THE UNDERLYING UNITY OF SEPARATION
AND NEUTRALITY†

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I. INTRODUCTION

This Article began as an oral comment on Professor Carl Esbeck’s article in this Journal,¹ but it has grown into much more. It also comments on Professor Ira Lupu’s recent article on the death of separationism,² which posits a theoretical model quite similar to Professor Esbeck’s, and it offers a synthesis of the Supreme Court’s cases that is quite different from that of Professors Esbeck and Lupu. They view separation and neutrality as inconsistent theories, with neutrality gradually replacing separation in the Supreme Court’s decisions. I do not believe that the Supreme Court has ever understood separation to be inconsistent with neutrality, although a minority of the Court may have come to see such a conflict in recent cases. I believe that the Supreme Court has thought itself committed to both separation and neutrality, and that separation and neutrality are two aspects of a consistent understanding of religious liberty.

Professor Esbeck posits two fundamentally different theories of religious liberty. He offers the theory of separationism, which he attributes to the Supreme Court and which he describes as dominant.³ He also offers the theory of neutrality, which he attributes to recent religious speech cases, and which he describes as “separationism’s major competitor.”⁴ He says the neutrality theory offers “a theory centered on the unleashing of personal liberty to the

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

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³ Esbeck, supra note 1, at 3.

⁴ Id. at 4.
end that, with minimal governmental interference, individuals make their own religious choices.\textsuperscript{5}

The occasion for Professor Esbeck’s consideration of these two theories is the charitable choice section of the recently enacted welfare bill, the Personal Responsibility and Work Opportunity Act of 1996.\textsuperscript{6} The charitable choice section, which Professor Esbeck helped draft, authorizes states to deliver certain government-funded social services through vouchers or through contracts with private providers,\textsuperscript{7} and requires that states electing either of these options not discriminate against religious providers.\textsuperscript{8} Professor Esbeck tries to make the best possible argument under each of these theories for the constitutionality of this section,\textsuperscript{9} but he believes that it is much easier to make the argument with neutrality theory.\textsuperscript{10}

The ultimate constitutionality of charitable choice will require careful attention to implementation. Beneficiaries of government assistance must have real choices; no one should be forced to accept services from a religious provider. Such forced choices may be difficult to avoid in the real world, where the supply of social services is often insufficient to meet demand. The Act does what it can, short of making larger appropriations. It mandates that any beneficiary of assistance who objects to a religious provider must be offered services of equal value from an accessible alternative provider within a reasonable time,\textsuperscript{11} and that religious providers may not discriminate against any beneficiary on the basis of “religion, a religious belief, or refusal to actively participate in a religious practice.”\textsuperscript{12}

Charitable choice also threatens the independence of the religious organizations that accept government funding. Rust v. Sullivan,\textsuperscript{13} which held that government can specify exactly what it wishes to fund and can require providers to refrain from offering any additional or alternative services, casts

\begin{itemize}
\item\textsuperscript{5} Id.
\item\textsuperscript{7} §104(a)(1).
\item\textsuperscript{8} §104(c).
\item\textsuperscript{9} Esbeck, supra note 1, at 3-4.
\item\textsuperscript{10} See id. at 41 (“For the sake of America’s poor and needy, we can only hope that the Supreme Court’s full embrace of neutrality will come soon.”).
\item\textsuperscript{11} §104(e)(1).
\item\textsuperscript{12} §104(g).
\item\textsuperscript{13} 500 U.S. 173 (1991).
\end{itemize}
doctrinal doubt on constitutional protection for the religious liberty of organizations that accept government contracts. The Act gives statutory protection instead, guaranteeing that a religious provider that accepts government funds under the Act "shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs,"14 that it need not alter its form of internal governance nor remove religious symbols from its facilities,15 and that it remains entitled to the Title VII exemption that authorizes religious organizations to hire on the basis of religion.16 These protections are needed. Stephen Monsma's recent study17 reports that a significant minority of religious social service organizations that have accepted government funds have experienced conflicts with government over their respective religious missions.

These issues of implementation are important, both practically and constitutionally, but they are not the focus of either Professor Esbeck's article or mine. At this point, we are considering underlying concepts rather than implementation. Professor Esbeck posits competing theories of religious liberty and asks which of these theories would permit government funding of secular services delivered by religious providers. I am more interested in how the competing theories relate to each other.

Indeed, I agree with almost everything Professor Esbeck says except the way he structures and labels his theories. I agree with his claim that charitable choice is constitutional in most of its applications. I agree that the Supreme Court has brought two conflicting theories to the Establishment Clause. And I agree that the way to resolve the conflict between these theories is to recognize that an underlying purpose of religious liberty is to minimize government influence on religious choices.18 I have called this underlying purpose "substantive neutrality,"19 and I am pleased to have Professor Esbeck

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14 § 104(d)(1).
15 § 104(d)(2).
18 Esbeck, supra note 1, at 25-26.
and Professor Monsma\textsuperscript{20} endorse that standard, even if we have not yet entirely agreed on terminology.

II. TWO WAYS OF THINKING ABOUT TWO THEORIES

Professor Esbeck’s labels for the two conflicting theories in the Supreme Court are “separationism” and “neutrality.” I think that these are the wrong labels, and that it is both a theoretical and tactical mistake to contrast these labels so sharply. To frame the universe of possibilities in this way is to make the Court’s doctrine seem more hostile than it is to Professor Esbeck’s substantive position. It concedes the rhetorical benefits of the separationist label to those who do indeed believe that separation requires discrimination against religion; it suggests that neutrality requires repudiation of the separation of church and state. Neither the Court nor the American people are likely to accept such a repudiation, nor should they. Separation has important benefits that neither Professor Esbeck nor I are willing to abandon.

The central meaning of separation is to separate the authority of the church from the authority of the state,\textsuperscript{21} so that “no religion can invoke government’s coercive power and no government can coerce any religious act or belief.”\textsuperscript{22} This separation is essential to the religious liberty of the numerically dominant faith, if any, and to the religious liberty of dissenters and nonbelievers.

I believe that the Court’s view of separation is similar, although less fully articulated. In the Court’s view, separation is and always has been a means of maximizing religious liberty, of minimizing government interference with religion, and thus, of implementing neutrality among faiths and between faith and disbelief. The Court may have been mistaken in some of its applications of separation, but it has never said that separation was fundamentally distinct from neutrality or religious choice.

My disagreement with Professor Esbeck is also a disagreement with Professor Lupu, who has offered a similar analysis of how neutrality is replacing

\textsuperscript{20} See Monsma, \textit{supra} note 17, at 111-14, 143 n.2, 177-89, 197-98 n.10 (proposing a standard of “positive neutrality,” which he and I agree is very similar to what I have called substantive neutrality).

\textsuperscript{21} For a statement of this view in historical context, see Douglas Laycock, \textit{Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century}, 80 MINN. L. REV. 1047, 1094 (1996).

separation as the core concept of religious liberty. In Professor Lupu’s view, “separationism has a doctrine of secular privilege at its heart; the public arena is for secular argument only.” The separationist premise of thoroughly privatized religion is symbolically threatened even if sectarian forces merely occupy public space. There are advocates, and even Justices, who sometimes seem to understand separation in this way. That is why I once called separation a “misleading metaphor”; the metaphor has misled people. Professor Lupu accurately describes a certain faction in recent controversies, and that faction may call itself separationist; but its defining commitment seems to be to secular supremacy and religious subordination, or at least to religious marginalization.

As I have argued elsewhere, there is little basis for that version of separation in constitutional text, history, or structure. So-called separationism that would privilege secular beliefs and bar religious arguments from public debates mistakes freedom of speech and the working of democracy for establishment. It distorts constitutional provisions that protect the people from the government into provisions that protect the government from the people. And separation that subordinates or marginalizes religion is hard to reconcile with the historical fact that evangelical Christians demanded the Establishment Clause as well as the Free Exercise Clause.

