Democracy, Education and Community*, *in* DEMOCRACY, EDUCATION, AND THE SCHOOLS (Roger Soder ed., 1996).

217. FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 119 (1995).

218. *Id.* at 38.

219. *Id.* at 34. Gedicks also criticizes the Court for "suggest[ing] that evolution is a matter of objective fact, whereas creationism is a matter of subjective belief." *Id.* at 33. He sees an unfair "privileging of secular knowledge as objective and its marginalizing of religious belief as subjective." *Id.* at 32.

ethnic, and racial group. Indeed, many Americans are suspicious of "high intensity faiths" and of churches that can be considered "conservative" or "evangelical."[220] "[I]n 1993, 45% of Americans admitted to 'mostly unfavorable' or 'very unfavorable' opinions of 'religious fundamentalists . . . .'"[221] Despite the fact that the religiously devout are expected to tolerate society's views on sex, birth control, abortion, and evolution, there is little attempt to tolerate the views of the religiously devout on such subjects. Yale University refused to allow any on-campus recruiting by the Christian Legal Society on the grounds that it favors Christians and disapproves of homosexual conduct.[222] Additionally, when the New York City board of education decided, as part of its sex education program, that every student in public school would be taught how to use a condom, even though the practice violated the religious beliefs of Catholics, Orthodox Jews, and Muslims, families offended by the practice were not initially given a chance even to opt out of the program.[223]

C. *Judicial Reflections of the Hostility Toward Religion*

Judges have echoed the cultural criticisms of religion. In their *Zelman* dissents, Justices Stevens and Breyer argued that public aid to religion would foster political discord and tear the social fabric underlying American democracy.[224] Drawing on experiences from the Balkans, Northern Ireland and the Middle East, Justice Stevens wrote: "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."[225] Justice Breyer likewise noted that "the Establishment Clause concern for protecting the Nation's social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program."[226] These views reflect the beliefs that religion is a divisive force, and that it is the Court's role to quell any conflicts that might arise from the religious practices of a diverse people.[227] However, this belief contradicts the idea of free exercise.

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220. *See* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 760 (1999).

221. *Id.*

222. Michael W. McConnell, *Religion and Constitutional Rights: Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1260 (2000).

223. VITERITTI, *supra* note 105, at 120.

224. Zelman v. Simmons-Harris, 536 U.S. 639, 685-86 (2002) (Stevens, J., dissenting); *id.* at 717 (Breyer, J., dissenting) (in addition to writing his own dissent, Justice Stevens joined in Justice Breyer's dissent).

225. *Id.* at 686 (Stevens, J., dissenting).

226. *Id.* at 717 (Breyer, J., dissenting).

227. The United States is one of the most religiously diverse countries in the world. *See*

Judicial hostility toward religion has shown itself in cases where religious beliefs run counter to modern medical practices. In those cases, the courts often impose criminal liability on parents whose religious practices prevent them from seeking medical treatment for their children's sickness. For instance, in *Commonwealth v. Barnhart*, the court upheld the involuntary manslaughter convictions of parents who, because of their religious beliefs, did not obtain medical treatment for their two-year-old son's cancerous tumor.[228] Similarly, in *Hall v. State*, the court upheld the reckless homicide conviction of parents who relied solely on spiritual healing to cure their son's pneumonia, which resulted in his death.[229] In

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Stephen J. Stein, *Religion/Religions in the United States: Changing Perspectives and Prospects*, 75 IND. L.J. 37, 41 (2000). Yet, America suffers from little of the sectarian strife that plagues much of the rest of the world. Furthermore, the claim that religion is divisive ignores the fact that religion is often a source of individual and social unity and healing. The way victims and the nation turned to prayer following such tragedies as the school shootings in Columbine and the September 11 terrorist attacks reflect this healing role. *See Columbine Tragedy Remembered in Prayer, Silence*, Apr. 20, 2000, *at* http://www.cnn.com/2000/US/04/20/columbine.05/ (last visited Oct. 25, 2004); George W. Bush, National Day of Prayer and Remembrance for the Victims of the Terrorist Attacks on September 11, 2001, (Sept. 13, 2001), *at* http://www.whitehouse.gov/news/releases/2001/09/20010913-7.html (last visited Oct. 25, 2004). In fact, following the September 11 attacks, members of Congress gathered together on the Capitol steps to sing "God Bless America." George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html (last visited Oct. 25, 2004).

Rather than serving to undermine civic values, the weight of evidence indicates that religious institutions have historically served as a foundation for civic life in America. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 65-69 (2000). Alan Wolfe has discovered that most Americans prefer to practice a "quiet faith"; that is, while Americans are more likely than citizens in other democratic countries to express a belief in God and to attend church regularly, they are reluctant to impose their religious views on their neighbors and are disinclined to support denominational leaders or groups that would. ALAN WOLFE, ONE NATION, AFTER ALL 39-87 (1998) (discussing "quiet faith" as it operates within middle-class America).

Even if one accepts the premise that religion is divisive, that reason alone is not sufficient to single it out for more restrictive treatment. In *Searcey v. Harris*, for instance, the Eleventh Circuit concluded that a regulation that precluded an organization from participating in a high school Career Day event when the organization's objective was to dissuade students from entering a particular occupation or from partaking of a particular educational opportunity was neither reasonable nor viewpoint neutral. 888 F.2d 1314, 1315-19 (11th Cir. 1989). The organization at issue was the Atlanta Peace Alliance, which wanted to distribute information in the offices of guidance counselors, run advertisements in school newspapers and participate in Career Day. *Id.* at 1316. It was an organization devoted to promoting nonmilitary solutions to conflicts. *Id.* at 1318. The school board denied the organization access to the schools because of its controversial viewpoint toward the military. *Id.* at 1323, 1326.

228. 497 A.2d 616, 624 (Pa. Super. Ct. 1985) (holding that punishment for parents' failure to seek medical treatment for their child does not violate the parents' freedom of religion).

229. 493 N.E.2d 433, 434 (Ind. 1986).

Walker v. Superior Court, a mother who sought spiritual treatment for her daughter's acute meningitis was convicted of manslaughter.[230]

Courts have also displayed an antireligious bias in their willingness to water down religion by expanding its definition to include virtually any kind of philosophical or pop-culture orientation with which people wish to identify themselves. Under such an "anything-goes" approach, religion becomes any mode of thinking by which people wish to define their life choices; self-perceived duties to one's emotional needs rise to the level of religious duties. For the framers of the First Amendment, religious obligations were obligations to God, paramount to anything owed to any individual.[231] According to modern judicial doctrines, however, the religion clauses require "equal respect for the conscience of the infidel [and] the atheist."[232] Under this view, obligations to God are neither special nor especially important.[233] Religious beliefs are simply matters of self-definition and self-determination.[234]

In *United States v. Seeger*,[235] which involved statutory exemptions from military service granted to religious objectors,[236] the Court expanded the definition of religion to include any "sincere and meaningful" belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."[237] But this definition blurs the distinction between religion and nonreligion,[238] allowing courts to define religion in such a way that guts it of any essential meaning and that sees religious beliefs as simply one form of "internally derived beliefs."[239]

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230. 763 P.2d 852, 855 (Cal. 1988).

