Boston College Law Review

Volume 43
Issue 5 *Shifting Into Neutral? Emerging Perspectives On The Separation Of Church And State*
Article 4

9-1-2002

Of (UN) Equal Jurisprudential Pedigree: Rectifying The Imbalance Between Neutrality and Separationism

Steven K. Green

OF (UN)EQUAL JURISPRUDENTIAL PEDIGREE: RECTIFYING THE IMBALANCE BETWEEN NEUTRALITY AND SEPARATIONISM

STEVEN K. GREEN*

Abstract: The Supreme Court's recent Establishment Clause decisions have framed neutrality and separationism as competing principles. A plurality of the Court views evenhanded neutrality as the superior principle over separationism and the controlling model for Religion Clause adjudication generally. A bare majority insists that the two principles are of equal jurisprudential pedigree. So framed, neutrality and separationism have been placed on an apparent collision course, forcing Supreme Court justices as well as church-state scholars to choose between one principle or the other. This Article proposes an alternative view of the relationship between separationism and neutrality. When viewed within its proper role and function, neutrality serves as an adjunct to separationism, and can only contribute a value consistent with the history and purpose of the religion clauses by existing as a subordinate principle.

INTRODUCTION

The current debate over the guiding principle for Religion Clause adjudication—separationism or neutrality—may be winding down.[1] Recent decisions by the Supreme Court in the Establishment Clause arena have confirmed the importance of evenhanded neutrality for adjudicating the constitutionality of public benefits and access

 Dr. Steven K. Green is Associate Professor of Law at Willamette University College of Law in Salem, Oregon. The title comes from *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 849 (1995) (O'Connor, J., concurring).

[1] According to Professor Esbeck, the debate over the interpretation of "the no-establishment principle has become one of the chief battle sites over who exercises cultural authority in this nation. Quite simply, the Establishment Clause has become where Americans litigate over the meaning of America." Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 3 (1997) (citations omitted).

programs,[2] effectively bringing that clause in line with the approach the Court has taken with Free Exercise matters since 1990.[3] Neutrality has emerged victorious from the doctrinal fray while separationism, which has been on the ropes for two decades, is apparently down for the count.

Separationism, the stalwart of church-state jurisprudence for more than fifty years, was most visible as the standard in parochial school funding and public school prayer cases—prohibiting both activities[4]—and was controlling, at least at the lower court level, on issues involving the public display of religious symbols and the government utilization of religious imagery and functionaries to effectuate government policies and goals.[5] But the impact of separationism was much broader than these obvious categories. Pursuant to the Court's "separationist" holdings, churches and religious organizations were left alone to determine their own beliefs and governance,[6] were accommodated in their practices,[7] and were exempted from taxation and intrusive regulation.[8] In exchange, religion was otherwise excluded from enjoying the benefits of extensive government sponsorship—financial, psychic or otherwise.[9] Equally important, separationism disabled the government from opining on the merits of any religious perspective.[10]

Throughout this period (1947 to 1985), the Court sometimes spoke in neutrality terms too, although commonly as a complement

---

[2] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001). *See generally* Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002); Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203, 234 (1997).

[3] *See generally* Employment Div. v. Smith, 494 U.S. 872 (1990).

[4] Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) (school funding). *See generally* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (school prayer and Bible reading).

[5] *See* Allegheny County v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989); Chabad-Lubavitch v. City of Burlington, 936 F.2d 109 (2d Cir. 1991); Smith v. Albermarle County, 895 F.2d 953 (4th Cir. 1989). *See generally* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

[6] *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 602 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724, 725 (1976).

[7] Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 506 (1979).

[8] *See* Walz v. Tax Comm'n. of N.Y., 397 U.S. 664, 673 (1970). *But see* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990); Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985).

[9] *See* Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985); Stone v. Graham, 449 U.S. 39 (1980); Meek v. Pittenger, 421 U.S. 349 (1975).

[10] *Allegheny County*, 492 U.S. at 573; United States v. Ballard, 322 U.S. 174 (1944).

to separationism and often as an afterthought.[11] In *Everson v. Board of Education*, considered by many to be the archetypal separationist opinion, the majority declared that the government could not exclude "the members of any . . . faith, because of their faith or lack of it, from receiving the benefits of public welfare legislation."[12] That statement, declaring that all individuals were entitled to equal regard by their government, irrespective of their religious belief or nonbelief, was consistent with *Everson*'s no-aid theory in that it distinguished generalized individual benefits from funding programs through which the government purchases or promotes certain goods or services from or through non-government institutions.[13] The Court's later use of neutrality was often discordant, however. Following *Everson*, the high court identified neutrality as a goal in apparently inconsistent rulings, upholding tax exemptions for churches but prohibiting tax credits for tuition at parochial schools.[14] Maintaining "neutrality" was also the rationale for prohibiting school-sponsored prayer and Bible readings but permitting student religious clubs on secondary school campuses.[15] In these earlier cases, however, the Court viewed neutrality as a complement to separationism. In fact, the Court integrated neutrality considerations into its Establishment Clause standard—the *Lemon* test—by asking whether the government acted with the purpose of advancing religion.[16]

One explanation for the Court's uneven approach to neutrality is that the concept is difficult to define. Neutrality is "a coat of many colors," the second Justice Harlan once remarked, and the concept is

---

[11] *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788, 792–93 (1973) ("pursue a course of neutrality toward religion"); *Walz*, 397 U.S. at 669–70 (referring to a position of "benevolent neutrality" that "derives from an accommodation of the Establishment and Free Exercise Clauses."); *Abington Sch. Dist.*, 374 U.S. at 251, 222 ("wholesome 'neutrality'").

[12] 330 U.S. 1, 16 (1947). Justice Black, the author of *Everson*, would later dissent from the Court's 1968 decision upholding the provision of secular textbooks to public and parochial schools, arguing that neutrality had its limits, especially where it resulted in state finances "actively and directly assist[ing] the teaching and propagation of sectarian religious viewpoints"). *See* Bd. of Educ. v. Allen, 392 U.S. 236, 253 (1968) (Black, J., dissenting).

[13] *See Nyquist*, 413 U.S. at 781–82 (distinguishing generalized benefits from aid to religious institutions); *Allen*, 392 U.S. at 243–44 (same).

[14] *Nyquist*, 413 U.S. at 788 (declaring that "our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion."); *Walz*, 397 U.S. at 669 (referring to a regime of "benevolent neutrality").

[15] Bd. of Educ. v. Mergens, 496 U.S. 226, 248 (1990); *Abington Sch. Dist.*, 374 U.S. at 223.

[16] *See Lemon*, 403 U.S. at 622–23.

open to many interpretations.[17] The Court has used the term to represent quite distinct concepts—as a median between being pro- and anti-religious,[18] as a synonym for "secular," and as a form of evenhanded treatment—but most often in a conclusory manner.[19] One need only peruse the multiple opinions in *Mitchell v. Helms*, all offering divergent views of neutrality, to appreciate the confusion and division that exists over this concept.[20] The scholarly literature on the subject has been equally diverse; some commentators assert that neutrality is the complement to non-advancement while others claim it is its antithesis.[21] As Professor Douglas Laycock has observed, we can "agree on the principle of neutrality without having agreed on anything at all."[22]

Beginning in the mid-1980s, a more "coherent" notion of neutrality began to emerge from the Court—or at least from its more conservative members.[23] This version of neutrality, of *evenhanded treatment* of religious entities under generally applicable laws, has come to be viewed as the counterpoise to the separationist "non-

---

[17] *Allen*, 392 U.S. at 249 (Harlan, J., concurring).