I will say more about history later, but the principal point of this Article is doctrinal. Professors Esbeck and Lupu describe a certain view of separation, but that view has never commanded a majority of the Supreme Court. The

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23 Lupu, supra note 2.
24 Id. at 249.
25 Id. at 250.
26 See, e.g., Suzanna Sherry, Enlightening the Religion Clauses, 7 J. CONTEMPO. LEGAL ISSUES 473 (1996) (arguing that purpose of the Establishment Clause is to subordinate religion to reason, and that the Free Exercise Clause must be subordinate to the Establishment Clause); Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. CHI. L. REV. 195 (1992) (arguing that the Establishment Clause implies a secular public order).
30 Laycock, supra note 21, at 1091-95.
31 Laycock, supra note 22, at 343-47.
conflict in the Supreme Court has not been over separation versus neutrality. A better set of labels for the two competing theories in the Court’s cases would be the “no-aid” theory and the “nondiscrimination” theory. Steven Monsma calls the two theories the “no-aid” theory and the “equal access” or “equal treatment” theory. The no-aid theory would forbid any government conduct that aids religion, and it would most especially and most stringently forbid financial aid. What I am calling the nondiscrimination theory would forbid government to discriminate either in favor of religion or against religion.

Each of these theories is said by its supporters to be consistent with neutrality; the disagreement is over the baseline from which to measure neutrality. It is fair to say that the Court has rarely discussed its choice of baseline, and that Justices of all persuasions have sometimes appeared inconsistent in their choice of baseline. But the implicit baselines of the two theories are readily identifiable. In the no-aid theory, the baseline is government inactivity, because doing nothing neither helps nor hurts religion. Any government aid to religion is a departure from that baseline, and thus a departure from neutrality. In the nondiscrimination theory, the baseline is the government’s treatment of analogous secular activities; a government that pays for medical care should pay equally whether the care is provided in a religious or a secular hospital. In this theory, any discrimination against religion is a departure from neutrality.

III. NO ANSWER FROM HISTORY

The no-aid theory has a narrower version, or a core application, which we might call the “no-funding principle”: government should not fund religious functions. The no-funding principle looms large in the American tradition of religious liberty because of two historical controversies of great importance: church finance in the eighteenth century and school finance in the nineteenth century. But neither of these controversies is a reliable guide to the choice between the no-aid theory and the nondiscrimination theory.

Financing of churches was the central church-state issue of the 1780s, and was the immediate background to the adoption of the Establishment Clause in 1791. The single most famous American statement on disestablishment, James

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32 MONSMA, supra note 17, at 30.
Madison's *Memorial and Remonstrance Against Religious Assessments*, was written in opposition to the general assessment bill in the Virginia legislature, which would have provided tax support for teachers of the Christian religion. If history settles anything in this area, it is that a general assessment would be unconstitutional.

But nothing like the general assessment has been seriously proposed since repeal of the Massachusetts establishment in 1833. The general assessment was a tax solely for the support of clergy in the performance of their religious functions. The reason for supporting religious functions was not that they fell within the neutrally drawn boundaries of some larger category of activities to be supported by the state. Rather, religion was to be singled out for special support because the state deemed it to be of special value.

The essence of the general assessment was massive discrimination in favor of religious viewpoints. In a time of minimal government, religious viewpoints were to be singled out for a special subsidy. When government funded almost nothing, the baseline of government inactivity was the same as the baseline of analogous secular activities. As applied to the general assessment, the no-aid theory and the nondiscrimination theory were fully consistent. But the two theories are not consistent, and the choice of baselines matters dramatically, when government spends three-eighths of gross domestic product. The point is not new. Donald Giannella argued a generation ago that in a totally collectivized society in which the state controlled all property, religious liberty would require the state to build churches.

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34 For comparison of the Massachusetts establishment with the Virginia general assessment bill, with citations to further sources, see Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 894-902 (1986). In essence, the Massachusetts establishment permitted choice at the local level; the rejected Virginia proposal would have provided choice at the individual level.

35 See Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2522 (1995) (“The apprehensions of our predecessors involved the levying of taxes upon the public for the sole and exclusive purpose of establishing and supporting specific sects.”). This overstates the point; the general assessment was for the sole and exclusive purpose of nonpreferentially supporting all religions then represented in the state.

36 Gross domestic product in 1992 was $6.0202 trillion. ECONOMICS AND STATISTICS ADMIN., DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. 699 at 451 (115th ed. 1995). Total government spending at all levels during fiscal 1992 was $2.262 trillion, id., tbl. 474 at 299, or 37.5% of GDP. Data for more recent years are not readily available and would not be significantly different.

37 Donald A. Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The
The other great controversy that gave prominence to the no-funding principle was the nineteenth century dispute over common schools. Over a period of decades, and amidst great controversy, Americans built up the public schools and withdrew funding from religious schools.\textsuperscript{38} Thirty-two states adopted constitutional provisions expressly prohibiting public funding of religious schools.\textsuperscript{39} This controversy was the source of the legal tradition that treats school funding as an especially important issue in the separation of church and state.

The nineteenth century resolution of the school funding controversy arguably represents a political judgment on the constitutional questions raised by such funding. But there are difficulties with relying on that political judgment, even with respect to schools. It is especially dangerous to abstract from that judgment a bright-line rule that applies to all contexts and overrides competing principles of religious neutrality and even freedom of speech. It is dangerous to reason from premises derived from an old dispute without recognizing and examining the source of the premises.

One difficulty with reasoning from nineteenth century rejection of funding for religious schools is that rejection was not part of the background of the First Amendment. And although the movement against funding religious schools amended many state constitutions, it conspicuously failed in its attempt to amend the federal Constitution.\textsuperscript{40}

Perhaps more important, the nineteenth century movement was based in part on premises that were utterly inconsistent with the First Amendment. Although there were legitimate arguments to be made on both sides, the nineteenth century opposition to funding religious schools drew heavily on anti-Catholicism. Nativist opposition to Catholic immigration fluctuated after


\textsuperscript{39} For a list, see CARL ZOLLMAN, AMERICAN CHURCH LAW §§ 65-66 at 78-80 (2d ed. 1933). For additional background, see GLENN, supra note 38, at 251-56. For examples, see CAL. CONST. art. IX, § 8; N.Y. CONST. art. XI, § 3; TEX. CONST. art. 7, § 5(a).

\textsuperscript{40} See infra text at notes 47-48.
1825, but it never disappeared. Anti-Catholic secret societies, such as the Know Nothings and the American Protective Association, occasionally grew large enough to influence elections, and there was occasional mob violence and burnings of Catholic churches and convents.

The movement for a federal constitutional amendment began with President Grant’s 1875 warning against a potential national conflict “between patriotism and intelligence on the one side, and superstition, ambition and ignorance on the other.” In context, there is no doubt that the feared source of “superstition, ambition and ignorance” was the Roman Catholic Church, rapidly growing from immigration, with its alleged papal conspiracy to dominate the country. The preventive measure that the President proposed was to “[e]ncourage free schools and resolve that not one dollar of money appropriated to their support, no matter how raised, shall be appropriated to the support of any sectarian school.”

Catholics argued that Protestant religious practices in the public schools made those schools as sectarian as any private school. Public schools commonly read the King James Bible ("the Protestant Bible") "without note or comment." Catholics noted that "the reading of the Scriptures as a public ceremony is as distinctive to [Protestants], as the celebration of Mass would be to Catholics."

Senator James G. Blaine proposed a constitutional amendment to implement the President’s proposal. The Blaine Amendment would have codified the Protestant position by expressly permitting Bible reading in the public schools but forbidding any use of state or federal funds to support religious schools. This amendment was narrowly defeated by Democrats in the Sen-

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41 See, e.g., David H. Bennett, The Party of Fear 105-16, 159-82 (1988); Donald L. Kinzer, An Episode in Anti-Catholicism: The American Protective Association 140-80 (1964); 1 Stokes, supra note 38, at 825-38.