231. Conkle, *supra* note 42, at 15.

232. Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985).

233. *See* JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 42-57 (1996) (discussing the autonomy theory and arguing that special treatment for religion can and should be defended on explicitly religious grounds); *see also* Gregory C. Sisk, *Stating the Obvious: Protecting Religion for Religion's Sake*, 47 DRAKE L. REV. 45 (1998) (arguing that the purpose of the Free Exercise Clause is to protect and recognize the good of religious faith); Michael Stokes Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597 (1997) (book review) (endorsing Garvey's view that religious freedom should be protected for the sake of protecting religion). But as Professor Gedicks explains, Garvey's argument faces an uphill struggle in our contemporary legal culture. *See* Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 567-68 (1998).

234. Conkle, *supra* note 42, at 15.

235. 380 U.S. 163 (1965).

236. *Id.* at 164-65.

237. *Id.* at 166.

238. *Cf.* Welsh v. United States, 398 U.S. 333, 341-44 (1970) (extending the *Seeger* definition to include a conscientious objector who had stricken the word "religious" from his application and who had declared that his beliefs were not religious in any conventional sense).

239. *Seeger*, 380 U.S. at 186-87; *see also* Stein, *supra* note 227, at 58 (arguing that "[r]eligion has become whatever a person declares to be the object of regard or pursuit"). The Court appears

Not only have judges stated that "Ethical Culture" and "Secular Humanism" qualify as religions,[240] but Alcoholics Anonymous, a therapeutic mutual-assistance program, was declared a religion in at least six cases in 2001.[241] Furthermore, in *Alliance for Bio-Integrity v. Shalala*,[242] a group of scientists' objections to the Food and Drug Administration's policy on genetically modified foods were treated as a religious belief akin to Roman Catholicism.[243] And in *Yusov v. Martinez*, where a prisoner refused to comply with prison regulations, the court accepted his statement that obtaining a sample of DNA would violate his religious beliefs, even though the prisoner never presented any specific religion or religious beliefs as the basis for his objection.[244]

VI. THE SPECIAL VALUE OF RELIGION

After decades of First Amendment doctrines that sought to separate religion out of the public square, the neutrality approach comes somewhat as a relief. However, contained within that approach is the assumption that the First Amendment protects secularism as much as religion; that atheism is protected as much as religion. Neutrality ignores the special value of religion, a value that prompted the framers to specify religious freedom as the first liberty articulated in the Bill of Rights.[245]

Religion is the oldest, most enduring institution in American social life. In this role, it has often provided the social capital necessary to overcome the atomizing forces of individualism.[246] Communities fostered by religion create a valuable buffer between the state and the individual.[247] They allow and advance the flourishing of moral principles, and they promote cultural diversity.[248]

A healthy democracy cannot survive without a social value system that supports the communal interests and bonds of that society. Religion

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to believe that the line between religion and nonreligion is increasingly thin in contemporary America. *See* Conkle, *supra* note 42, at 31.

240. JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY 230 (1998).

241. Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 BUFF. L. REV. 127, 140 (2003). Indeed, the category of "religion" has become highly flexible, malleable, and perhaps even consumerist.

242. 116 F. Supp. 2d 166 (D.D.C. 2000).

243. *See id.* at 181.

244. No. 00CIV5577(NRB), 2000 WL 1593387, at *4 (S.D.N.Y. Oct. 24, 2000). However, this case was decided under a motion to dismiss, in which the court is obliged to accept all factual allegations as true. *Id.* at *2.

245. U.S. CONST. amend. I.

246. *See* CARTER, *supra* note 212, at 35-43.

247. *See* Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984).

248. *See* Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 116 (1989).

counteracts the destructive urges of individual narcissism that elevate self-centeredness to the point that it drowns out any sense of public responsibility.[249] Consequently, with the increasing separation of religious influences from the public sphere over the past several decades, society has witnessed dramatically higher levels of violence, divorce, illegitimacy, and other manifestations of cultural dysfunction.[250] Americans often name the loss of religion as a leading cause of difficult social problems such as drugs and crime.[251] According to recent studies, a large majority believes that religion helps improve individual behavior, and that "[m]ore religion is the best way to" decrease crime, greed, and materialism.[252]

In addition to its cultural role, religion serves a vital political role. It is not only an important source of viewpoints in the process of democratic self-government,[253] but also a powerful political motivator behind some of the nation's greatest crusades.[254] Religious organizations, for instance, energized both the abolitionist movement of the nineteenth century and the civil rights movement of the twentieth century.[255] In the Southern Christian Leadership Conference, the force that developed the infrastructure of the civil rights movement,[256] twenty-one of the twenty-five original officers were ordained ministers.[257]

Long before government bureaucracies became involved in providing social welfare services, religious institutions performed that role. Moreover, despite the predominant role of government in the modern social welfare state, religious organizations continue to serve a vital and

249. *See generally* CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM (1979) (outlining the harms brought to American culture through an elevation of individual narcissism and of an obsession with self-identity).

250. KMIEC & PRESSER, *supra* note 165, at 196.

251. Messerly, *supra* note 153, at 164.

252. *Id.* Sixty-nine percent polled said, "'[m]ore religion is the best way to strengthen family values and moral behavior.'" *Id.* Additionally, 85% believed that parents would do a better job raising their kids if more Americans were to become deeply religious; 79% felt that crime would decrease; and 69% felt that greed and materialism would decrease. *Id.*

253. A Pew Research Center report found that 71% of Americans believe strongly in God. French, *supra* note 241, at 160. Other polls have found 95% attest to a belief in God. *Id.*

254. Political movements owing to religious inspirations include the Social Gospel movement, nearly all the peace movements, the demand for freer immigration of refugees, and the abolition and civil rights movements. NOONAN, *supra* note 240, at 249-60.

255. *Id.*

256. *Id.* at 256.

257. *Id.* at 257. Reverend Dr. Martin Luther King, Jr. was the president of the Leadership Conference at that time. *Id.*

unique function, achieving social goals that the state cannot.[258] This ability was highlighted in the Cleveland school voucher case.[259]

A "crisis of magnitude" existed in the Cleveland public school system, with only 10% of ninth graders able to pass a proficiency test and more than two-thirds of high school students failing to graduate.[260] This crisis prompted Cleveland's school voucher program, which passed with the strong support of inner-city minorities who viewed the program as a way of escaping the chronically failing urban schools.[261] Indeed, studies have revealed that most urban public school students around the nation are failing to perform at even the most basic level of achievement, and that black parents strongly support school choice, with 60% saying they would switch their children from public to private school if money were not an obstacle.[262] An investigation commissioned by the National Center for Education Statistics shows that private schools produce better cognitive outcomes (even after controlling for the family background of the students), provide a safer and more structured learning environment, and have less racial segregation.[263] The study found that minority students who attend Catholic schools do better than their public-school peers, and that disadvantaged minority students who attend Catholic high schools are more likely to graduate, go on to college, and earn a degree.[264] Other studies have also found Catholic schools to be an effective vehicle for educating the same minority populations that have not been well served by urban public schools.[265]

In *Zelman*, Justice Thomas observed that "failing urban public schools disproportionately affect minority children most in need of educational opportunity."[266] He warned that the "failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives."[267] He then cited data from Cleveland showing that religious schools

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258. *See* VITERITTI, *supra* note 105, at 80-81 (arguing that religion is able to serve some social welfare goals or functions better than secular institutions).

259. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

260. *Id.* at 644.

261. Joseph P. Viteritti, *Reading* Zelman*: The Triumph of Pluralism, and Its Effects on Liberty, Equality, and Choice*, 76 S. CAL. L. REV. 1105, 1173-74 (2003) (arguing that almost a half-century after *Brown v. Board of Education* was handed down, most blacks are still not getting a decent education, and so vouchers are the necessary next step beyond *Brown*).

262. VITERITTI, *supra* note 105, at 7.

263. *Id.* at 80.

264. *Id.* at 83.

265. *Id.* at 84.

266. Zelman v. Simmons-Harris, 536 U.S. 639, 681 (2002) (Thomas, J., concurring).

267. *Id.* at 683 (Thomas, J., concurring).

are more educationally effective than public schools.[268] Whereas 95% of eighth graders in Catholic schools passed a state reading test, only 57% of their public-school peers did.[269] Similarly, whereas 75% of the Catholic school students passed a math proficiency test, their public-school peers had only a 22% passage rate.[270] Furthermore, the average cost incurred by the state for sending a child to a religious school is considerably lower than the cost of public school.[271] In the Cleveland program, for example, religious schools received a maximum of $2250 per student in public funding, whereas public schools were allocated $7746 per student.[272]

In addition to education, religious organizations have proven especially effective in the areas of prison operation and offender rehabilitation. Take, for instance, the case of Prison Fellowship Ministries (PFM), a nondenominational group founded in 1976 by former Nixon aide Charles Colson, who embraced evangelical Christianity while serving time in a federal prison in Alabama for his part in the Watergate cover-up.[273] PFM volunteers and staffers operate in prisons across the country.[274] Among other functions, they teach faith-based courses that show inmates how religious conviction can help them stay off drugs, care for their children, and hold down a steady job.[275] A civil liberties group, Americans United for Separation of Church and State, filed suit to stop a PFM operation in Iowa, but "[o]ne barrier to the lawsuit was finding a prisoner who wanted to complain."[276] Another problem for the suit was that PFM "does a far better job rehabilitating prisoners than the government" does.[277] Studies also show that PFM inmates, once released, are half as likely to end up back in the criminal justice system as other inmates.[278]

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268. *Id.* at 681 (Thomas, J., concurring).

269. *Id.* (Thomas, J., concurring).

270. *Id.* (Thomas, J., concurring).

271. Viteritti, *supra* note 261, at 1163-64.

272. *Id.* at 1164.

273. Daniel Brook, *When God Goes to Prison*, LEGAL AFF., May-June 2003, at 22, 24.

274. *Id.*

275. *Id.* In 1997, at the request of the Texas State Legislature, PFM was given control over a wing at the state prison in Richmond. *Id.* After assuming control, PFM implemented a regimen of prayer meetings, classes, and rehabilitation programs. *Id.*

276. *Id.*

277. *Id.* at 24-25. To avoid constitutional problems, taxpayer money pays for only those aspects of prison life that exist at state-run prisons. *Id.* at 26. All the religious programs, which are completely voluntary, are paid for by private donations. *Id.* at 26-27.

278. *Id.* at 27.

VII. APPLYING THE NONPREFERENTIAL DOCTRINE TO THE ESTABLISHMENT CLAUSE

A. *The Shortcomings of Neutrality*

The modern Court has so far rejected nonpreferential favoritism to religion. It has moved away from the separationist mindset of *Lemon*, but, in its Establishment Clause jurisprudence, it has refused to allow the state to show any favoritism to religion in general.[279] Under the neutrality approach, religion as a whole is not given special treatment or benefits.[280] However, this ignores the historical and constitutional role of religion, as well as the unique social role of religion.[281] The neutrality doctrine also rests on an unjustified, overbroad reading of the Establishment Clause.[282] Case law has put too much focus on government purpose or perceived endorsement of religion. The Establishment Clause essentially only prohibits the government from singling out one or more religious sects for preferential/nonpreferential legal or economic treatment, or in a way that coerces or restricts religious liberty.

B. *Reasons to Favor Religion in General*

By encouraging a diverse political landscape composed of many competing groups and interests, James Madison hoped to achieve pluralism and avoid the threat of majority tyranny.[283] Just as a thriving political pluralism would make it difficult for any one group to dominate politics,[284] so too would a robust religious pluralism with a "multiplicity of sects" be the best way to guard against the oppression of minority religions.[285] Obviously, the way to achieve this "multiplicity of sects" is to accommodate and support them.

By giving special recognition to religion, the government not only helps a useful social institution to survive—it recognizes one of the most

279. The neutrality doctrine holds that a state program does not violate the Constitution simply because it aids a religious institution. *See* Mueller v. Allen, 463 U.S. 388, 393 (1983). Under this approach, in contrast to *Lemon*, the courts have de-emphasized the purpose inquiry. *Id.* at 394-95. Furthermore, the courts have gone from substantive neutrality to formal or purposive neutrality. *See* Werhan, *supra* note 23, at 612. Under a purposive neutrality approach, as used in *Mueller*, the flow of a benefit to religious institutions is not sufficient to invalidate a law unless that substantive effect is so stark as to prove that the law can be explained only as an effort to advance religion. *See* Lynch v. Donnelly, 465 U.S. 668, 691-92 (1984) (O'Connor, J., concurring).

280. *See supra* Part II.C.

281. *See supra* Part II.C.

282. *See supra* Part IV.E.

283. THE FEDERALIST NO. 10, at 77-84 (James Madison) (Clinton Rossiter ed., 1961).

284. *See id.*

285. THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

fundamental laws of sovereignty. The framers saw that religious duties are more important than secular duties.[286] As the Declaration of Independence stated, the duties owed to God transcend those owed to any temporal authority.[287] To the religious believer, the duty to God is supreme. Religious claims are prior to and of greater dignity than the claims of the state. The state cannot simply ignore these claims without treating them as false or unimportant. Thus, even though the state cannot determine the truth of religious beliefs, it should respect them and afford them every possible benefit of the doubt. As the philosopher Blaise Pascal once argued, the risk of not respecting religious beliefs is a risk not worth taking.[288]

The state, with the acquiescence of the courts, already favors religion in various subtle ways.[289] In the Cleveland voucher case, Justice O'Connor discussed all the ways in which the government aids religion, including property tax exemptions and income tax deductions, and concluded that a voucher system was not atypical of existing government programs.[290] The military also makes special accommodations for religion. It employs more than 1400 ministers of eighty-six different religious denominations and operates more than 500 chapels.[291] Given this precedent of favorable treatment toward religion in general, it should not be a drastic step to adopt the nonpreferential aid model offered in this Article.