[18] *See* Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968) ("Government in our democracy . . . must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of nonreligion; and it many not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and religion and nonreligion.").

[19] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8–9 (1993) (evenhanded); Mueller v. Allen, 463 U.S. 388, 401 (1983) (evenhanded); *Meek*, 421 U.S. at 372 (secular); Tilton v. Richardson, 403 U.S. 672, 677 (1971) (median); *Allen*, 392 U.S. at 245 (secular); *Everson*, 330 U.S. at 18 (median). See Justice Souter's discussion in *Mitchell*, 530 U.S. at 878–84.

[20] *See Mitchell*, 530 U.S. at 836–41 (O'Connor, J., concurring); *id.* at 877–85 (Souter, J., dissenting).

[21] *Compare* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997) [hereinafter *Underlying Unity*], *with* Esbeck, *supra* note 1, at 4. *See generally* Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of 'Neutrality Theory' and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243 (1999); 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 (2000); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) [hereinafter *Formal, Substantive, and Disaggregated Neutrality*]; Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146 (1986); Dhananhai Shivakumar, *Neutrality and the Religion Clauses*, 33 HARV. C.R.-C.L. L. REV. 505 (1998); Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243 (1996); John T. Valauri, *The Concept of Neutrality in Establishment Clause Jurisprudence*, 48 U. PITTS. L. REV. 83 (1986).

[22] *Formal, Substantive, and Disaggregated Neutrality*, *supra* note 21, at 994.

[23] *See* Bowen v. Kendrick, 487 U.S. 589, 608–09 (1988); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 490–91 (1986) (Powell, J., concurring); *Mueller*, 463 U.S. at 398–99.

advancement" position in Establishment Clause jurisprudence.[24] In *Widmar v. Vincent* (1981) and *Board of Education v. Mergens* (1990), both involving religious group use of public educational facilities, the Court looked to the general access allowed under the programs and used their neutrality to diffuse Establishment Clause concerns.[25] The same rationale appeared last term when the Court upheld a religious group's use of elementary school classrooms immediately following the school day, with the equal availability of access negating impressionability concerns.[26]

The Court took neutrality to the next level in a series of educational benefits cases by apparently elevating it to the status of a free-standing constitutional/adjudicatory principle.[27] "[S]tate programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate [the Establishment Clause]," Justice Powell boldly asserted in 1986.[28] But it was in *Rosenberger v. Rector & Visitors of University of Virginia* that the Court made the central role of neutrality most clear.[29] There, the Court highlighted neutrality as the justification for permitting funding of a religious magazine while simultaneously providing little discussion of its earlier separationist holdings to the contrary.[30] "The guarantee of neutrality is respected, and not offended," Justice Kennedy wrote, "when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[31]

More recently, in *Mitchell*, Justice Thomas declared that, pursuant to the principle of neutrality, "if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose,

---

[24] Of course, the neutrality theory has had an even greater impact in the Free Exercise context with the 1990 decision of *Employment Division v. Smith*, 494 U.S. 872, a decision generally deplored by separationists and accommodationists alike. For a discussion of its relevance in this context, see text accompanying notes 139–144.

[25] *See Mergens*, 496 U.S. 226; Widmar v. Vincent, 450 U.S. 909 (1981).

[26] *See Good News Club*, 533 U.S. at 114.

[27] *See generally Zobrest*, 509 U.S. at 8; *Witters*, 474 U.S. 481 at 490–91 (Powell, J., concurring); *Mueller*, 463 U.S. at 398–99.

[28] *Witters*, 474 U.S. at 490–91 (Powell, J., concurring).

[29] 515 U.S. at 859.

[30] *Id.* at 839.

[31] *Id.* Justice Kennedy did limit the reach of the neutrality principle by implying a different resolution had the Court confronted a case "where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity." *Id.* at 842.

then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose."[32] These decisions all indicate a growing view that evenhanded neutrality is not merely one element in the Court's analysis but is becoming the sole determining factor. This trend has led Justice O'Connor to criticize the plurality's reliance on neutrality, calling their formula "a rule of unprecedented breadth," one that comes close "to assigning that factor singular importance in the future adjudication of Establishment Clause challenges."[33] Yet, despite her criticism of the plurality's approach,[34] O'Connor agrees that "neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges."[35]

Although opinions differ as to the meaning of neutrality or its dispositiveness, there can be no doubt that the principle now commands the Court's Religion Clause jurisprudence. A plurality of the Court views evenhanded neutrality as the superior principle over separationism and the controlling model for Religion Clause adjudication generally.[36] The remainder of the justices view neutrality as an important and sometimes indispensable principle—a prerequisite for the constitutionality of many programs—although not serving as the sole consideration.[37] As Justice O'Connor remarked in *Rosenberger*, neutrality toward religion is of "equal historical and jurisprudential pedigree" with the principle of separation.[38] Paralleling the scholarly debate, therefore, division on the Court apparently turns on whether neutrality is supreme and dispositive for resolving religion clause disputes or whether it merely has equivalent value and status with separationism when adjudicating such controversies.

This article proposes a third view of the relationship between separationism and neutrality. Rather than being principles of "equal historical and jurisprudential pedigree,"[39] neutrality and separation-

---

[32] 530 U.S. at 810 (Thomas, J., plurality opinion).

[33] *Id.* at 837 (O'Connor, J., concurring).

[34] According to Justice O'Connor, the Court's earlier holdings touting the importance of neutrality "provide no precedent for the use of public funds to finance religious activities." *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring); *accord Zelman*, 122 S. Ct. at 2476 (O'Connor, J., concurring).

[35] *Mitchell*, 530 U.S. at 838 (O'Connor, J., concurring).

[36] *See id.* at 809–14.

[37] *Zelman*, 122 S. Ct. at 2476 (O'Connor, J., concurring); *Mitchell*, 530 U.S. at 838 (O'Connor, J., concurring); *id.* at 883-84 (Souter, J., dissenting).

[38] *Rosenberger*, 515 U.S. at 849 (O'Connor, J., concurring).

[39] *Id.* (O'Connor, J., concurring).

ism are not of equal weight or value. Instead, when viewed within its proper role and function, neutrality serves as an adjunct to separationism, and can only contribute a value consistent with the history and purposes of the religion clauses by existing as a subordinate principle. The Court and scholars have thus erred in elevating neutrality to an equipoise with separationism.