42 Kaestle, supra note 38, at 170; Ravitch, supra note 38, at 36, 66, 75; 1 Stokes, supra note 38, at 817-22, 824, 830-31.

43 President Ulysses S. Grant, Speech to the Army of the Tennessee (Sept. 29, 1875) (unpublished manuscript and typescript available in the Ulysses S. Grant Papers in the Library of Congress).

44 Id. The President requested a constitutional amendment to this effect in his Annual Message to Congress (Dec. 7, 1875), reprinted in James D. Richardson, 7 Messages and Papers of the Presidents 332, 334 (1898).

45 For accounts of the Protestant Bible controversy, see Glenn, supra note 38, at 196-204; Kaestle, supra note 38, at 98-99, 166-71; Ravitch, supra note 38, at 3-76; 1 Stokes, supra note 38, at 825-32.

46 The President’s Speech at Des Moines, 22 Catholic World 433, 438 (1876).

47 For the text of the Amendment with discussion, see Glenn, supra note 38, at 252-53; 2 Stokes,
ate; one of Blaine’s supporters later denounced the Democrats as “the party of Rum, Romanism, and Rebellion.”

In contrast to the general assessment debate, the nineteenth century debate over school finance did present the choice between the no-aid theory and the nondiscrimination theory. Indeed, it presented the choice between the two competing baselines in substantially its modern form. Yet these nineteenth century debates did not produce a principled resolution to a difficult problem. Badly tainted by anti-Catholicism, these debates produced instead a nativist Protestant victory over Catholic immigrants. There was only a pretense of neutrality; the end result sustained a Protestant establishment in the public schools at public expense, with no relief for religious minorities. Major Jewish groups responded with their long effort to secularize the public schools. Catholics continued their long effort to build and finance private schools. Anti-Catholicism continued; the most extreme achievement of the attack on Catholic schools was Oregon’s law to close all private schools, struck down in 1925.

One other little noted historical practice is also relevant here. Beginning in the time of the Founders, and continuing for a hundred years, the federal government paid for missionaries to the Indians. This practice does not seem to have been the subject of significant constitutional debate at its beginnings or during most of its continuance. It was finally abolished in 1897 in the wake of the Protestant-Catholic school wars and during the period of strong anti-Catholicism. Without genuine debate, the Founders’ acquiescence is weak evidence of any considered constitutional judgment. Moreover, citing this practice as evidence may prove too much. It is likely that those who voted for these funds thought it proper for government to Christianize the Indians, a purpose impossible to reconcile with any principled interpretation of the Establishment Clause. And I have seen no evidence that the government was careful either to treat all potential providers equally or to account sepa-

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supra note 38, at 68-69, 722-28; Zollman, supra note 39, § 62 at 75-76.
49 See Jonathan D. Sarna, American Jews and Church-State Relations 14-31 (1989).
51 See Robert Cord, Separation of Church and State: Historical Fact and Current Fiction 53-80, 261-70 (1982). I have previously rejected Cord’s claim that this practice is evidence that the Founders supported nonpreferential aid to religion. Laycock, supra note 34, at 915.
rately for the costs of religious and secular instruction. Still, this practice at least suggests that the Founders saw no problem with purchasing secular services (education for the Indians) from religious providers. Those who rejected the constitutionality of earmarked taxes to support the clergy apparently did not challenge payment of general revenues to religious organizations for services that included substantial secular components. This uncontroversial practice did not become controversial until after Catholic immigration changed the terms of the debate.

The relevance of the nineteenth century Protestant-Catholic conflict is principally as a warning not to beg questions. Americans today should not unwittingly reason from a premise rooted in nineteenth century anti-Catholicism. We must think these questions out afresh, with no inherited presuppositions.

IV. THE TWO THEORIES IN THE SUPREME COURT

A. The Conflicting Theories Struggling to Coexist

The long controversy over financial aid to religious schools has associated separation with the no-aid theory. But that is not the only or necessary meaning of separation, and it has not been the dominant meaning of separation in the Supreme Court’s cases. The Court rejected any strong version of the no-aid theory in Everson v. Board of Education,\(^5\) the case that Professor Esbeck cites as the beginning of separationist doctrine.\(^4\) Indeed, the essence of both the no-aid and the nondiscrimination theories is succinctly laid out in two paragraphs of the Court’s opinion in Everson:

Neither a state nor the Federal government can . . . aid one religion, [or] aid all religions . . . . 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 religion. . . .

New Jersey cannot . . . contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, . . . New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-

\(^5\) 330 U.S. 1 (1947).
\(^4\) Esbeck, supra note 1, at 3.
believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.55

The tension between these two approaches has continued ever since. The Court unanimously supported separation, and even unanimously believed that government should not aid religion, but it voted five to four on what these principles meant for the facts of Everson. The majority held that nondiscriminatory payments for transportation to religious and public schools are not aid to religion.56 The dissenters thought that free transportation to religious schools is a form of aid, and that even nondiscriminatory aid is an establishment.57

The majority in Everson rejected the no-aid theory on the facts, but it did not reject that theory universally, nor did it adopt the nondiscrimination theory universally. Both theories have had continuing influence. The influence of the no-aid theory is most apparent in the context of financial support for religious schools.58 Professor Esbeck notes that “all the Supreme Court’s cases striking down direct programs of aid have involved primary and secondary faith-based schools.”59 A dominant theme of Professor Monsma’s book is that the no-aid doctrine is stated in general terms but is in fact confined entirely to schools from kindergarten through twelfth grade.60 Of course this is no accident; the special doctrinal and political sensitivity of schools is partly a function of battles to control the minds of children and partly the legacy of the bitter nineteenth century conflicts over public funding of Catholic schools.61

55 Everson, 330 U.S. at 15-16 (first emphasis added).
56 Id. at 17-18.
57 Id. at 45-46 (Rutledge, J., dissenting). Justices Frankfurter, Jackson, and Burton joined in this dissent.
59 Esbeck, supra note 1, at 11.
60 MONSMA, supra note 17, at 30-42.
61 See supra text accompanying notes 38-50; MONSMA, supra note 17, at 140-42.
But even in this context, the no-aid theory never fully prevailed. The no-aid theory was rejected in all of the much-criticized distinctions that permitted money to flow, even to religious elementary schools, over the objection of no-aid advocates. As Professor Esbeck summarizes these distinctions, the Court has forbidden only direct aid to pervasively sectarian institutions.\(^{62}\) Indirect aid is permitted,\(^{63}\) as is direct aid to institutions that are sectarian but not pervasively so.\(^{64}\) Even direct aid to “pervasively sectarian” institutions may be permitted if it is directed to secular functions and cannot be diverted to religious functions.\(^{65}\) The Court’s explanations of its “pervasively sectarian” category are inconsistent and incoherent; in practice, the category seems to be a synonym for elementary and secondary education.\(^{66}\)

Justice Douglas once argued that any government money that goes to a religious school aids religion, even if it is spent for purely secular functions, because it frees up the school’s own money for religious functions.\(^{67}\) This is sound economics, and it makes perfect legal sense under the no-aid theory, but the Court explicitly rejected this argument.\(^{68}\) To accept that argument might have required the Court to overrule \textit{Everson}; it would have deprived religious schools of neutral secular benefits, and thus it would have meant defining separation in a way too obviously inconsistent with neutrality.

\(^{62}\) Esbeck, \textit{supra} note 1, at 10.