The state should be able to assist religion in general because of religion's ability to solve problems that the government cannot solve. In *Zelman*, the Court recognized that "[a]ny objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general."[292] As Justice O'Connor declared in her concurrence, the Court should not

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286. *See* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 154-58 (1991).

287. The primacy of conscience is reflected throughout the constitutional documents. *See* McConnell, *supra* note 222, at 1251-52.

288. *See* BLAISE PASCAL, PASCAL'S PENSEES § 3 (John Cruickshank trans., Grant & Cutter ed. 1983).

289. *See, e.g.*, Stark v. Indep. Sch. Dist. No. 640, 123 F.3d 1068, 1070, 1077 (8th Cir. 1997) (holding that a school district's arrangement with a small religious group, whereby the religious parents were allowed to send their children to a public school containing one multi-age classroom that conformed to the group's religious tenets opposing the use of computers, did not amount to an unconstitutional preference); *see also* Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084, 1089 (8th Cir. 2000) (upholding exceptions to the federal Medicare and Medicaid Acts that gave nonmedical benefits to patients treated in religious nonmedical health care facilities and that opponents argued were designed to help Christian Scientists).

290. Zelman v. Simmons-Harris, 536 U.S. 639, 665-68 (2002).

291. NOONAN, *supra* note 240, at 220.

292. *Zelman*, 536 U.S. at 655.

"ignore how the educational system in Cleveland actually functions."[293] Even the challenging parties conceded that the voucher program was "enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system."[294] Thus, the Establishment Clause should accord to government the flexibility to let religion address certain social problems. The First Amendment was neither intended to exclude religious approaches to social problems, nor to deny society the benefit of religious contributions to secular projects.

Operating as it must with a kind of religious blindness, the neutrality doctrine can deprive democracy of one of its strongest institutions. In *American Civil Liberties Union v. Foster*, an Establishment Clause challenge was brought against religious organizations participating in a federal program that allocated funds for teaching and promoting sexual abstinence among youth.[295] The objection was that the religious organizations, in teaching abstinence, incorporated religious messages and values.[296] But then, if abstinence is a real social goal, it is likely that no one can teach it as well as a religious organization.

C. *The Accommodation Doctrine*

1. Setting the Stage for Nonpreferentialism

Unlike the neutrality doctrine and its religious blindness, accommodation tries to understand the special needs of religious exercise. Under an accommodation approach, courts do not use the Establishment Clause to strike down government efforts to facilitate the practice and expression of religious beliefs.[297] Although the accommodation doctrine recognizes the specialness of religion in general, its application tends to be specifically focused on clearing away obstacles to the free exercise needs of religious groups.[298] The nonpreferential model, on the other hand, goes

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293. *Id.* at 663 (O'Connor, J., concurring).

294. *Id.* at 649.

295. No. Civ.A.02-1440, 2002 WL 1733651, at *1 (E.D. La. July 24, 2002).

296. *Id.* The court ruled against the involvement of these religious institutions in the federally funded program. *Id.* at *7. It held that "disbursing government funds to pervasively sectarian institutions runs afoul of the Establishment Clause." *Id.*

297. According to Gedicks, the Court has generally defended practices such as Sunday closing laws, legislative prayer, religious holiday displays, and religious property tax exemptions by reference to the secular individualist value of neutrality between religion and nonreligion rather than the religious communitarian value of encouraging socially-valuable religion. FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 63 (1995).

298. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329-30 & n.1 (1987), a case involving accommodation through the

one step further and allows completely discretionary benefits to be given to religion, as long as they are given without discrimination among sects.

The separationists argue that accommodation is just establishment in disguise.[299] However, this argument ignores a fundamental distinction. The hallmark of accommodation is that the individual or group decides for itself whether to engage in a religious practice; the government simply facilitates that decision.[300] In then-Justice Rehnquist's words: "governmental assistance which does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice does . . . not violate the Establishment Clause."[301] As Justice Brennan admitted in his *Texas Monthly, Inc. v. Bullock* opinion, the courts should be able to uphold some accommodations that are not actually mandated by the Free Exercise Clause.[302] However, the Court has never clarified the relation between permissible and mandatory accommodations.[303] This is where nonpreferentialism comes into play: under this doctrine, all nonpreferential accommodations, whether mandatory or voluntary, are constitutional, unless they have a coercive effect on someone else's religious exercise.

Although accommodation is usually employed to prevent a free exercise violation, the legislative branch should be able to grant religious organizations nonpreferential exemptions from burdens that the courts have not yet held to be free-exercise violations.[304] Under this approach,

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granting of special exemptions, the Court held that the government could exempt religious institutions from the religious antidiscrimination requirements of Title VII, thereby allowing them to favor members of their own faith in hiring for positions in noncommercial activities of the church.

299. "Anti-accommodationists object to singling out religion for special protection under the Free Exercise Clause but . . . have no qualms about singling out religion for special prohibitions under the Establishment Clause." *See* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 717 (1992). But "far from 'enacting into law the religious preferences of the political majority,' or bringing about an 'alliance between church and state,' accommodations reflect a decision to tolerate dissent from the policies adopted by the political majority." *Id.* (quoting Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 76, 186 (1990)).

300. *Id.* at 716-17.

301. Thomas v. Review Bd., 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting).

302. 489 U.S. 1, 18 n.8 (1989). Brennan's assertion supports one of the basic tenets of the nonpreferential model.

303. McConnell, *supra* note 299, at 709.

304. *Id.* at 710. The goal should be finding the best way of achieving religious liberty, which is what the First Amendment is all about. Accommodation tries to achieve this goal, according the legislatures some flexibility in dealing with religion. *Id.* The presumption is to accommodate up until the point that such accommodation begins to coerce the free exercise rights of others. The separationist view, on the other hand, tends to look more at what the government is doing than at whether religious liberty is actually being expanded or curtailed.

society's elected leaders would be given the flexibility to address and alleviate burdens on religious exercise that do not quite rise to the level of unconstitutional infringements. A government committed to religious pluralism should be able to recognize and accommodate religious needs, even if those needs do not fit within the judiciary's definition of a "burden" under the Free Exercise Clause.[305]

2. The Need for Accommodation

Unlike the religious indifference of neutrality advocates, accommodationists seek to discern the social and political realities of modern life that affect religious practices. Indeed, with the pervasiveness of government in modern society, religion may not always be able to thrive independently without some favoritism. Given the historic involvement of religions in social welfare work, for instance, the overwhelming resources of the government should not be allowed to squeeze out religious organizations from this role. Such a result could easily happen, however, if the government funds only nonreligious viewpoints or approaches to social problems.