This Article begins by considering the purposes and role of separationism, a principle that has generally been short-changed by contemporary scholars.[40] It then briefly examines the historical treatment of religion by government for consistency with the principle of neutrality.[41] Part III argues that, based on the history and a purpose of the religion clauses, neutrality is an inadequate organizing principle for First Amendment jurisprudence—that, at best, it fulfills a supportive function.[42] The Article concludes by offering a framework under which neutrality is applied in a manner that is not only consistent with separationism but also supportive of it.[43]

I. Defining Separationism

The impending demise of separationism, and the concomitant ascension of neutrality, has been the subject of scholarly examination for several years. As far back as 1994, leading church-state scholar Ira Lupu—no fan of permissive accommodation of religion[44]—proposed that we were witnessing the "Lingering Death of Separationism."[45] In Professor Lupu's view, the separationist approach relies on an outdated world view based on a foregone Protestant hegemony—a perspective that is out of touch with contemporary conflicts facing the Court and at tension with claims of equality and neutrality toward religion.[46] Professor Lupu's understanding of the separationist perspec-

---

[40] *See infra* notes 44–92 and accompanying text.

[41] *See infra* notes 93–130 and accompanying text.

[42] *See infra* notes 131–144 and accompanying text.

[43] *See infra* notes 145–157 and accompanying text.

[44] *See generally* Ira C. Lupu, *The Trouble with Accommodation*, 60 Geo. Wash. L. Rev. 743 (1992); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. Pa. L. Rev. 555 (1991).

[45] Ira C. Lupu, *The Lingering Death of Separationism*, 62 Geo. Wash. L. Rev. 230, 230 (1994).

[46] *See id.* at 231, 249. Professor Lupu has adhered to his view of separationism as an anachronism in his more recent scholarship. *See generally* Ira C. Lupu & Robert Tuttle, *Giannella Lecture: The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 Vill. L. Rev. 37 (2002); Ira C. Lupu, *To Control Faction and Protest Liberty: A General Theory of the Religion Clauses*, 7 J. Contemp. Legal Issues 357 (1996).

tive is decidedly cramped, however, with him describing separationism as "a doctrine of secular privilege at its heart," under which "the public arena is for secular argument only."[47] Indeed, "[t]he separationist premise of thoroughly privatized religion is symbolically threatened even if sectarian forces merely occupy private space."[48] While not all separationist-leaning scholars are ready to surrender the perspective, many share Professor Lupu's constricted view of separationism.[49]

Professor Lupu's ambivalence toward separationism[50] pales, however, when compared to the vitriol directed at the perspective by several other scholars. Critics have accused the separationist approach of promoting discrimination against religious institutions, of marginalizing religious perspectives and approaches to normative issues, and otherwise creating a climate of hostility towards religion.[51] Others, including members of the Court, have questioned the historical basis for separationism or attempted to taint it with an earlier anti-Catholic bias.[52] By emphasizing the more visible aspects of separationism, these views have given short-shrift to the "spacious conception" of the principle as well as its historical understanding and purposes.[53]

The theory of separationism, though central to the Court's jurisprudence for at least forty years, has always lacked a coherent definition. At its most basic level, separationism means the singling out of religion for distinctive treatment. Perhaps the most familiar and expansive statement of the principle appears in *Everson v. Board of Education*, where Justice Black declared that the government may not

---

[47] Lupu, *supra* note 45, at 249.

[48] *Id.* at 250.

[49] *See generally* Stephen G. Gey, *Why is Religion Special? Reconsidering the Accommodation of Religion Under Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473 (1996); Kathleen M. Sullivan, *Exchange; Religious Participation in Public Programs: Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

[50] In fairness to Professor Lupu, he sees a continuing, important role for separationism in Establishment Clause jurisprudence. *See* Lupu, *supra* note 46, at 370–71 (arguing that the separationist approach should control in the areas of government speech, government-controlled programs such as public schools and disputes over church property and doctrine).

[51] *See* STEPHEN V. MONSMA, POSITIVE NEUTRALITY 68–73 (1993); Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 289–91 (1999); Esbeck, *supra* note 1, at 6–20.

[52] *See* Mitchell v. Helms, 530 U.S. 828–29 (2000); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 852–63 (1995) (Thomas, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 8, 11–15, 17 (1982).

[53] *See* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) (Frankfurter, J., concurring).

"pass laws which aid one religion, aid all religions, . . . prefer one religion over another . . . [nor] force [or] influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion."[54] As is evident from the passage, this view of separationism encompassed more than merely prohibiting state financial aid to religious institutions; this view embraces what I would term "non-impact" principles: lessening government impact on and interference with religious institutions and religious decision making.[55]

This aspect to separationism, however, was overshadowed by what became Black's sound-bite for the concept:

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[56]

The controlling significance of this phrase was only bolstered by the dissenters who, in chastising the majority for its inconsistent holding, added that the Constitution required a "complete," "uncompromising," and "permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[57] Later refinements of this view of separationism were expressed as prohibiting "sponsorship, financial support, [or] active involvement of the sovereign in religious activity."[58] Though the Court occasionally abjured the apparent absolutism of *Everson* by inserting modifiers such as "benevolent,"[59] it always re-

---

[54] Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

[55] *Everson* contains additional statements of the same tenor: "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*." *Id.* at 16.

[56] *Id.* at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1890)).

[57] *Id.* at 19 (Jackson, J., dissenting); *id.* 31–32 (Rutledge, J., dissenting).

[58] Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668 (1970).

[59] *Id.* at 669. "No perfect or absolute separation is really possible." *Id.* at 670; *accord* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (noting that the Court's holdings "do not call for total separation between church and state; total separation is not possible in an absolute sense. . . . [T]he line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.").

turned to Black's "no-aid" statement as representing the heart of separationism well into the 1980s.[60]

The problem with the *Everson* image of separationism was that it was a mirage—it never existed, neither in *Everson* nor even in the later funding cases. During the high-water years of separationism, 1970–1978, the Court continued to qualify its rhetoric while permitting limited forms of public aid to religious institutions, much to the chagrin of separationist groups such as the ACLU, Americans United for Separation of Church and State and PEARL. Tax exemptions for churches—despite their acknowledged subsidy effect—construction and program grants for religious colleges, and numerous forms of public aid to parochial schools passed under—or more correctly, through—the separationist radar screen.[61] Even in *Lemon v. Kurtzman*, a holding that memorialized the separationist standard into a three-part test, the Court equivocated by insisting that "total separation" was not possible and the wall of separation was at best a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[62]

This is not to suggest that the no-aid principle is inconsequential as a value. On the contrary, the no-aid principle rightly defines the core of separationism by reinforcing many of the values that both tradition and experience have demonstrated as crucial to the Republic. Public funding of religious worship and education is inherently coercive of freedom of conscience, inevitably inequitable in its results, corrosive in its effect on its recipients, and ultimately leads to religious dissension.[63] Justice Souter has summed up the principle thus: "Using public funds for the direct subsidization of preaching the word

---

[60] *See* Allegheny County v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 381, 393 (1985).

[61] *See* Comm. for Pub. Educ. v. Regan, 444 U.S. 646 (1980); Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Bd. of Pub. Works, 426 U.S. 736 (1976); Tilton v. Richardson, 403 U.S. 672, 679 (1971); *Walz*, 397 U.S. at 675-76.

[62] *Lemon*, 403 U.S. at 614.