\(^{63}\) See Mueller v. Allen, 463 U.S. 388 (1983) (upholding income tax deductions for tuition at private schools or out-of-district public schools); \textit{Wolman}, 433 U.S. at 241-48 (upholding guidance counseling, remedial instruction, and therapeutic services from public school teachers to private school students, when delivered off the campuses of religious schools, and diagnostic services when delivered on the campuses of religious schools); Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding government “loans” of textbooks to children attending private schools).

\(^{64}\) This category is best illustrated by the cases permitting aid to colleges and universities. See Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 433 U.S. 672 (1971).

\(^{65}\) See Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (upholding state payments for salaries of teachers in private schools for the portion of their time devoted to recordkeeping and administering state-required tests); \textit{Wolman}, 433 U.S. at 238-41 (upholding state-administered tests in private schools).

\(^{66}\) See MONSMA, \textit{supra} note 17, at 36-40, 120-21.


\(^{68}\) Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends. \textit{Hunt}, 413 U.S. at 742-43 (citations omitted).
Professor Esbeck poses the choice as separation versus neutrality, but the Court has rarely, if ever, posed the choice that way. The *Lemon* test, the very symbol of strict separation, itself began as an elaboration of neutrality. The first two prongs of the *Lemon* test are taken almost verbatim from the Court's elaboration of "benevolent neutrality" in *Abington School District v. Schempp.* Under that formulation, the Court had upheld a state program to supply textbooks to private schools. The *Lemon* test's most explicit formulation of the neutrality requirement is in the second prong, which requires that government action have a primary effect "that neither advances nor inhibits religion." But the *Lemon* test disaggregated the inquiry into neutrality, asking about effects that advance religion and separately asking about effects that inhibit religion.

Disaggregating the inquiry made it easy for advocates of the no-aid position to implicitly use government inactivity as the baseline. It was easy to compare the funding of religious schools to doing nothing, and considered in light of that comparison, funding clearly seemed to "advance" religion. The disaggregated inquiry did not require the Court to compare the "advancing" effects of aid to the "inhibiting" effects of funding secular schools but not religious schools, so the Court did not have to decide which was the greater departure from neutrality. And anyway, the Court never took the "inhibiting" prong of *Lemon* seriously in the context of school finance. The Court summarily rejected claims that refusing to fund religious schools discriminates against those who wish to attend them, and it also rejected arguments that funding should be permitted under the Establishment Clause because it serves free exercise values.

There were many possible reasons for the Justices' inclination to the no-aid baseline in the context of aid to religious schools. Indeed, when historical context is also considered, the surprise is not that the Court so often adopted the no-aid baseline, but that even in the context of schools it sometimes

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69 *Lemon*, 403 U.S. at 612.
72 *Lemon*, 403 U.S. at 612.
73 *Id.*
adopted the analogous-secular-funding baseline, permitting nondiscriminatory funding of transportation, textbooks, and some services.\textsuperscript{76}

The no-aid baseline seemed natural because it had seemed politically settled for all of the Justices’ lives that the state could not finance religious schools. Moreover, all of the Justices had lived their formative years well before the dramatic reduction of Protestant-Catholic conflict in the 1960s. But the story runs deeper than that. The historian John T. McGreevy has recently documented a shift in the nature of anti-Catholicism in the period leading up to Everson.\textsuperscript{77} The 1920s saw a resurgence of the Ku Klux Klan and of the obviously bigoted anti-Catholicism associated with it; few intellectuals were willing to publicly associate themselves with that.\textsuperscript{78} But that wave faded, to be replaced by a wave of open and respectable anti-Catholicism among the American intellectual elite. Responding in part to Catholic support for Franco in the Spanish Civil War\textsuperscript{79} and the right-wing polemics of Father Coughlin,\textsuperscript{80} these intellectuals saw Catholicism as imimical to democracy and conducive to fascism or other forms of authoritarian government. A Who’s Who of mid-century American intellectuals offered research, analysis, or opinion to support this theory from a range of disciplines.\textsuperscript{81}

Paul Blanshard, author of the viciously anti-Catholic best-seller American Freedom and Catholic Power, was a Trustee of the Society for Ethical Culture and brother of a Yale philosophy professor.\textsuperscript{82} His book was favorably reviewed in both academic and popular journals,\textsuperscript{83} and his invited lecture at Harvard was well received.\textsuperscript{84} McGreevy was able to document that this intellectual anti-Catholic movement attracted the favorable attention of Justices Black, Frankfurter, Rutledge, and Burton,\textsuperscript{85} and with the intellectual attitude so pervasive, many of the other Justices and the elite lawyers who would later

\textsuperscript{76} See cases cited supra notes 56, 63, 65.
\textsuperscript{77} John T. McGreevy, Thinking on One’s Own: Catholicism in the American Intellectual Imagination, 1928-1960, 84 J. Am. Hist. ___ (June 1997) (forthcoming). Citations to specific passages in Professor McGreevy’s article are based on a version that was not quite final; footnote numbers may have changed slightly by the final published version.
\textsuperscript{78} Id. text at notes 7, 19-21.
\textsuperscript{79} Id. text at notes 36-40.
\textsuperscript{80} Id. text at note 43.
\textsuperscript{81} Id. passim.
\textsuperscript{82} Id. text at notes 8, 29.
\textsuperscript{83} Id. text at notes 1-3; MONSMA, supra note 17, at 140.
\textsuperscript{84} McGreevy, supra note 77. text at note 3.
\textsuperscript{85} Id. text at notes 83-88.
become Justices were likely to have been exposed to it directly or indirectly. 86

_Everson_ was written in 1947, before Blanshard’s book but well into the period of intellectual anti-Catholicism. These anti-Catholic attitudes plainly did not control the result in _Everson_, but they influenced the dissent and they may have influenced the majority’s no-aid rhetoric. It is at least clear that the dominant intellectual response to _Everson_ was to endorse its no-aid rhetoric and to condemn the holding. 87

Respectable anti-Catholicism faded in the 1950s and all but collapsed in the 1960s in the wake of the Kennedy presidency and Vatican II. 88 But even at the time of _Lemon_, some Justices were influenced by residual anti-Catholicism and by a deep suspicion of Catholic schools. This appears most clearly in Justice Douglas’s citation of an anti-Catholic hate tract in his concurring opinion in _Lemon_, 89 and in Justice Black’s dissenting opinion in _Board of Education v. Allen_. 90 The Court’s opinion in _Lemon_ is more subtle and arguably open to more charitable interpretations, but it relied on what it considered to be inherent risks in religious schools despite the absence of a record in _Lemon_ itself 91 and despite contrary fact-finding by the district court in the companion case. 92

Funding for religious schools was still a Catholic issue in 1971, and the Court’s assumptions about religious schools were assumptions about Catholic schools. Most Protestants still opposed funding for religious schools; this included evangelical Protestants, who had not yet sought funding for their

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86 See _e.g._, _Board of Educ. v. Everson_, 330 U.S. 1, 23 (1947) (Jackson, J., dissenting) ("Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values.").

87 McGreevey, _supra_ note 77, text at notes 77-78.

88 See _id._ text at notes 98-103; Laycock, _supra_ note 21, at 1066-69.


90 392 U.S. 236, 251 (1968) (Black, J., dissenting) ("The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion."). In context, there is of course no doubt that in Justice Black’s mind, the “sectarian . . . propagandists” seeking “complete domination” were Roman Catholics. _id._.

91 See _Lemon_, 403 U.S. at 620.

92 See _id._ at 618.
own schools. While *Lemon* was pending in the Supreme Court, eleven state conventions of Southern Baptists passed resolutions opposing financial aid to private schools.\(^3\) *Christianity Today* editorialized against aid to religious schools while the case was pending and again after the decision.\(^4\) As late as about 1980, Jerry Falwell urged "that no church or private school be underwritten by the government."\(^5\) At the time of *Lemon*, the evangelical claim that public schools were secular and hostile to religion was little developed beyond criticism of the school prayer decisions, and there was substantial dissent even from that: the Southern Baptist Convention adhered to its separationist tradition and opposed the school prayer amendment.\(^6\) The evangelical movement is bitterly unhappy with *Lemon* today, but at the time, it was on the other side.