When the First Amendment was ratified, the government had little or no involvement in education or social welfare.[306] These functions were predominantly left to the private sphere, where religious institutions played a leading role.[307] But with the rise of the welfare-regulatory state, the spheres of religion and government were no longer distant and distinct. The state had "extended its regulatory jurisdiction over broad aspects of life that formerly had been private and frequently religious, creating conflicts with both religious institutions and the religiously motivated activity of individuals."[308] This takeover of religion's traditional functions, without a corresponding approach of accommodation, constricts the freedom and ability of religious groups to perform the social duties that their religious beliefs demand of them.[309]

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305. *Id.* at 710. In *Catholic Charities of Sacramento, Inc. v. Superior Court*, 109 Cal. Rptr. 2d 176, 181 (Cal. Ct. App. 2001), *aff'd*, 85 P.3d 67 (Cal. 2004), the court rejected plaintiffs' pleas for an exemption from a state statute requiring employers to include prescription contraceptive drugs in the health benefit plans offered to employees. Plaintiff sought an exemption because of the Catholic belief that artificial contraception is morally unacceptable. *Id.* But under both an accommodation and a nonpreferential aid model, the case should have gone the other way.

306. McConnell, *supra* note 222, at 1261.

307. Throughout much of the nation's history, religious institutions built the hospitals and nursing homes whose structures still serve the entire community. The religious beginnings of these facilities are still evident in many cities across the country.

308. McConnell, *supra* note 222, at 1261.

309. *See id.* Gedicks claims that

3. The Supremacy of Free Exercise over Establishment

The accommodation doctrine reflects, as does the nonpreferential aid model, the belief that the Free Exercise Clause has supremacy over the Establishment Clause. According to Professor Tribe, whenever tension exists between the two, "the free exercise principle should be dominant in any conflict with the anti-establishment principle."[310] Because the purpose of the First Amendment is to maximize religious liberty, and because every presumption should be made in favor of expanding that liberty, the Establishment Clause should be interpreted accordingly. It should only control when government accommodation of religion reaches the point that one or more sects have been singled out for special benefits or burdens, or when government accommodation begins to infringe on some other individual's or group's religious exercise rights.[311]

The Establishment Clause essentially addresses a specific kind of threat to religious liberty—the threat that exists when the government entangles itself within one or more specific religious denominations through its taxing, regulatory, or law enforcement functions.[312] The separationists, however, see the Establishment Clause as protecting a secular society and keeping the public presence of religion in check. Thus, whenever a perceived conflict arises between the Establishment Clause and the Free Exercise Clause, they give priority to the former and make every presumption in favor of limiting the public role of religion. However, this approach violates not only historical precedent but the whole rationale behind codifying religious freedom within the First Amendment.

The question of which religion clause is subordinate to the other arose in *Texas Monthly*,[313] where the Court held that a sales tax exemption for periodicals published or distributed by religious organizations violated the Establishment Clause because similar exemptions were not given to other

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> [i]n the modern welfare state that the contemporary United States has become, government aid to both individuals and organizations is widespread and pervasive. Since in the United States most persons and entities are entitled to some kind of government aid, religious neutrality would generally seem to require that this aid not be denied to otherwise qualified recipients simply because they are religious.

GEDICKS, *supra* note 297, at 57. Thus, contrary to the separationist claim, the no-aid baseline is implausible in the late twentieth century.

310. TRIBE, *supra* note 158, at 833.

311. Many of the Establishment Clause doctrines focus on what the government does or how it acts rather than on whether individual religious liberty is expanded or restricted. While the separationists look at the former, the accommodationists and nonpreferentialists look to the latter.

312. In this sense, a very narrow role is given to the Establishment Clause, unlike the broad interpretation given in *Lemon*.

313. 489 U.S. 1 (1989).

nonreligious publications.[314] There was no allegation that Texas discriminated among different religious sects, only that a benefit was given to religion in general that was not otherwise available to nonreligious organizations.[315] The only issue before the Court was whether religious organizations in general could be given benefits not accorded to nonreligious organizations, or whether the Establishment Clause required mandatory indifference to the impact of government action (e.g., sales taxes) on religious activity or institutions.[316] However, this issue was quickly resolved when the Court focused its analysis on whether the benefits flowed exclusively to religious groups.[317] The Court's "neutrality" approach assumed that the Establishment Clause forbids the government from favoring religion in general, even though neither the text nor the history of the First Amendment supports that conclusion.[318]

Because *Texas Monthly* dealt with a governmental benefit aimed at further expanding the free exercise rights of religious denominations that published and distributed periodicals, it presented the question of whether those expanded exercise rights rose to the level of a state establishment of religion.[319] The Court, however, did not directly address this issue. Instead, Justice Brennan stated that the sales tax exemption was unconstitutional because it benefitted only religion and gave an accommodation not required by free exercise.[320] This approach subordinated the Free Exercise

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314. *Id.* at 5, 15 (plurality opinion).

315. *Id.* at 15-16 (plurality opinion).

316. In the *Texas Monthly* plurality opinion, Justice Brennan noted that "we in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." *Id.* at 18 n.8 (plurality opinion). But the Court could discern "[n]o concrete need to accommodate religious activity" in this case. *Id.* at 18 (plurality opinion). Although, assuming that the imposition of a sales tax imposes no burdens on religious organizations, the remaining issue is whether the state can grant accommodations for which courts find no need and which pose no free exercise infringements. *See id.* (plurality opinion).

317. *See id.* at 10-17 (plurality opinion).

318. One of the most firmly ingrained principles of the religion clauses is that all religious faiths must enjoy an equality of rights. *See* Everson v. Bd. of Educ., 330 U.S. at 66 (1947) (Rutledge, J., dissenting). Thus, accommodation should not be allowed to favor one religion over another. Indeed, "it is exceedingly impractical to treat accommodations of religion as categorically unconstitutional." McConnell, *supra* note 299, at 715. If a legislature, for instance, concluded that religious organizations had better success than other types of organizations at certain social welfare functions, such as drug rehabilitation, then nothing should stop the legislature from providing funding in a way that might favor those religious organizations.

319. Determining which clause is subordinate is a necessary step to determining whether the separationist or accommodationist interpretation of the Establishment Clause applies.

320. *Texas Monthly*, 489 U.S. at 5 (plurality opinion). To Justice Blackmun, "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable." *Id.* at 28 (Blackmun, J., concurring in the judgment). But the Court could discern "[n]o concrete need to

Clause to the Establishment Clause, whereas upholding the exemption would have reversed that relationship.[321]

Contrary to what the *Texas Monthly* decision might suggest, nonmandatory accommodations of religion occur quite frequently. Municipalities, for instance, frequently adopt ordinances that protect churches.[322] In these ordinances, certain types of establishments, such as theaters, fire stations, and bars are often excluded within a certain distance from houses of religious worship.[323] The presumption is that religious exercise is a valuable activity to protect, and minimizing the types of businesses that might be "demoralizing or annoying" to churchgoers is one way of doing so.[324] Despite this belief, in an opinion focusing more on a rigid rule of neutrality than on the protection of religious liberty, the Court in *Larkin v. Grendel's Den, Inc.*[325] invalidated a law that gave a church the right to veto the grant of a liquor license to an establishment within a 500-foot radius of the church.[326]

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accommodate religious activity," and so viewed the exemption as nothing but a benefit to religion. *Id.* at 18 (plurality opinion). However, it seems that the legislatures should have some freedom to decide which benefits are appropriate for religion, as long as those benefits do not infringe on anyone else's exercise rights.The *Texas Monthly* opinion is a classic example of the Court simply refusing to allow the government to assist religion in any way. The Court denied that it was suggesting "that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." *Id.* at 18 (plurality opinion). Yet one is left with the conclusion that *Texas Monthly* stands for the proposition that government benefits to religion can only be sustained if those benefits flow to a large number of nonreligious groups as well as religious entities or if the accommodation is aimed only at alleviating a free exercise infringement.