[63] *See* Thomas Jefferson, *Jefferson's Act for Establishing Religious Freedom (1786)*, *in* 2 CHURCH AND STATE IN AMERICAN HISTORY 73 (John Wilson & Donald L. Drakeman eds., 1987) ("[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical . . . it tends also to corrupt the principles of that very religion it is meant to encourage."); James Madison, *Memorial and Remonstrance (1785)*, *in* 2 CHURCH AND STATE IN AMERICAN HISTORY, *supra*, at 69 ("the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."); *see also Rosenberger*, 515 U.S. at 869–72 (Souter, J., dissenting).

is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar [such] use of public money."[64]

Despite its centrality to separationism, the no-aid principle has never represented more than the concept's most visible core. The Court has identified a multiplicity of values furthered by separationism. First and foremost, separationism has at its base the protection of religious liberty through the prevention of government interference with religious belief, practice, or doctrine.[65] This impulse has had two strains, the first to protect individual liberty against government coercion and the second to protect the autonomy and independence of religious bodies. The Framers identified both as fruits from the tree of separation. The legacy of official use of religion as a tool of oppression was familiar to the Framers. "Who does not see," wrote James Madison, "that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects."[66] The Framers' concern with coercion did not end with religious assessments. Madison and Thomas Jefferson believed that the power to prescribe any religious exercise, whether by mandate, suggestion or example, was inherently coercive. Religion "can be directed only by reason or conviction, not by force or violence," Madison wrote.[67] Jefferson insisted that to require a person to support even his own faith was "sinful and tyrannical" and deprived him of his "comfortable liberty."[68]

Of only slightly lesser concern for these Framers was the corrosive effect of government on religious institutions. Establishments "tend[ed] also to corrupt the principles of that very religion it is intended to encourage,"[69] and led to "an unhallowed perversion of the means of salvation."[70] Jefferson viewed separation as thus forbidding

---

[64] *Rosenberger*, 515 U.S. at 868 (Souter, J., dissenting).

[65] *See generally* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

[66] Madison, *supra* note 63, at 69.

[67] *Id.* at 68–69.

[68] Jefferson, *supra* note 63, at 73.

[69] Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), *in* 2 CHURCH AND STATE IN AMERICAN HISTORY, *supra* note 63, at 79.

[70] Madison, *supra* note 63, at 70.

the government from "intermeddling with religious institutions, their doctrines, discipline or exercises."[71]

Based on this impulse, it should not be surprising that some of the earliest references to separation appeared in those cases considering judicial review of church doctrine and polity.[72] That principle was summed up in *Kedroff v. Saint Nicholas Cathedral* where the Court identified "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[73] Although the basis for the Court's church-doctrine cases may rest in the Free Exercise Clause,[74] the principle of non-interference emanates from the Establishment Clause as well.[75] On one level, this concern can be termed as non-entanglement, but limiting the concept to entanglement would be shortsighted; disengagement is more accurate. As Professor Laycock has concluded, "separation is and has always been a means of maximizing religious liberty [and] of minimizing government interference with religion."[76]

Madison and Jefferson's interest in preserving religious exercise and church autonomy went beyond protecting religious liberty to more pragmatic concerns that had immediate benefits to the new government. On the one hand, the Framers believed that faith could only be realized if achieved voluntarily, without encouragement by

---

[71] Letter from Thomas Jefferson to Rev. Samuel Miller, *supra* note 69, at 79 ("I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its disciplines, or its doctrines . . . .").

[72] *See* Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 114 (1952); *Reynolds*, 98 U.S. at 164 (1878); Watson v. Jones, 13 Wall. 679, 728–29 (1871).

[73] *Kedroff*, 344 U.S. at 116.

[74] Presbyterian Church in the United States v. Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449, 450 (1969); *Kedroff*, 344 U.S. at 107, 108.

[75] Jones v. Wolf, 443 U.S. 595, 602 (1979); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 501 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976); *Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 449 (all relying on the First Amendment and non-entanglement).

[76] *Underlying Unity*, *supra* note 21, at 46. To be sure, in its more recent church dispute cases the Court ruled that, where possible, courts should apply "neutral principles of law" to resolve intra-church controversies. *See Jones*, 443 U.S. at 602–03. Still, the Court applied the neutral principles approach in a manner that recognized and protected the distinctiveness of religious entities: "the neutral principles [of law] approach . . . promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id.*

temporal powers.[77] On the other hand, they recognized that the perpetuation of the new Republic would depend in part on the virtue of its citizens.[78] While men would never become angels, thus necessitating structural checks and limitations on the accumulation of power,[79] virtue was no less indispensable. For government to take full or even primary responsibility for ensuring virtue, however, would risk advancing or favoring particular religious viewpoints over others and invite religious dissension.[80] In addition, history had demonstrated that government-promoted religions were inevitably corrupt and lacked the purity upon which virtue depended.[81] Thus religion, rather than government, would be the primary vehicle for instilling virtue.[82] Yet, for religion to be able to provide this necessary function, it needed to be independent from government.[83] As a result, the impulse for protecting religious exercise was as pragmatic as it was altruistic and focused in no small degree on the benefits that flowed to republican society, as much as on the benefits to religion itself. A corrupted religion could not provide the purity of virtue on which the nation depended.

This is where the analysis of some scholars falls short. Separationism does not covet a "thoroughly privatized religion" but instead needs a vibrant religious culture to ensure its vision of a secular Republic.[84] A non-corrupted religious community—able to promote virtue and religious values—acts as a surrogate for the government, freeing it of responsibility to perform those duties itself. At the same time, a vibrant religious culture releases pressure on the government to act religiously, serving as an escape valve against those who insist on a visible degree of religious expression in society. If the secular ideal is the preferred model and closest to the Framers' intent, as I believe it

---

[77] Letter from James Madison to Jasper Adams (1833), *in* 2 CHURCH AND STATE IN AMERICAN HISTORY, *supra* note 63, at 80.

[78] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 425–29 (1998).

[79] *See* THE FEDERALIST NOS. 10, 51 (James Madison).

[80] Madison, *supra* note 63, at 69, 71.

[81] *Id.* at 70 ("[E]clesiastical establishments, instead of maintaining the purity and efficacy of religion, have had a contrary operation."); Letter from James Madison to Edward Livingston (Jul. 10, 1822), *in* JAMES MADISON ON RELIGIOUS LIBERTY 82–83 (Robert S. Alley, ed., 1985) (asserting that "Religion flourishes in greater purity, without than with the aid of [government].")

[82] WOOD, *supra* note 78, at 425–29.

[83] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1416 (1990).

[84] *See* Lupu, *supra* note 45, at 250.

is, then religion must be protected from government corruption and influence in order for it to perform its essential functions. It is this impulse, and not paternalism, that underlies the separationist argument that religion must be protected from the corrupting effect of government funding. Government has an important self-interest irrespective of whether religion is willing to "take the shackles with the shekels."