Two important denominations dissented from the dominant Protestant position: the Missouri Synod Lutherans and the Christian Reformed Church, each with well-developed systems of religious schools. These denominations supported financial aid in the 1960s and led in developing the argument against secularized public schools.\(^7\) Protestant, Jewish, and independent schools

\(^3\) *Baptists Support Separation*, 24 CHURCH & STATE 38 (1971).


\(^6\) *Baptist Leaders Hit Amendment*, 24 CHURCH & STATE 203 (1971) (describing opposition to school prayer amendment by six Baptist organizations, including the Southern Baptist Convention). Evangelicals are divided over this issue again today, with major evangelical groups resisting a school prayer amendment. *See*, e.g., Rob Boston, *Making Ameins*, 50 CHURCH & STATE 100 (1997). But this is in the context of having achieved substantial protection for voluntary student prayer groups and student religious speech under the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1994), and the Free Speech Clause. *See* Board of Educ. v. Mergens, 496 U.S. 226 (1990) (interpreting the Act broadly); *cf.* Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995) (protecting religious speech of university students); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (protecting religious speech of community groups on school premises). Southern Baptist opposition to the school prayer amendment in 1971 was more politically significant, because at that time, there were no alternatives designed to accomplish any part of the purposes of the amendment.

\(^7\) *See* William Willoughby, *Parochial School Crisis Fuels State Aid Debate*, 13 CHRISTIANITY TODAY 605 (1969) (reporting the position of these two denominations); Gordon Oosterman, *Tax Funds for Religious Education? Yes*, 13 CHRISTIANITY TODAY 575 (1969) (pro-aid article by official of Christian Reformed Church’s school association); *cf.* C. Stanley Lowell, *Tax Funds for Religious Education? No*, 13 CHRISTIAN-
were active defendants in *Lemon*, and Protestant and Orthodox Jewish organizations filed or joined in briefs supporting financial aid to schools, but these efforts did little to change the impression that the case was essentially about aid to Catholic schools. Plaintiffs claimed that 97% of the money under the Pennsylvania program went to Catholic schools, and they argued that the program was unconstitutional in part because it preferred one religion over others. The program’s supporters conceded that most of the money went to Catholic schools: “This fact is admitted but irrelevant.” At oral argument both sides reportedly emphasized that the legislation was needed to rescue the financially troubled Catholic schools in Pennsylvania. In the companion case, the Court focused on the characteristics of Roman Catholic schools in Rhode Island, which taught 95% of the private school students in the state.

An anti-aid amicus felt obliged to deny that its position was an attack on any particular denomination, but it also said that if there were to be an aid program, “Every one of the 258 different denominations must get its ‘fair share’ of the tax money now going almost wholly to the Roman Catholic Church.” My colleague L.A. Powe, who clerked for Justice Douglas that year, remembers the briefing as a bitter fight between Catholics and their enemies, and he doubts that anyone in Justice Douglas's chambers read far enough in the unusually large stack of amicus briefs to discover that there were Protestant denominations on both sides.

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*ITY TODAY 574 (1969) (anti-aid article by official of Americans United for Separation of Church and State).*

*See Brief of Appellee Schools, Lemon v. Kurtzman, 403 U.S. 602 (1971) (No. 70-89).*

*See Brief of the National Catholic Education Association et al. as Amicus Curiae; Brief of the National Jewish Commission on Law and Public Affairs as Amicus Curiae; Brief of the National Association of Independent Schools as Amicus Curiae; Brief of the Long Island Conference of Religious Elementary and Secondary School Administrators as Amicus Curiae, *Lemon*, 403 U.S. 602.*


*Id. at 36-38.*


*See The Nation Waits, 24 CHURCH AND STATE 75, 84 (1971).*

*Lemon*, 403 U.S. at 615-18.

*Id. at 608.*

*Brief of Protestants and Other Americans United for Separation of Church and State as Amicus Curiae 2, *Lemon*, 403 U.S. 602.*

*Id. at 12 (quoting GASTON D. COGDELL, WHAT PRICE PAROCHIAL 75 (1970)).*

*Personal conversation with L.A. Powe, now a professor of law at The University of Texas (May 6, 1997).*
With the case posed in this way, it was easier to see funding as a subsidy for one church than as a means of achieving neutrality across a wide range of views. Viewing the program as a subsidy for one church made it harder to take the view of later conservatives that opposition to funding reflected hostility to religion in general.109

The analogous-secular-activity baseline was also partially obscured by the facts of cases, which never squarely presented the discrimination argument. When government funds only public schools, it discriminates between public schools and private schools and only incidentally between secular schools and religious schools. Discrimination between public and private institutions is rarely if ever unconstitutional; the Court is always suspicious of claims of a constitutional right to government money.110

Finally, the Court in 1971 was at the height of its battle “to achieve the greatest possible degree of actual desegregation” in public schools;111 it affirmed a busing order for the first time in the same Term as Lemon.112 The prospect of subsidized private schools threatened to aggravate the difficulties of desegregation by expanding the avenues for white flight. The Court had already invalidated deliberate state schemes to thwart desegregation by subsidizing private education,113 and it had already encountered the risk that with or without a subsidy, “white students will flee the school system altogether.”114 The Justices may or may not have known that desegregation in Mississippi had produced a nine-fold increase in the number of non-Catholic private schools; they would soon find out.115 Those who organized the


110 See, e.g., Rust v. Sullivan, 500 U.S. 173 (1991) (holding that recipients of government grants to fund family planning services have no right to discuss abortion in government-funded facility, because government need not pay for any but its own message); Regan v. Taxation with Representation, 461 U.S. 540 (1983) (holding that government can limit free speech rights of some tax-exempt organizations, and permit full free speech rights to others, because government can refuse to subsidize Politics with tax exemption); Maher v. Roe, 432 U.S. 464 (1977) (holding that right to choose abortion does not include right to have government pay for abortion, even in circumstances in which government would pay for live birth, because refusal to fund is not a burden). This is a strong tendency, not a rule. Cf. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995) (holding that if government funds a broad range of publications, it cannot discriminate on the basis of viewpoint).


115 See Norwood v. Harrison, 413 U.S. 455, 457 (1973) (holding that the state could not aid these
on litigation argued these dangers; they named an African-American man, Alton Lemon, as the lead plaintiff, and devoted ten pages of their brief to a segregation claim.\footnote{Brief of Appellant 47-57, Lemon v. Kurtzman, 403 U.S. 602 (1971) (No. 70-89). As to the organizers of the litigation, Leo Pfeffer, the great separationist litigator who long represented the American Jewish Congress, represented Lemon in the trial court. Lemon v. Kurtzman, 310 F. Supp. 35, 38 (E.D. Pa. 1969), rev'd, 403 U.S. 602 (1971). Other plaintiffs included the Pennsylvania NAACP, the Pennsylvania Council of Churches (made up mostly of Protestant and Eastern Orthodox denominations), the Pennsylvania Jewish Community Relations Conference, the Pennsylvania ACLU, and Americans United for Separation of Church and State. Id. at 35. Americans United participated both as an appellant and an amicus, using one version of its name on the Jurisdictional Statement and Brief, and a different version on its amicus brief, supra note 106.} No Justice ruled on that claim, but every Justice took note of the issue,\footnote{See Lemon, 403 U.S. at 611 n.5 (opinion of the Court) (stating that it was unnecessary to reach the equal protection claim); id. at 632 & n.17 (Douglas, J., concurring) (reviewing the cases on tuition subsidies to avoid desegregation); id. at 642 (Marshall, J., disqualifying himself, presumably because the Pennsylvania NAACP was an appellant); id. at 644 n.1 (Brennan, J., concurring) (stating his view that Lemon had standing to assert the segregation claim); id. at 671 n.2 (White, J., dissenting) (stating his view that the state could not constitutionally aid schools that discriminated on basis of race or religion).} and it is hard to believe that no Justice was influenced by it.