321. To the dissenters, the exemption was proper under the accommodation doctrine, even if the Exercise Clause did not require it. *Id.* at 39-41 (Scalia, J., dissenting). Later, in *Jimmy Swaggart Ministries v. Board of Equalization*, the Court held that California's imposition of sales and use tax liability on sales of religious materials does not violate the Free Exercise Clause because those taxes do not impose a constitutionally-significant burden on religious practice or beliefs. 493 U.S. 378, 380, 392 (1990).

In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Court similarly subordinated free exercise rights, as it had in *Texas Monthly*. In *Thornton*, the Court struck down a Connecticut law requiring employers to recognize the right of any employee not to work on a day the employee designated as the Sabbath. *Id.* at 710-11. Finding that the law violated the Establishment Clause, Justice O'Connor stated in her concurring opinion that the law "singles out Sabbath observers for special . . . protection." *Id.* at 711 (O'Connor, J., concurring). Under the nonpreferential aid model, however, such favoritism would be allowed, especially since it does not infringe on anyone else's free exercise rights.

322. *See* JAMES E. CURRY, PUBLIC REGULATION OF THE RELIGIOUS USE OF LAND 3 (1964).

323. 3 STOKES, *supra* note 103, at 369.

324. *Id.*

325. 459 U.S. 116 (1982).

326. *Id.* at 117, 127. The Court's decision rested on the grounds that the relationship between church and state generated by the statute amounted to impermissible entanglement. *Id.* at 126-27.

D. *The Judicial Fear of Favoring*

The separationist attitudes that harbor a suspicion of and hostility toward religion have restrained the courts from granting nonpreferential benefits to religion in general. This reluctance to grant any benefit to religion is reflected in the *Lemon* legacy and its maze of rules governing the most intricate and minute aspects of church-state relations.

In their Establishment Clause decisions, courts too often look at all the trivial facts and petty distinctions of government aid—for example, the number of religious recipients versus the number of non-religious recipients,[327] whether the aid is in the form of cash or in the much less visible form of tax breaks,[328] whether the direct recipient is a religious institution or an individual who then forwards the aid to a religious institution,[329] whether the aid reaches religion "directly" from the state or as the result of a predictable choice by an individual recipient,[330] and whether the administration of the aid program results in any visible associations between the government and a religious institution.[331] Courts also have required that, to be an equal participant in a government program, a religious institution cannot be "pervasively sectarian,"[332] whatever that might mean.

In its application of the neutrality doctrine to cases involving public funding of religious institutions, the Court has adopted the direct-indirect test, which generally requires that government aid reaching religious institutions do so only indirectly through the private choices of citizens.[333] Yet, as Justice O'Connor noted in *Zelman*, that case was "different from prior indirect aid cases in part because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds."[334] Thus, the distinction between direct and indirect aid can often be irrelevant and formalistic. As long as the government does not engage in religious discrimination in its aid programs, it should not matter if the aid is indirect or direct.[335] A needless emphasis on the direct-indirect distinction could deprive states of the flexibility to create, through legislative innovation, new types of education programs, or it could leave them with a convenient constitutionally based

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327. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986).

328. Mueller v. Allen, 463 U.S. 388, 399 (1983).

329. *Witters*, 474 U.S. at 488.

330. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993).

331. Agostini v. Felton, 521 U.S. 203, 232-35 (1997).

332. *See* Bowen v. Kendrick, 487 U.S. 589, 610-12 (1988).

333. Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002); *Witters*, 474 U.S. at 486-87; *Mueller*, 463 U.S. at 399.

334. *Zelman*, 536 U.S. at 663 (O'Connor, J., concurring).

335. *See* Mitchell v. Helms, 530 U.S. 793, 831 (2000).

excuse for excluding sectarian schools if they chose to do so.[336] Furthermore, the line between direct and indirect is not always easy to draw. A perfectly neutral voucher program could be invalidated solely because the government's tuition checks are made out directly to the religious school rather than to the parents of the students.

The direct-indirect distinction has become a prominent factor in the current neutrality doctrine. It has been influential in the Court's attempt to refashion the *Lemon* rule. In *Agostini*, a case involving a federally funded program sending public school teachers into private religious schools to give remedial instruction during school hours, the Court adopted the following test to determine if government aid has the impermissible effect of advancing religion: 1) the government aid must not result in indoctrination; 2) it must not define its recipients by reference to religion; and 3) it must not create an excessive entanglement of government and religion.[337] But just as the *Lemon* test did, the *Agostini* test focuses too much on the government action and not enough on the actual occurrence of any religious coercion.[338] The real concern of the first prong should not be whether some indoctrination can occur, since indoctrination can always occur in any program,[339] but whether the public has alternative options by which to receive the same government benefits and hence the freedom to escape any indoctrination to which they might be subjected. The second prong of the *Agostini* test essentially addresses the nonpreferential factor—whether the government is preferring one sect over another. And the third prong is really concerned with whether government involvement with a religious organization infringes on the religious liberty and autonomy of that organization.

Recognizing some of the drawbacks of the direct-indirect distinction, *Agostini* abandoned the rule that "all government aid that directly assists the educational function of religious schools is invalid."[340] The Court ruled that no establishment violation occurs as long as the government money

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336. Anthony T. Kovalchick, *Educational Aid Programs Under the Establishment Clause: The Need for the U.S. Supreme Court to Adopt the Rule Proposed by the* Mitchell *Plurality*, 30 S.U. L. REV. 117, 148 (2003).

337. Agostini v. Felton, 521 U.S. 203, 234 (1997). In *Agostini*, the Court designed a test for purposes of evaluating the validity of governmental programs that include some degree of interaction between the public school system and competing schools, many of which are sectarian. Under the *Agostini* test, which is a modification of the old *Lemon* test, all three factors relate to the larger rule that the statute's primary effect must be one that neither advances nor inhibits religion.

338. Incorporating the *Lemon* test, *Agostini* inevitably reflects a certain suspicion of religion that is inherent in the separationist view. *See id.*

339. Indeed, indoctrination occurs in public schools everyday, when children whose families believe in creationism are taught only the theory of evolution, and when sex education courses completely ignore or ridicule certain religious beliefs.

340. *Agostini*, 521 U.S. at 225.

goes to sectarian institutions "'only as a result of the genuinely independent and private choices of' individuals."[341] After all, it was the parents and not the government who decided where to send the eligible children to school.