The values advanced by separation do not end with the prevention of coercion and the protection of religious liberty, purity, and autonomy. As the above discussion demonstrates, other important values are advanced by separationism: ensuring religious and secular equality, preventing the accumulation of power by one religion or a union of religions and any alignment thereof with government, alleviating dissension among religions through competition for benefits or favoritism, and protecting the legitimacy and integrity of both government and religion.[85] Of arguably greater concern for James Madison than protecting religious exercise was his aversion to religious majorities and the deleterious effect that they had on both civil liberties and government.[86] Madison saw a value in religious equality beyond simply protecting the liberty interests of religious minorities.[87] In his *Memorial and Remonstrance*, Madison identified the value of a society based on "equal conditions," with people retaining "*equal* title to the free exercise of Religion according to the dictates of Conscience."[88]

---

[85] Brownstein, *supra* note 21, at 256–67 ("Equality and freedom of speech interests are simply too essential a part of the constitutional framework relating to religion to be dismissed as irrelevant or secondary."); Lupu, *supra* note 46, at 360 (discussing "the Religion Clauses' other animating concerns—to protect religious equality and to control religious factionalism . . . ."); Sullivan, *supra* note 49, at 197–99.

[86] Federalist 51 states this concern most clearly: "In a free government, the security for civil rights must be the same as for religious rights. It consists in one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects." THE FEDERALIST PAPERS 324 (Rossiter ed., 1961).

[87] In a letter to Thomas Jefferson during the fight over ratification of the Constitution, Madison warned that "[i]n our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense or its constituents, but from acts in which the Government is the mere instrumentality of the major number of the constituents." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826, at 1:564 (James Morton Smith ed., 1995). This statement follows immediately on an extended discussion about the need for a bill of rights to prevent religious tests and establishments. *Id.*

[88] *Memorial and Remonstrance*, *in* JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 81, at 57.

Responding to those who saw religious liberty as the sole value of the religion clauses, Madison countered that "[w]hilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."[89] Complementing Madison's concern for equal conditions was his aversion to a consolidation of religious groups. Madison maintained that liberty and republican government would be furthered through "the multiplicity of sects."[90] The converse to consolidation was the threat of competition, dissension and strife among religious bodies, something the Framers had witnessed firsthand. Preventing government support of religion, even where attempted on an evenhanded basis, would diffuse these potentially destructive forces.[91] Finally, Madison viewed the religion clauses as ensuring the integrity of both government and religion, writing that religious establishments produce a "spiritual tyranny on the ruins of Civil authority," while they undermine the "purity and efficacy of Religion."[92]

Separationism therefore encompasses much more than a rule against aiding or supporting religious enterprises. Separationism protects religious liberty and the autonomy of religious institutions, ensures that government will not impact religious choices, guarantees religious equality and equal treatment of religion, prevents factional strife and the accumulation of power by religion, and finally protects the integrity of religion and secular government. As can be seen, evenhanded treatment of religion represents only one aspect of the myriad values that inform the spacious concept of separationism.

---

[89] *Id.* The theme of religious equality as distinct from religious liberty runs throughout the Memorial. *See id.* at 56 (expressing concern that "the majority may trespass on the rights of the minority"); *id.* at 58 (declaring that a "just Government" must protect "every Citizen in the enjoyment of his Religion with the same equal hand ...."); *id.* at 59–60 (reaffirming the "'equal right of every citizen to the free exercise of his Religion according to the dictates of conscience'").

[90] *See* FEDERALIST NOS. 10, 51 (James Madison).

[91] *See Lemon*, 403 U.S. at 622 (noting that "political division along religious lines was one of the principle evils which the First Amendment was intended to protect."); FEDERALIST NO. 10 (James Madison); *Memorial and Remonstrance, supra* note 88, at 58–59; *see also* Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 832 (1999); Lupu, *supra* note 46, at 357.

[92] *See Memorial and Remonstrance, supra* note 88, at 58; *see also Detached Memoranda, in* JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 81, at 90 (describing the constitutional "separation between Religion & Govt" as "[s]trongly guard[ing] ... [against] the danger of encroachments by Ecclesiastical Bodies").

II. The Distinctive Treatment of Religion

Separationism, at its most basic level, presumes that government should, and at times, must, treat religion distinctively. Conversely, evenhanded neutrality toward religion requires that government treat religious entities and individuals the same as non-religious entities with respect to participation in government programs and the disbursement of government benefits.[93] Underlying neutrality theory therefore is the assumption that religion is no different from other theories, philosophies or motivations. As Professor Daniel Conkle has termed it, evenhanded neutrality "belie[s] the claim that religion is distinct and distinctly important."[94]

One would expect, however, that for such a theory to command favor among a majority of the Court, it would find basis in our historical understanding and legal treatment of religion. Yet, in stark contrast to the notion of separationism, government neutrality toward religion is ahistorical. Indeed, the Framers viewed religion as distinct and distinctly important, and thus deserving of special treatment and protection.[95] The historical and legal record from the founding period through the nineteenth century indicates that treating religion equally or similarly to its non-religious counterparts was a foreign notion.

The Framers did not view religion as simply another philosophical or ideological system. According to Madison, religion in particular was "exempt from [the] cognizance" of civil government.[96] Each person was bound to render homage to "the Creator . . . as he believes to be acceptable to him; this duty is precedent, both in order of time and in degree of obligation, to the claims of civil society."[97] The Framers universally recognized and accepted religion's unique character and position in the new nation.[98] All of the original states, including those that abolished religious assessments for the support of church establishments, maintained laws that preferred religion generally or

---

[93] *See* Mitchell v. Helms, 530 U.S. 793, 809–10 (2000).

[94] Conkle, *supra* note 21, at 2.

[95] *See id. See generally* Lupu & Tuttle, *supra* note 46, at 38; McConnell, *supra* note 83, at 1415.

[96] Letter from James Madison to Edward Everett (Mar. 19, 1823), *in* James Madison on Religious Liberty, *supra* note 81, at 84.

[97] *Memorial and Remonstrance*, *supra* note 88, at 56.

[98] *See* City of Boerne v. Flores, 521 U.S. 507, 563 (O'Connor, J., dissenting) ("Foremost, these early leaders accorded religious exercise a special status."). *See generally* Edwin S. Gaustad, Faith of Our Fathers: Religion and the New Nation (1987).

Christianity in particular, and afforded religion and religiously-based obligations special treatment.[99] A majority of state constitutions expressly referred to the importance of religion or piety in maintaining civic virtue, while those of Massachusetts, Connecticut, New Hampshire, Vermont, Maryland, South Carolina and Georgia provided for financial support of Christian ministers through multiple religious establishments.[100] The New Hampshire Constitution of 1784 provided that:

> [M]orality and piety, rightly grounded on evangelical principles, will give the best and greatest security to the government, and will lay in the hearts of men the strongest obligations to due subjection; and. . .the knowledge of these, is most likely to be propagated through a society by the institution of public worship of the Deity, and public instruction in morality and religion.[101]

More common in the early constitutions were provisions requiring religious (usually Protestant) belief for public office-holding and religious oaths for jury duty, court testimony and other legal transactions.[102] Several states also barred clergy from public office-holding or serving in their legislatures.[103] Conversely, state laws provided protection for religious worship from outside annoyance or interference. Finally, all states retained or reenacted laws regulating conduct according to a Christian standard: Sabbath desecration, blasphemy, profane swearing, fornication and bastardy.[104]

---

[99] THOMAS J. CURRY, THE FIRST FREEDOMS 134–92 (1986); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 25–62 (1986).