All these factors tended to obscure the possibility of choosing the government's treatment of analogous secular activity as the baseline. Thus, throughout the 1970s and into the 1980s, the Court more often than not restricted financial aid to religious schools,\footnote{Compare cases cited supra note 58 (seven cases from the 1970s and 1980s invalidating aid to religious elementary and secondary schools), with cases cited supra notes 63, 65 (four cases from the 1970s and 1980s upholding aid to religious elementary and secondary schools).} usually without attention to its implicit choice of baseline. But despite these factors, the Court never invalidated all forms of aid, it never abandoned talk of neutrality, and it never repudiated the nondiscrimination theory.

Professors Esbeck, Lupu, and Monsma all attribute the birth of the neutrality theory to \textit{Widmar v. Vincent}\footnote{454 U.S. 263 (1981).} in 1981.\footnote{Esbeck, supra note 1, at 21; Lupu, supra note 2, at 247; MONSMA, supra note 17, at 42.} But the Court in \textit{Widmar} did not think that it was departing from precedent or adopting a fundamentally different theory. \textit{Widmar} was decided by a vote of eight to one, with Justices Brennan, Marshall, and Blackmun in the majority, and with Justice Stevens concurring on grounds that did not question or seek to limit the Court's analysis of the Establishment Clause.\footnote{Justice Stevens wrote separately to argue that content discrimination is sometimes permissible under schools even with free textbooks, a form of aid that would have been permissible under the Establishment Clause.} \textit{Widmar} was seven to none in infor-
mal discussions among the Texas constitutional law faculty; moreover, it was one of the very few issues ever to draw agreement from Lino Graglia on the right, Barbara Aldave on the left, and all those in between.\textsuperscript{122} \textit{Widmar} was an easy case, and it did not overrule or limit a single precedent. The case law roots of the nondiscrimination theory are not in \textit{Widmar}, but in the Court's frequent statements over two decades that the Constitution requires government to be neutral toward religion,\textsuperscript{123} in the religious free speech cases from the Jehovah's Witness era,\textsuperscript{124} in the result and opinion in \textit{Everson},\textsuperscript{125} and, even earlier, in \textit{Bradfield v. Roberts},\textsuperscript{126} unanimously upholding a government contract with a Roman Catholic hospital for the treatment of charity patients.

The Court did not adopt a neutrality theory in \textit{Widmar} and a separation theory in \textit{Lemon}. The Court did indeed have two different theories, but it thought that they were variants of a single theory and that each variant was consistent with neutrality and also with separation.\textsuperscript{127} Each variant applied in its own sphere. There was the no-aid (or no-advancing) variant of \textit{Lemon}, with its core application to financial aid to religious schools, and the nondiscrimination variant of \textit{Widmar}, with its core application to religious speech. The Court thought that \textit{Lemon} and \textit{Widmar} were entirely consistent.\textsuperscript{128}

the Free Speech Clause, 454 U.S. at 277-81 (Stevens, J., concurring). His analysis of the Establishment Clause issue was simply that it is not an establishment to permit both religious and antireligious speech. \textit{Id.} at 281.

\textsuperscript{122} The \textit{Widmar} issue arose on the Texas campus while the case was pending. For a brief account, see Laycock, \textit{supra} note 28, at 14-15.


\textsuperscript{125} 330 U.S. 1, 18 (1947).

\textsuperscript{126} 175 U.S. 291 (1899).


\textsuperscript{128} \textit{Id.}
The problem with treating these cases as consistent is that the separate spheres are illusory. Advocates can logically expand each variant from its point of origin until it covers the universe of cases. The no-aid theory can be applied to religious speech, and some lower courts and commentators have done so. When a religious group meets on campus, it gets free use of a room, free heating or air conditioning, free lighting, a convenient meeting place for its members, and access to a larger potential audience. These may all be said to advance religion, and if no one inquires into the inhibiting effects of allowing groups to meet on campus only so long as they refrain from discussing religion, letting religious groups meet on campus looks like aid forbidden by the no-aid theory.

Similarly, the nondiscrimination theory can be applied to financial aid to religious schools, and advocates for such aid have attempted to do so. The state will spend large sums to educate children in secular public schools, but only if they forfeit their constitutional right to attend religious schools. This is certainly discrimination between two sets of schools that differ sharply in their approach to religion. The nondiscrimination theory could be applied here, and if it were, the Court would have to overrule all the cases invalidating aid to religious schools. State subsidies to both public and private schools would neutrally fund education that satisfies the compulsory education laws, without regard to whether that education is provided in a religious or secular environment. The Court would not have to hold that the Constitution requires public funding for religious schools; it could say that the existing discrimination is really between public schools and private schools, not between secular schools and religious schools. But if government chose to end that discrimination and fund private schools, the nondiscrimination theory would permit

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129 See Esbeck, supra note 1, at 35 ("there is no logical stopping place").
131 But see Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2523 (1995) (observing, as a reductio ad absurdum, that "[e]ven the provision of a meeting room . . . involved government expenditure, if only in the form of electricity and heating or cooling costs").
such funding and would require that it not discriminate between religious private schools and secular private schools.

The strange distinctions in the Court's cases on financial aid to religious schools have been puzzling to almost all observers of the Court, and they were frustrating to supporters of the no-aid view who thought that they had won in *Lemon.* Part of the explanation is that the no-aid theory had not won—that the Court was never fully committed to the no-aid theory. The Court was inconsistently committed to both the no-aid theory and the nondiscrimination theory, and the absurd distinctions in its financial aid cases resulted from the effort to maintain the inconsistency.

It is thus impossible to create a coherent theory out of what the Court has done since *Lemon.* There are two theories, and they are inconsistent, as Professor Esbeck argues. But for most of the last half century, the Court did not recognize the inconsistency. It is a mistake to apply the separationist label only to the no-aid half of what the Court did under *Lemon,* or to apply the neutrality label only to the nondiscrimination half. To concede that charitable choice cannot be reconciled with separation is to create unnecessary doctrinal difficulty; it is to sever connections with a long and honorable tradition and to endanger the benefits of separation. Supporters of charitable choice need not oppose or repudiate the separation of church and state.

B. The Theories in Open Conflict

The conflict crystallized in *Rosenberger v. Rector and Visitors of the University of Virginia,* a case that fell near the core of both theories. *Rosenberger* was a free speech case; plaintiffs were publishing a magazine called *Wide Awake: A Christian Perspective at the University of Virginia.*

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133 Compare Leo Pfeffer, *Aid to Parochial Schools: The Verge and Beyond,* 3 J.L. & Educ. 115, 121 (1974) ("the Court is likely to strike down on its face a statute providing aid to parochial elementary and secondary schools beyond the narrow confines of bus transportation and strictly limited textbook loans"), with Leo Pfeffer, *The Current State of the Law in the United States and the Separationist Agenda,* 446 Annals 1, 8 (1979) (stating that decisions on financial aid to religious schools are not "secure"); compare Norman Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey,* 60 Notre Dame L. Rev. 1094, 1105 (1985) (stating that *Lemon* "appeared to shut off direct financial aid to church-related elementary and high schools"), with id. at 1109 (arguing that the Court "in the latter part of the decade appeared to draw very fine, and arguably arbitrary, distinctions," but conceding that *Lemon*'s failure to overrule *Allen* and *Eveerson* probably made such distinctions unavoidable).