The Court reinforced *Agostini* in *Mitchell v. Helms*, where it allowed the government to lend educational materials and equipment directly to public and private (including religious) schools on the basis of school enrollment.[342] As in *Agostini*, the four-Justice plurality in *Mitchell* downplayed the distinction between direct and indirect aid to religious schools as formalistic.[343] However, Justice O'Connor's concurrence argued that this distinction should be maintained.[344] Therefore, the direct-indirect test will most likely continue to influence Establishment Clause cases.

In *Mitchell*, the Court's decision rested on neutrality grounds: if all organizations were eligible for aid, then no one could reasonably presume that the government had supported any indoctrination through its grants to religious schools.[345] If funds were made available to all recipients based on religion-neutral criteria, the plurality considered it unimportant if a private entity diverted that aid for religious uses.[346] Despite the fact that the majority of aid designated for private schools went to religiously affiliated ones, the Court concluded that the aid was "'allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion,'" and that

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341. *Id.* at 226 (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).

342. 530 U.S. 793, 801 (2000).

343. *Id.* at 818. In *Agostini*, the Court had relied on the principle of neutrality, as well as on two indirect-aid cases, to uphold a provision for direct aid to religious schools. *Id.* at 810-11. The two indirect-aid cases were *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), and *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986).

344. *Mitchell*, 530 U.S. at 841-44 (O'Connor, J., concurring). In *Bagley v. Raymond School Department*, 728 A.2d 127, 130 (Me. 1999), the Supreme Court of Maine held that a voucher program expressly excluding religious schools did not violate the Free Exercise Clause. The exclusion did not burden the plaintiffs' religious freedom because they were still free to send their children to a religious school; they just had to pay the entire tuition bill themselves. *Id.* at 135. While acknowledging that the parents rather than the government chose the school, the court stated that "choice alone cannot overcome the fact that the tuition program would directly pay religious schools for programs that include and advance religion." *Id.* at 144. Thus, the court saw the Maine program as a direct aid program more than as a true private choice program. But this technical distinction, as Justice Thomas stated in *Mitchell*, "would exalt form over substance." 530 U.S. at 818.

345. *Mitchell* involved Chapter 2 of the Education Consolidation and Improvement Act of 1981, which provided funds to both public and private schools for the acquisition and use of instructional and educational materials. 530 U.S. at 801-02. The funds were distributed to each school based on the number of children enrolled in that school. *Id.* at 802. But again, the focus here is on what may be presumed about what the government did or did not do.

346. *Id.* at 820.

the materials were "'made available to both religious and secular beneficiaries on a nondiscriminatory basis.'"[347]

Mitchell seems to stand for the following propositions: 1) indirect aid that flows to religious organizations only by the independent choices of private individuals does not violate the Establishment Clause, even when such aid is applied to religious uses; and 2) the Establishment Clause permits direct government aid to flow to religious organizations without first passing through the hands of private individuals, but only if such aid is not applied to religious uses or "used to advance the religious missions" of the organization.[348] Consequently, from the *Mitchell* decision, it is clear that government may in some circumstances enact policies and aid programs that directly benefit religious groups.[349] But while government may provide direct benefits to religion, it must still not show favoritism toward the religious over the secular. A primary rationale underlying the *Mitchell* decision was the Court's reliance on the fact that the aid at issue neither favored nor disfavored religion.[350]

Just as there is a distinction between accommodation and establishment, there also is a difference between advancement and establishment. The question under the Establishment Clause is not whether religion in general is better off because of some government program, but whether the government has singled out various religious sects for

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347. *Id.* at 829 (quoting Agostini v. Felton, 521 U.S. 203, 231 (1997)).

348. *Id.* at 840 (O'Connor, J., concurring). Such an approach is consistent with the other ways in which government gives financial assistance to religious groups—for example, property tax exemptions, personal income tax deductions for donations, and federally subsidized financial aid that students can use at religious universities. *See supra* note 290.

349. *Mitchell* is distinguishable from *Agostini* in that it involved direct aid to religious schools in the form of library and media materials and computer software and hardware. *Mitchell*, 530 U.S. at 802.

In *Mitchell*, the eligibility for funds was based on the private choices of parents as to where to enroll their children. *Id.* at 830. The plurality rejected the suspicious stance that had previously been taken toward religious organizations. The possibility of a religious school using a state-funded overhead projector to show a film about Jesus Christ was deemed not constitutionally significant because that same piece of equipment could be used in a public school to show a film about George Washington. *Id.* at 823 n.9. Unlike the approach in *Aguilar*, the *Mitchell* Court did not believe that the mere potential for diversion was enough to establish a constitutional violation. *Id.* at 820. Instead, challengers had to prove that the aid in question was actually used for sectarian purposes. *Id.* Thus, because the Court had abandoned the presumption that teachers would act in bad faith, the Court did not see a reason to require the kind of pervasive governmental monitoring that had created the forbidden excessive entanglement in *Aguilar*. *Id.*

350. In the aftermath of *Agostini*, most courts were of the view that "the Establishment Clause required nothing more than governmental neutrality towards religion." Kovalchick, *supra* note 336, at 120. But Justice O'Connor's concurring opinion in *Mitchell* rejected such a broad interpretation of *Agostini* and instead argued that the government cannot include sectarian institutions in generally available aid programs without running afoul of the Establishment Clause. 530 U.S. at 837 (O'Connor, J., concurring).

preference and in so doing has infringed on others' religious liberty. In *Bowen v. Kendrick*,[351] the Court rejected a facial Establishment Clause challenge to the Adolescent Family Life Act, which provided grants to private nonprofit organizations (including religious organizations) for counseling and education services related to adolescent sexual relations and pregnancy.[352] It then remanded the case for determination as to whether any grants had been made to "'pervasively sectarian'" organizations or whether any funds had been used for "'specifically religious activities'" or "'materials that have an explicitly religious content.'"[353] But the Court provided little guidance regarding how to make such determinations, nor did it provide a definition as to what constitutes a "specifically religious" activity. Furthermore, the Court was so focused on not allowing the "advancement of religion" that it essentially endorsed governmental discrimination against the expression of religious views by "pervasively sectarian" organizations—the kind of discrimination that was later held in *Good News Club* to violate the Free Speech Clause.[354]

The problem with the Court's emphasis on "advancement of religion" is that it looks only at whether religion has received a benefit, not at whether the government has somehow restricted religious liberty, which is the fundamental concern of the First Amendment. Illustrating this misplaced focus is the decision in *DeStefano v. Emergency Housing Group, Inc.*,[355] holding that direct, unrestricted state funding of an organization whose staff members actively supervise Alcoholics Anonymous (AA) meetings and discuss AA literature with clients violates the Establishment Clause.[356] The court also held that AA meetings are religious as a matter of law and that the staff's participation constitutes indoctrination.[357] But this holding, that staff members can present all perspectives on a subject except religious perspectives, raises a free speech issue. Moreover, the court essentially concluded that impermissible indoctrination is to be attributed to the government whenever direct funding is used for activities that could merely be characterized as religious indoctrination.[358] But will an attempt to eradicate all indoctrination come at too high a price in terms of restrictions on free

351. 487 U.S. 589 (1988).