[100] LEVY, *supra* note 99, at 25–62. Although the constitutions of Maryland, South Carolina and Georgia allowed for multiple establishments, none of those states enacted authorizing legislation. *Id.* at 47. All three states rescinded such authority in later constitutions. THE FEDERAL AND STATE CONSTITUTIONS 800–01, 1702, 3264 (Francis Newton Thorpe ed., 1909).

[101] N.H. CONST. of 1784, art. VI, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 100, at 2454.

[102] *See* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 13–44 (Neil H. Cogan ed., 1997).

[103] DEL. CONST. of 1776, art. 29; GA. CONST. of 1789, art. I, § 18; N.Y. CONST. of 1777, art. 39; S.C. CONST. of 1778, art. 21.

[104] Religious tests: Delaware, Massachusetts, New Jersey, North Carolina, Pennsylvania, South Carolina; Free exercise restrictions on non-Protestants or non-Christians: Maryland, New Hampshire, New Jersey, Pennsylvania, South Carolina; Clergy disqualifications: Delaware, Georgia, New York, South Carolina. THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 100, *passim*; GAUSTAD, *supra* note 98, at 161–74.

Beyond merely distinguishing religion in their laws, states frequently exempted churches and religiously motivated conduct from the strictures of generally applicable laws. Religious exemptions from the taking of oaths or serving in the military were common.[105] As Professor Michael McConnell has demonstrated, the language of many state constitutions protected religious belief and practice to the extent that those actions did not rise to "civil injury or outward disturbance of others."[106] Such language confirms the expectation that some religiously motivated actions would be immune from obedience to otherwise neutral laws, until the actions threatened public peace and safety.[107] As Oliver Ellsworth, future Chief Justice of the United States Supreme Court, wrote during the 1787 Connecticut ratifying convention:

> Civil government has no business to meddle with the private opinions of the people. If I demean myself as a good citizen, I am accountable, not to man, but to God, for the religious opinions I embrace . . . . But while I assert the rights of religious liberty, I would not deny that the civil power has a right, in some cases, to interfere in matters of religion. It has the right to prohibit and punish gross immoralities and impieties; because the open practice of these is of evil example and detriment.[108]

Courts similarly found religious exemptions from laws of general application. In the 1813 case of *Guardians of the Poor v. Greene*, the Pennsylvania Supreme Court held that a Methodist minister was exempt from serving as official town guardian, despite him otherwise meeting the qualifications for office and the lack of an express exemption in the law.[109] As a court later in the century noted: "ministers of the various denominations are exempted from the performance of many public duties on account of the sacred character of their vocation, as jury, road and military duty, such as devolves upon the great

---

[105] McConnell, *supra* note 83, at 1467–69.

[106] *Id.* at 1461–62.

[107] *Id.* Although disagreement exists over the extent to which the early states exempted religiously motivated conduct from generally applicable laws, see generally Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992), that debate does not detract from the fact that state constitutions and laws viewed religion and religious entities as distinct from similarly situated conduct and institutions of a secular character.

[108] THE DEBATE ON THE CONSTITUTION 1:524 (Bernard Bailyn ed., 1993).

[109] *See generally* Guardians of the Poor v. Greene, 5 Binn. 554 (Pa. 1813).

body of the citizens."[110] Early legal writers such as Nathan Dane and Joseph Story affirmed the legal distinctiveness of religion and supported laws for the protection and promotion of religious piety.[111] Later treatise writers such as Thomas Cooley and Christopher Tiedeman, while more circumspect about the government's ability to affirmatively promote religion, were no less assertive about the uniqueness of religion and religious institutions under the law.[112]

At the same time that religion was singled out for special treatment, it was commonly denied the opportunity to participate in neutral benefits and programs. As noted, several states disqualified clergy from election to public office.[113] Similarly, in February 1811, President Madison vetoed two congressional bills that would have provided land and financial grants to churches, even though grants to secular counterparts were common.[114] The most notable disqualification of religion in the nineteenth century, however, was the exclusion of Catholic and other parochial schools from receiving public funding under state and local common school funds.[115] While this latter disqualification can be tied in part to nativist and anti-Catholic sentiments,[116] the principle behind excluding religious schools from receiving public dollars predated the rise of Catholic parochial schooling and reflected a prevailing sentiment about the distinctive character of religion.[117]

---

[110] First Methodist Episcopal Church v. City of Atlanta, 76 Ga. 181, 194 (1886).

[111] *See* NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 664–84 (1824); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 698–703 (1833).

[112] THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 580–97 (4th ed. 1878); CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 156–88 (1886).

[113] *See* McDaniel v. Paty, 435 U.S. 618, 625 (1978) (noting that eleven of the thirteen original states disqualified clergy from various types of public office-holding).

[114] *See Veto Messages to Congress February 21 & 28, 1811*, *in* JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 81, at 79–80.

[115] *See* People *ex rel.* Roman Catholic Orphan Asylum Soc. v. Bd. of Educ., 13 Barb. 400 (N.Y.S. 1851); DIANE RAVITCH, THE GREAT SCHOOL WARS 20–76 (1974).

[116] RAY ALLEN BILLINGTON, THE PROTESTANT CRUSADE, 1800–1860, at 1–52 (1938); Vincent P. Lannie, *Alienation in America: The Immigrant Catholic and Public Education in Pre-Civil War America*, 32 REV. OF POL. 503–21 (1970).

[117] WILLIAM OLAND BOURNE, HISTORY OF THE PUBLIC SCHOOL SOCIETY OF NEW YORK 103 (1870); RAVITCH, *supra* note 115, at 20–22. *See generally* Holy Trinity Church v. United States, 143 U.S. 457 (1892); Steven K. Green, *Justice David Josiah Brewer and the 'Christian Nation' Maxim*, 63 ALB. L. REV. 427, 427 (1999).

The nineteenth century attitude about the distinct legal position of religion is aptly summed up in the 1892 Supreme Court case of *Holy Trinity Church v. United States*.[118] There, a prestigious New York City Episcopal church was fined for violating an immigration law after hiring a British cleric as its new rector.[119] In reversing the fine, a unanimous Court held that the statute had been misapplied because Congress had never intended the law to prohibit the hiring of "ministers of the gospel, or, indeed, of any class whose toil is of the brain."[120] Although the Court read an exception into the neutral law that benefitted interests other than religion, the opinion made clear that the statute interfered with the unique status of religion in American society.[121] According to Justice David Brewer, the immigration law could not apply to the minister because America was a "Christian nation" where the law recognized the importance of Christianity and accommodated its practice.[122] Brewer quoted extensively from colonial charters and state constitutional provisions that acknowledged God or recognized Christianity.[123] He also pointed to cases where judges had declared Christianity to be part of the common law.[124] Other evidence of the special legal status was found in the existence of oaths referencing God, the protection of the Sabbath, and the public acknowledgments of Christianity.[125] There was no dissonance in these declarations, Brewer insisted.[126] They "affirm and reaffirm that this is a religious nation."[127] As a result, Congress would not—and could not—pass a law contrary to the pervasive Christian character of the nation. Any law that effectively barred the hiring of a minister of the gospel had no authority.[128] Although judges and scholars would subsequently criticize Brewer's Christian Nation opinion for its jingoistic tenor,[129] it nevertheless represented the prevailing view about the

---

[118] *See* 143 U.S. at 463.