135 id. at 2515.
Rosenberger was also a funding case; plaintiffs wanted a share of funds that the state university raised from the general student population. The funds would go to a religious function in a pervasively religious organization, because Wide Awake was a pervasively religious magazine. This characterization is not inconsistent with the Court’s statement that Wide Awake was not a “religious institution” or a “religious organization.” Instead, the Court said, Wide Awake was “a publication.” But in that sense, a religious school is not a religious institution; it is a school. The curriculum of most religious schools has a far higher percentage of secular content than the pages of Wide Awake had. Wide Awake was pervasively religious in the same sense as religious schools, which the Court has long characterized as pervasively sectarian. The dissenters accurately observed that the Court had required “direct funding of core religious activities.”

There was no pretense that Wide Awake served some separable secular function. The only secular benefit was the benefit of neutrality itself: campus debate would more fully represent the student population, and no students would be coerced or discriminated against in their religious choices. Despite the similarities with the cases in which the Court had applied the no-aid theory, this time the nondiscrimination theory prevailed: the Court invalidated the University’s policy of funding secular publications but not religious publications. The four dissenters made the opposite choice, insisting that the no-aid cases stood for an absolute prohibition on direct funding of religious functions, and that nondiscrimination (“evenhandedness” in Justice Souter’s terminology) is a subordinate criterion, relevant “when advancement is not so obvious as to be patently unconstitutional.”

After Rosenberger, it is very difficult to imagine that the no-aid and nondiscrimination theories can be reconciled by drawing careful boundaries between their separate spheres. The boundaries have been erased and the Court will have to choose, however much it hopes to avoid the choice. The Court split five to four in Rosenberger, and the majority hedged the opinion with

136 Id. at 2515-16.
137 Id. at 2524.
138 Id.
139 See id. at 2534-35 (Souter, J., dissenting) (describing the magazine’s contents).
141 Rosenberger, 115 S. Ct. at 2533 (Souter, J., dissenting).
142 Id. at 2516-25 (opinion of the Court).
143 Id. at 2541 (Souter, J., dissenting).
unpersuasive distinctions and reservations. But forced to choose, the Court applied the nondiscrimination theory to the funding of religious speech by a pervasively religious organization.

Charitable choice presents a far easier case than Rosenberger for application of the nondiscrimination theory. Charitable choice is easier both doctrinally and politically, because when government contracts with religious providers to deliver social services, it gets full secular value for its money. The government gets to specify the social service, and the government gets that service delivered. The secular benefit is far more tangible than in Rosenberger, and there is little doubt that the secular benefit is fully equal to the government’s cost.

The social service context also makes charitable choice far easier than school vouchers or other forms of support for religious education. As already noted, religious education has its own unique history of bitter religious conflict in this country. There was arguably a political resolution of the constitutional question, and judicial doctrine reflects that history. An especially strong suspicion of government funding for religious education is deeply embedded in the case law and in the beliefs and motivations of the organizations that litigate these issues.

Apart from education cases, there are no Supreme Court cases restricting government financing of church-affiliated social services. Bradfield v. Roberts is the case most nearly on point, unanimously upholding payments for medical services. Bowen v. Kendrick is the nearest modern equivalent, narrowly upholding government grants to religious institutions to teach sexual responsibility to adolescents. The Court may have found Kendrick difficult in part because it involved a form of education—indeed, education on a topic where the government’s secular message closely paralleled well-known religious teachings. I know of no modern cases challenging government payments to church hospitals, feeding programs, or other noneducational social services. Even the long-running litigation over religious foster care for children in New York was principally a challenge to religious discrimination in the programs, and eventually settled without forbidding the City’s practice of

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144 Id. at 2522-24 (opinion of the Court) (arguing that student fees were not a tax, and that the money was paid directly to the printer and not to Wide Awake).
145 See supra text accompanying notes 38-50.
146 175 U.S. 291 (1899).
contracting with religious organizations to deliver foster care.\textsuperscript{148} Such relationships are common. Professor Monsma's survey of child service agencies found that 82\% of religious agencies receive government money, and that nearly half receive a majority of their budget from government funds.\textsuperscript{149}

Charitable choice does not appear to be different in principle from these and other longstanding contracts with religious social service agencies. The recently enacted provisions for charitable choice\textsuperscript{150} regularize, and make more visible, a practice that some states and cities have long followed without significant challenge. If charitable choice is challenged, I expect the Court to apply the nondiscrimination theory and to uphold the statute.

V. UNITING THE TWO THEORIES: SUBSTANTIVE NEUTRALITY

I have argued that the no-aid and nondiscrimination theories each attempt to implement both neutrality and separation. I have also argued that the attempt to confine the no-aid and nondiscrimination theories to separate spheres has collapsed; we must find some deeper criterion for choosing between them. This criterion must be found in the underlying purposes that unite neutrality and separation. Professor Esbeck has identified the underlying criterion, but he has failed to unify the concepts.

He says that he supports neutrality with respect to the distribution of government benefits,\textsuperscript{151} but he supports separation with respect to government speech—no government endorsements, no government prayers, no government crèches.\textsuperscript{152}

Professor Esbeck also says that he supports separation with respect to regulatory exemptions.\textsuperscript{153} He means that he supports exemptions for religiously motivated conduct, and he is right to characterize this view as separationist. Exemptions separate religion from the coercive power of government, and


\textsuperscript{149} MONSMA, supra note 17, at 68 tbl. 3. For additional data on these and other types of agencies, see id. at 1, 9-10, 64-80.

\textsuperscript{150} See supra text accompanying notes 6-16.

\textsuperscript{151} Esbeck, supra note 1, at 23-26.

\textsuperscript{152} id. at 22 n.87.

\textsuperscript{153} id. at 23-24.
thus separate religious and secular authority.\textsuperscript{154} This characterization begins to explain why it is not inconsistent for such staunchly separationist secular organizations as the American Civil Liberties Union, People for the American Way, and Americans United for Separation of Church and State to support the Religious Freedom Restoration Act.\textsuperscript{155} Some scholars who oppose exemptions think of themselves as separationists,\textsuperscript{156} but this is true only if separation is defined as uniformly subordinating religion to secular authority and secular values.\textsuperscript{157}

When Professor Esbeck favors separation on some issues, and neutrality on other issues, we have additional evidence that these two theories are not as opposed as he claims. Something unites them, as I have said. This something eventually appears in his article: The "goal is the minimization of the government’s influence over personal choices concerning religious beliefs and practices."\textsuperscript{158}

I have been urging that standard for ten years, in almost those words.\textsuperscript{159} Minimizing government influence maximizes religious liberty by maximizing the autonomy of religious choice. Minimizing government influence is consistent with neutrality; a government without influence over religion neither encourages nor discourages religion; it neither advances nor inhibits religion. Minimizing government influence is consistent with the central meaning of separation—it maximally separates government power and influence from religious belief and practice. Minimizing government influence implements separation in terms of a coherent purpose—not institutional separation as a

\textsuperscript{154} See Laycock, supra note 21, at 1094; Lupu, supra note 2, at 236.


\textsuperscript{156} The clearest example is Steven Gey, Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment, 52 U. PITT. L. REV. 75 (1990). I assume that other opponents of exemptions think of themselves as separationists, but separationism has not been an important part of their analysis. See, e.g., William Marshall, The Case Against the Constitutionally Compelled Free Exercise Exemption, 40 CASE W. RES. L. REV. 357 (1990); Suzanna Sherry, Paradox Redux: Lee v. Weisman, 1992 SUP. CT. REV. 123.

\textsuperscript{157} See supra text accompanying notes 24-31.

\textsuperscript{158} Esbeck, supra note 1, at 25, accord, id. at 26 n.100.

\textsuperscript{159} Laycock, supra note 19, at 1001 ("My basic formulation of substantive neutrality is this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."); Laycock, supra note 28, at 3 ("I mean neutrality in the sense of government conduct that insofar as possible neither encourages nor discourages religious belief or practice.").
goal in itself, and not separation as a euphemism for whatever is worst for religion, but separation as minimizing government influence over religious belief or disbelief, practice or nonpractice.