352. *Id.* at 593.

353. *Id.* at 621 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)). But this approach calls for too much line-drawing—for example, a religion may not engage in sectarian instruction with government money solely to advance a particular sect but may engage in instruction on a government program topic from a religious perspective or with some religious content.

354. *Id.* at 609-13.

355. 247 F.3d 397 (2d Cir. 2001).

356. *Id.* at 419.

357. *Id.* at 417.

358. *Id.* at 418.

exercise? Should not our concern be only for coercion, and not for indoctrination? Finally, if the public always has options regarding whether to receive social services from a religious provider, how can indoctrination amount to establishment?

In *Freedom from Religion Foundation, Inc. v. McCallum*,[359] the court likewise held that the direct, unrestricted government funding of a religious organization that provided various social services from a religious perspective (including an AA program) violated the Establishment Clause.[360] The court concluded that the organization's activities constituted religious indoctrination because its staff members "encourage[d] participants to integrate spirituality into their recovery program."[361] The court also held that religious indoctrination is attributable to the government when the organization receives unrestricted cash payments from the government without regard to how many recipients enroll in the organization's programs.[362] However, this attribution element is yet another diversion from the essential nature of the Establishment Clause, which serves two primary functions: to protect the institutional autonomy of religions from governmental interference, and to prevent the government from singling out certain denominations for preferential treatment. A similar diversion occurred in *School District v. Ball*,[363] where the Court noted that a program sending public teachers into religious schools would create a "symbolic union" between the government and religion.[364] But this is not what the Establishment Clause is all about. It is about the real discrimination and coercion that results when the government institutionally entangles itself with a particular religion.

VIII. CONCLUSION

Neutrality is in vogue. The judicial use of neutrality in religion cases coincides with a larger social trend toward equality and away from any discriminatory treatment. While neutrality marks a welcome change from the previous approach of *Lemon* and its hostility toward religion, it still does not capture the spirit and intent of the First Amendment.

As history shows, the First Amendment does not place religion and nonreligion on the same level. It does not give the same importance to each, nor does it command the government to treat them the same. Given

359. 179 F. Supp. 2d 950 (W.D. Wis. 2002).

360. *Id.* at 970-71, 978.

361. *Id.* at 969. The court concluded that although the organization "may have the secular purposes of providing drug treatment, education and job training, this does not mean that religion does not permeate the programming." *Id.*

362. *Id.* at 970-71.

363. 473 U.S. 373 (1985), *overruled in part by* Agostini v. Felton, 521 U.S. 203 (1997).

364. *Id.* at 391-92.

the framers' belief in the value of religion to a democracy, the First Amendment certainly was not intended to create or protect a secular state. To the framers, one of the vital ingredients of a democratic system was the assertive religious values of the people. To the framers, it was these values that turned a self-interested individual into a public-minded citizen.

The neutrality approach confines religion to a social role defined by secular institutions. It puts false boundaries around the public space allotted to religion. But nothing in the text or history of the First Amendment suggests that it was intended to hobble society in its ability to take advantage of religion's special services and talents. Religion provides a valuable alternative to the secular state, possessing unique traits and capabilities. Just as legislatures did in the late eighteenth century, the legislative branch today should have the flexibility to interact with one of society's most pervasive and influential institutions, and the public should have the freedom to express all of its opinions and values, including those deriving from its religious beliefs.

Judicial acceptance of the neutrality doctrine marks only a half-way departure from the separationist mindset of *Lemon*. Under neutrality, there is not any outright discrimination, but there is also no recognition of the special value or role of religion in our constitutional scheme. In a way, neutrality reflects the urge to sterilize religion, to make it just like every other secular institution. Neutrality reflects a kind of simplistic compromise over the religion question—an attempt not to fulfill the true spirit of the First Amendment but simply to minimize the conflict.

The nonpreferential aid model, which grants to the government the ability to confer benefits upon religion that are not conferred upon any secular group, best expresses the historical intent underlying the First Amendment. The Establishment Clause was meant to protect not a secular state, but rather the institutional autonomy of a thriving diversity of religious groups. Thus, the beneficiaries of the clause are not the nonreligious but the religious. Just as with the Free Exercise Clause, religious coercion and infringement of religious freedom are the focus of the Establishment Clause. The distinction is that the Free Exercise Clause tends to focus on individual autonomy, while the Establishment Clause aims at institutional autonomy.

The courts have come part of the way toward recognition of the nonpreferential model. They have ruled that government funding programs are not unconstitutional just because they aid religion. They have also upheld certain exemptions given to religious organizations, such as tax breaks. However, the courts have never specifically endorsed nonpreferential favoritism toward religion in general that is not also given to secular institutions. Yet history shows that there is a clear difference between establishing a religion and supporting a pre-existing religious presence in society. The only constitutional limitations on this support

should be that it is given without discrimination among religious denominations, and that it is given in a way that does not infringe on any exercise rights. The essential distinction in government financial aid cases should not be whether the aid is given directly or indirectly. Rather, the inquiry should be whether the aid is to finance the *status* or *institutional survival* of a religion, or whether the aid finances a particular *function* performed by a religious organization. In this latter respect, it is the *goal* (secular) of the function that is important, not the *means* (religious) used to achieve it.

After decades of confusing jurisprudence on this subject, the courts should abandon the "perceptions of endorsement" or "attribution of indoctrination" aspects of Establishment Clause cases. The religion clauses are about coercion, not perceptions. If perception is a problem, then it needs to be a matter of education. It needs to be openly debated in the legislatures. When there is misperception about the government's motives or actions, the solution is to educate. Religious presence should be tolerated, not banished. If anything, the French experience should be instructive enough. Their attempt to eliminate religious presence from public life is causing severe tension and conflict with its growing Islamic population.[365]

Under the spirit of the First Amendment, it is better to favor all religion than to risk discriminating against one or more religions or risk eliminating a religious presence from the nation's public life altogether. It is better to risk the incidental occurrences of some religious proselytizing than to censor religious viewpoints. Moreover, the government should make it easier to exercise religious beliefs than not. Religious freedom is a fundamental right, and religion plays a vital role in society. The burden should be on challengers to prove an impermissible establishment of religion, not on religious practitioners to prove that any establishment has been avoided.

An advantage of the nonpreferential aid approach is that it would end the accommodation conflict and all the disputes over how "religious" an organization is, or whether that organization receives some "advancement" through a government program, or whether public aid might result in the perception of attribution, or whether a religious organization receiving aid is somehow conveying a religious message, or whether the nonreligious recipients of a government program are sufficiently numerous in comparison to the religious recipients.

365. Jim Maceda, *Debate over Religious Symbols Divides France*, NBC NEWS, Feb. 9, 2004, *at* http://www.msnbc.msn.com/id/4106422.