[119] *See id.* at 456–58. The Contract Labor Act of 1885 prohibited the importation of foreigners into the United States under contracts of employment. *See* Act of 1885, ch. 164, 8 U.S.C. § 141 (repealed 1952).

[120] *Holy Trinity*, 143 U.S. at 463.

[121] *See* Green, *supra* note 117, at 445–46.

[122] *See Holy Trinity*, 143 U.S. at 465–72.

[123] *Id.*

[124] *Id.* at 470–71.

[125] *Id.*

[126] *Id.* at 470.

[127] *Holy Trinity*, 143 U.S. at 470.

[128] *Id.* at 470–71.

[129] *See* Lee v. Weisman, 505 U.S. 577, 641 (1992) (referring to *Holy Trinity* as an aberration to the rule prohibiting "government sponsored endorsement of religion."); Lynch v.

special status of religion under the law, one that frequently called for distinctive treatment as against neutral regulations and programs.[130]

III. The Insufficiency of Neutrality

The purposes and values of the religion clauses, supported by the historical record, indicate that evenhanded neutrality is an insufficient principle for the ordering of the Establishment Clause. Simply put, neutrality is incomplete as a constitutional doctrine. First, neutrality has no independent meaning or substantive value. Neutrality is a means to a goal rather than a goal itself. Neutrality must therefore take its meaning from some other source.[131]

The most obvious base-line for neutrality—the one identified by the Court—is that of equality. But equality and neutrality are not equivalent, as equality involves normative questions about the beginning and ending positions of participants, asking whether they are or should be similarly situated. Evenhanded neutrality, in contrast, is concerned only with *similar* treatment, considered in isolation from the starting and ending points.[132] Also, some forms of equality are more compelling than others. Discrimination among religions strikes more deeply at the heart of Establishment Clause values—creating impressions of government favoritism and inviting religious dissension—than distinctions between religion and non-religion.[133] In point of fact, distinctions between religion and non-religion are *consistent* with the language of the First Amendment and its apparent mandate of distinctive treatment of religion.[134] Finally, the equality principle grows in importance the less the government is involved in directing policy outcomes or asserting its own position on issues, such as in an

---

Donnelly, 465 U.S. 668, 717–18 (1984) (Brennan, J., dissenting) (referring to Brewer's declaration as "arrogant[]"); Green, *supra* note 117, at 427–29.

[130] The 1899 case of *Bradfield v. Roberts*, 175 U.S. 291 (1899), is not to the contrary. There, the Court upheld as against an Establishment Clause challenge a public grant to a Catholic hospital for the construction of a medical ward. *Id.* at 299, 300. Contrary to first impression, the Court did not base its holding on the theory that the religious hospital could receive the grant under a neutral program made generally available to religious and non-religious entities alike, but rather that the functions and legal character of the hospital were not religious. *Id.* at 298, 298.

[131] *See Formal, Substantive, and Disaggregated Neutrality*, *supra* note 21, at 998.

[132] *See generally* Brownstein, *supra* note 21, at 257–67; *Formal, Substantive, and Disaggregated Neutrality*, *supra* note 21, at 995–98.

[133] *See* Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

[134] U.S. Const. amend. I.

open forum for private speech.[135] Equality, therefore, can be an aspect of neutrality, but the latter must still look to other values for its substantive meaning.

Accordingly, evenhanded neutrality is incomplete as a constitutional doctrine because it fails to account for the other important values that inform the religion clauses, such as protecting religious liberty and autonomy, ensuring religious (and secular) equality, alleviating religious dissension, and protecting the legitimacy and integrity of both government and religion.[136] A focus on neutrality, however, discounts these values of liberty, equality, diffusion, and government integrity.

To be sure, evenhanded neutrality can be viewed as advancing equality values by removing barriers to religious participation in generally available programs. Neutrality theory provides that individuals and organizations should not be disabled from participating in government benefits programs simply because of their religious character and states its goal as minimizing government influences on private religious choices.[137] Under this theory, the government violates neutrality when it requires religious individuals and organizations "to shed or disguise their religious convictions or character" as the cost of participating in general benefits programs.[138] But as discussed, merely resolving the issue of equal treatment fails to address the remaining concerns of religious dissension and factionalism, government entanglement with religion, or the coercive element inherent in funding programs.

Neutrality theory also aspires to the removal of government constraints on religious liberty.[139] For the purposes of religious exercise, however, the effect of the neutrality mandate has been less than benign. Contrary to its billing, neutrality implies "that religion is virtually an irrelevancy" under the Constitution and, like race, is to be af-

---

[135] *See* Rust v. Sullivan, 500 U.S. 173, 194 (1991). *Compare* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 840 (1995), *with* Nat'l Endowment for the Arts v. Finely, 524 U.S. 569, 587–88 (1978).

[136] Brownstein, *supra* note 21, at 256–67 ("Equality and freedom of speech interests are simply too essential a part of the constitutional framework relating to religion to be dismissed as irrelevant or secondary."); Lupu, *supra* note 46, at 360 (discussing the Religion Clauses' "other animating concerns—to protect religious equality and to control religious factionalism"); Sullivan, *supra* note 49, at 197–99.

[137] *See* Esbeck, *supra* note 1, at 4–5; *Underlying Unity*, *supra* note 21, at 45; *Formal, Substantive, and Disaggregated Neutrality*, *supra* note 21, at 1001.

[138] Esbeck, *supra* note 1, at 21.

[139] MONSMA, *supra* note 51, at 188–89; Esbeck, *supra* note 1, at 4–5

forded protection only in those instances of purposeful discrimination.[140] Religious organizations and claimants are not exempt from neutral laws of general applicability, even if their application has a disproportionate impact on religious practice.[141] Disparate impact of neutral laws thus goes unremedied, regardless of the disquieting affect on religious pluralism and practice. This is the distinct downside to neutrality as the operative principle for the religion clauses. As Professor Alan Brownstein has noted, those who advocate neutrality as the be-all and end-all of religion clause jurisprudence have "traded our constitutional birthright to engage in religious practices free from government interference for the pottage of government subsidies."[142] Granted, the neutrality principle does not bar all special treatment of religion. Justice Scalia, author of *Employment Division v. Smith* and the leading proponent of neutrality theory on the Court, would have allowed the Texas Legislature to exempt religious magazines (and only religious magazines) from state sales taxes as a permissible accommodation of religion.[143] But freedom from regulation via legislative largess provides little security for most religious organizations, particularly those discrete and insular minorities with little access to the political process.[144]

IV. Rectifying the Imbalance Between Separation and Neutrality

So what is the appropriate role for neutrality in Establishment Clause adjudication and under what circumstances is neutrality effective? At the risk of sounding circular, neutrality is an important consideration to the extent that it is not inconsistent with other Establishment Clause values. At the most immediate level, when a controversy raises issues primarily involving religious equality, with few other values implicated, then the neutrality of the program may become dispositive. The most obvious example involves questions of access to government owned speech forums and is represented by the

---

[140] Conkle, *supra* note 21, at 25. *See generally* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[141] *See generally* Employment Div. v. Smith, 494 U.S. 872 (1990).