The goal of minimizing government influence on religious choices provides a criterion for choosing between the baseline of government inactivity and the baseline of how government treats analogous secular activity. Recall that this choice of baseline defines the difference between the no-aid version of neutrality and the nondiscrimination version of neutrality. The same choice of baseline appears in a somewhat different guise in the debate over regulatory exemptions. Those who support exemptions argue from a government-inactivity baseline: compared to doing nothing, government regulation burdens religion. Those who oppose exemptions argue for an analogous-secular-activity baseline: if secular peyote use is regulated and religious peyote use is not, this looks like discrimination.

Uniform selection of government inactivity as the baseline would produce a regime of no financial aid (money would be aid) and of regulatory exemptions (regulation would be a burden). This approximates the traditional position of the ACLU and Americans United. Uniform selection of analogous secular activity as the baseline would produce a regime of nondiscriminatory financial aid and no regulatory exemptions. This position is most famously associated with Philip Kurland. I have called it formal neutrality.

Minimizing government influence on religion, which I have called substantive neutrality, is its own baseline, dictating variable choices between the two baselines discussed so far. Substantive neutrality sometimes invokes government’s treatment of analogous secular activity as the baseline, requiring that religious and secular activity get the same treatment. Equal funding for religious and secular hospitals is an example. But sometimes substantive neutrality requires that religion get better treatment than similar secular activities, as in most claims to religious exemptions from regulation.

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160 See Laycock, supra note 22, at 350-51.
161 See Sherry, supra note 156, at 142-43.
163 Laycock, supra note 19, at 999-1001.
164 Id. at 1001-06.
sometimes, substantive neutrality requires that religion be treated in ways that are arguably worse than the treatment available to similar secular activities. Most obviously, government cannot celebrate religion or lead religious exercises. In these contexts, when religion must be treated better or worse than analogous secular activities, substantive neutrality invokes government inactivity as the baseline. Prosecution makes religion worse off, and celebration makes it better off, than if government did nothing.

How do we know when to use which baseline? How does minimizing government influence generate a more fundamental baseline that unifies these arguably contrasting results? Minimizing government influence requires that we minimize government incentives to change religious behavior in either direction. Thus, the underlying criterion for choosing among baselines depends on the incentives that government creates.

If government says it will pay for your soup kitchen if and only if you secularize it, that is a powerful incentive to secularize. If government is paying for soup kitchens, it ought to pay no matter who runs them, and it ought to pay without requiring religious providers to surrender their religious identity. In this context, the baseline of analogous secular activity is substantively neutral: if government will pay both religious and secular providers, it creates no incentive for either to change.

Less hypothetically, the University of Virginia offered to pay for secular student activities and publications but not religious student activities and publications. This conditional offer created powerful incentives to secularize student activities and publications where possible. Attempting to prove that it had not discriminated among religions, the University went to some lengths to persuade the Court that at least one religious organization had succumbed to the pressure and secularized its publication.

In the regulatory context, substantive neutrality generally requires the baseline of government inactivity. If government says it will send you to jail if you consume peyote in a worship service, that is a powerful disincentive to

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166 This discussion is drawn from Laycock, supra note 22, at 349-52.
167 See Respondent's Brief, 1995 WL 16452 at n.3, Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329) (stating that the Islamic magazine on campus was denied funding because it was too religious, and then funded after it secularized and became a “cultural” publication).
religious behavior. But an exemption for religious behavior rarely encourages people to join the exempted church.\textsuperscript{169} When religious exemptions do encourage religious behavior (when claims for religious exemptions are self-interested in a secular sense), claims to exemption present special difficulties and require special solutions.\textsuperscript{170} But when the claim to religious exemption is not contaminated by secular self-interest, exemption minimizes government influence on religion. The formal neutrality of punishing religious behavior under secular norms does not serve substantive neutrality.

Similarly, if government were free to praise or condemn religion, celebrate religious holidays, or lead prayers or worship services, government could potentially have enormous influence on religious belief and liturgy. Government is large and highly visible; for better or worse, it would model one form of religious speech or observance as compared to others. The closest approximation to substantive neutrality is for government to be silent on religious matters, and to leave private and public fora open to the enormous variety of religious views and forms of worship represented in the American people.

Professor Esbeck agrees with these results\textsuperscript{171} (with the possible exception of self-interested claims to exemptions, an issue that he does not address), and he sees that the underlying principle is to minimize government influence on religion.\textsuperscript{172} He also proposes a rule of thumb: the analogous-secular-activity baseline (which he calls neutrality) with respect to government benefits and the government-inactivity baseline (which he calls separation) with respect to government-imposed burdens.\textsuperscript{173}

Like most rules of thumb, this formulation is easy to apply and often reaches the right result, but it is not quite right. The rule of thumb does not work with respect to government speech, where government can neither praise religion nor condemn it. Praise for religion might be thought a benefit, and condemnation might be thought a burden, but the same rule applies in either case: government should neither praise nor condemn religion in general or any religion in particular. And if I am right about the special problems of

\textsuperscript{169} Even Professor Sherry, perhaps the harshest critic of regulatory exemptions, concedes this much. Sherry, supra note 156, at 143. Her error is to read an implied message of endorsement into every regulatory exemption. \textit{Id.}

\textsuperscript{170} See Laycock, supra note 19, at 1017-18.

\textsuperscript{171} Esbeck, supra note 1, at 22-26 & n.87.

\textsuperscript{172} Id. at 25-26.

\textsuperscript{173} Id. at 24.
self-interested claims to exemptions, Professor Esbeck’s rule of thumb would not work there. His rule of thumb does work with respect to most claims to religious exemption, and with respect to nondiscriminatory funding of secular services delivered by religious organizations.

VI. CONCLUSION

Professor Esbeck and I agree that a significant doctrinal shift appears to be in progress. But the shift is not accurately described as the abandonment of separation and the adoption of neutrality. The Court was not against neutrality in the past, and the majority need not be against separation today.

A more precise statement would be that the Court has sometimes measured neutrality from a baseline of government inactivity, and sometimes from a baseline of how government treats analogous secular activities. With increasing frequency, and in increasingly sensitive contexts, the Court is choosing the baseline of analogous secular activity. Professor Esbeck emphasizes the funding cases, but there has been a similar shift with respect to regulatory exemptions, tax exemptions, and resolution of internal church disputes. Sometimes the Court attends to the choice of baseline; sometimes the shift appears to be intuitive and unreflective. *Rosenberger* forced both the majority and dissenters to face the choice.

Neither choice is right in every context. Sometimes one baseline best serves religious liberty, sometimes the other, depending on the incentives created. Unelaborated talk of neutrality tends toward formal neutrality, because it diverts attention from the substantive components of religious liberty. Substantive neutrality, understood as minimizing government influence on religious belief or practice, better captures both the individual’s substantive right and the government’s obligation of neutrality.

Separation is consistent with substantive neutrality. Separation can be a misleading metaphor; it requires definition and integration with other components of the religious liberty tradition. But it is too much a part of that tradition to be repudiated, and properly understood, it captures essential elements of that tradition. Separation helps explain why government cannot try to influence religious belief with its own religious speech, and why the Court’s

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175 See id. at 13-17.
unelaborated neutrality talk has led to error on the question of regulatory exemptions.

The no-aid theory has an historical and political claim to the separationist label, but in the Supreme Court's cases, the no-aid theory was always forced to coexist with the nondiscrimination theory. And nondiscriminatory funding maximally separates government influence from religious choices. In the debate over charitable choice, both sides can claim parts of the separationist tradition. For Professor Esbeck, it is a theoretical and tactical mistake to equate separation with no aid.