[142] Alan E. Brownstein, *Constitutional Questions About Charitable Choice*, *in* Welfare Reform and the Role of Faith-Based Organizations 248 (Davis ed., 1999); *see also* Conkle, *supra* note 21, at 25.

[143] Texas Monthly v. Bullock, 489 U.S. 1, 38–39 (1989) (Scalia, J., dissenting).

[144] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

Widmar v. Vincent,[145] *Lambs' Chapel v. Center Moriches Union Free School District*,[146] and *Capitol Square Review & Advisory Board v. Pinette*[147] line of cases. Neither the purpose nor function of a truly open public forum suggests preference for any religious perspective or of religion over non-religion. Neither is the government advancing any policy or goal—other than enhancing free expression—nor seeking to use religious messages for its own purposes. Allowing religious access to such a forum thus is unlikely to create religious dissension or competition, involve government influencing religious choices, threaten the independence or autonomy of religious entities, compromise the integrity of either religion or government, or result in the accumulation of power by religion, short of religion effectively capturing the forum.[148] In such circumstances, the fact that the program is neutral in application should be controlling.[149]

A tax exemption for charitable organizations, including religious entities, as represented in *Walz v. Tax Commission of New York City*,[150] is another example where the scarcity of countervailing Establishment Clause values makes neutrality more compelling. A generally available exemption program, with a potentially unlimited number of participants, is unlikely to be perceived as favoring religion or to create religious dissension or competition.[151] On the contrary, an exception will likely lead to greater autonomy and independence of religious entities, thus ensuring greater separation of the two spheres.[152] Coercion and endorsement concerns are not completely removed but are diffused by the general and indirect nature of the benefit. Neither is it likely that a tax exemption will either create a dependency on government or corrupt religion in exchange for the benefit.[153]

Conversely, the neutrality of a benefit program may not be effective where other Establishment Clause values are more dominant. For example, suppose that the Department of Housing and Urban Devel-

---

[145] 454 U.S. 263 (1981).

[146] 508 U.S. 384 (1993).

[147] 515 U.S. 753 (1995).

[148] *See Capitol Square*, 515 U.S. at 777 (O'Connor, J., concurring).

[149] In contrast, the neutrality of the access program at issue in *Good News Club v. Milford Cent. Sch.* should not have been controlling due to the special nature of public elementary schools with greater potential for appearances of official endorsement and subtle coercion of impressionable school children. *See* 533 U.S. 98, 141–45 (2001) (Souter, J., dissenting).

[150] 397 U.S. 669 (1970).

[151] Texas Monthly v. Bullock, 489 U.S. 1, 14–15 (1989); *Walz*, 397 U.S. at 673.

[152] *Walz*, 597 U.S. at 674–75.

[153] *Id.* at 675–76.

opment (HUD) decides to choose corporate and private partners for a highly publicized housing development project in an urban center. Assume the partners provide limited programmatic and service support for the project while they endorse the project's goals and priorities. HUD uses a competitive process to choose representatives with which to partner: a local bank; a local television or radio station; a fast-food franchise; and a local church. Although the program is neutral and evenhanded, it implicates values that may be unique in the religion clause area, threatening religious factionalism and divisiveness over the selection of one church over others while potentially compromising the church's integrity through its apparent endorsement of HUD priorities and goals. The overall neutrality of the program fails to defuse these concerns.

The neutrality of a program may also be more constitutionally effective when the program involves individuals as opposed to institutions. The Court has often distinguished between the appropriateness of government aid to individuals in contrast to religious entities.[154] *Everson v. Board of Education* established this theme by holding that private individuals could not be excluded "from receiving the benefits of public welfare legislation . . . because of their faith or lack of it."[155] This distinction makes sense as, absent the limited number of individuals who have selected a monastic lifestyle, people of faith are not religious actors in all contexts or for all purposes. They can and do shed their religious identity for a host of interactions and relationships. The neutral provision of benefits to individuals would not normally implicate those religion clause values discussed above. In contrast, churches, synagogues, mosques, temples and other religious institutions never shed their religious identities or purposes. The inclusion of religious institutions in direct grant programs thus implicates Religion Clause values in ways that the inclusion of individuals does not.[156]

As a result, neutrality is less effective and clearly subordinate to separationist values where a law or program risks religious factionalism and dissension through appearances of favoritism or competition for government support or affection. Also, the more that the government is involved in the initiation or operation of a program, and has

---

[154] *Compare* Mueller v. Allen, 463 U.S. 388, 399 (1983), *and* Bd. of Educ. v. Allen, 392 U.S. 236, 244 (1968) (aid to individuals), *with* Bowen v. Kendrick, 487 U.S. 589, 621 (1988), *and* Meek v. Pittenger, 421 U.S. 349, 362–64 (1975) (aid to religious institutions).

[155] 330 U.S. 1, 16 (1947).

[156] For a related discussion, see Lupu & Tuttle, *supra* note 46, at 82.

greater interest in the outcomes or expressions of the program's goals, then the less effective neutrality is in diffusing other Establishment Clause goals.

It is within direct funding situations that neutrality is least effective as a constitutional principle. Under neutrality theory, so long as the government program promotes overall secular goals and its benefits are generally available to religious and non-religious entities alike, then it is irrelevant whether a religious participant uses funds for religious purposes.[157] But direct funding of religious entities as part of a general program including secular participants—such as under Charitable Choice—raises several establishment concerns not answered by neutrality: government attribution of religious messages; government impacting the religious choices of beneficiaries who receive their services via the religious provider; dependency of religious entities on government; the potential of compromise of religious voices to accommodate government policies; and threats to religious autonomy through government regulation. In such circumstances, other Establishment Clause values are dominant and should be dispositive of constitutionality.

Conclusion

The Court's recent Establishment Clause holdings have set up neutrality and separationism as competing principles. So framed, neutrality and separationism have been placed on an apparent collision course, forcing the justices and scholars to choose between one principle or the other. Neutrality appears to be on the assent, though a bare majority insists that the two principles are of equal jurisprudential pedigree. The problem with this typology is that in its attempt to

---

[157] As Esbeck describes it:

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

Esbeck, *supra* note 1, at 37; *see also id.* at 17 n.68 ("The neutrality principle . . . requires only that the Court examine the outcome of the welfare program with an eye to determining whether the public purpose is being served by the social service provider. If so, then the judicial inquiry is at an end, for the government has received full 'secular' value in exchange for taxpayer funds.").

shore-up separationist principles, it concedes that separationism and neutrality are of co-equal value. This Article has argued to the contrary; neutrality—which has no substantive quality and takes its meaning from other values—should be considered an adjunct to separationism. Neutrality should be controlling in Establishment Clause cases only in the absence of countervailing religion clause values. Only when neutrality is viewed in this subordinate role is it consistent with the purposes and values that inform the religion clauses.