

A TWO-TRACK THEORY OF THE ESTABLISHMENT CLAUSE

FREDERICK MARK GEDICKS*

Abstract: Establishment Clause doctrine has long been informed by two mutually antagonistic values: the separation of church and state, and government neutrality with respect to religion. This puzzle of conflicting values mirrors that of Speech Clause doctrine, which has operated for decades with a value conflict between content-based and content-neutral regulation under the so-called "two-track" theory of the Speech Clause. This Article compares Establishment Clause doctrine with the two-track Speech Clause in order to illuminate how separation and neutrality might coexist. Just as Speech Clause doctrine provides an absolute minimum of constitutional protection for expression against even content-neutral regulation, so also Establishment Clause doctrine provides for an absolute minimum of church-state separation against even religiously neutral government action. As a result, neutrality has not totally eclipsed separation, which is the more fundamental Establishment Clause value.

INTRODUCTION: TWO CONFLICTING VALUES

The Establishment Clause has long been thought to protect two values, the separation of religion and government from each other, and government neutrality with respect to religion.¹ Separation requires that religion and government each refrain from involving itself in the affairs of the other. In *Everson v. Board of Education*, for example, the Supreme Court of the United States declared that government cannot "set up a church," or "adopt, . . . teach or practice religion."² It

* Professor of Law, Brigham Young University Law School. I am grateful to Jim Gordon, Steve Green, Jim Rasband, Laura Underkuffler, and Kevin Worthen for comments and criticisms of earlier versions of this paper, and to Chip Lupu and Bob Tuttle for pressing me on several points during discussion at the Symposium. I also benefited from the discussion of some of the arguments in this paper at a faculty workshop at BYU. Finally, I wish to thank Kim Pearson, Shima Baradaran Robison, Eric Soderlund, and Wade Taylor for research assistance.

¹ See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) (reading the Establishment Clause as both forbidding laws that "prefer one religion over another" and requiring a "wall of separation" between religion and government).

² *Id.*

also stated that "[n]either a state nor the Federal Government can participate in the affairs of any religious organizations or groups, and vice versa."³ Separation seeks to ensure that government and religion each operate freely in their own separate spheres, uninhibited by regulation or control by the other.⁴

Neutrality requires that government regulate its interactions with religious individuals and institutions so that it neither encourages nor discourages religious beliefs or practices. In *Epperson v. Arkansas*, for example, the Court stated that

[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may 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 between religion and nonreligion.⁵

Neutrality seeks to ensure that the degree of acceptance enjoyed by any particular religion is the result of the free and independent choices of its members, undistorted by government coercion or influence.⁶

³ *Id.* at 16.

⁴ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-3, at 1161 (2d ed. 1988); Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 292 (1999) ("[T]he most fundamental aim of church/state separation . . . is to keep these two centers of authority—God and Caesar, so to speak—within their respective spheres of competence.").

⁵ 393 U.S. 97, 103-04 (1968); see also *Everson*, 330 U.S. at 15 (Neither the federal government nor any state "can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence anyone to go or to remain away from church against his will or force him to profess belief or disbelief in any religion.").

⁶ See, e.g., *Zorach v. Clawson*, 343 U.S. 306, 313-14 (1952) ("We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. . . . The government must be neutral when it comes to competition between sects."); see also TRIBE, *supra* note 4, at 1160-61 ("The establishment clause . . . can be understood as designed in part to assure that the advance of a church would come only from the voluntary support of its followers and not from the political support of the state. Religious groups, it was believed, should prosper or perish on the intrinsic merit of their beliefs and practices."); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Towards Religion*, 39 DEPAUL L. REV. 993, 1001 (1990) (arguing that "substantive neutrality" requires government "to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance").

Neutrality and separation are in considerable tension.⁷ Separation requires that the government sometimes treat religion worse, and sometimes better, than comparable secular activities. An Establishment Clause doctrine informed by separation presupposes that the involvement of government in matters of religious belief and practice threatens liberty in ways that government involvement in secular matters does not.⁸ Separationist doctrine thus subjects relationships between religion and government to special scrutiny, which may result in religion's being subjected to legal and regulatory burdens not imposed on secular activities, or relieved from burdens that are generally imposed on such activities.⁹ The *School Prayer Cases*, for example, teach that government may not involve itself in the composition or encouragement of religious worship in public schools, even if stu-

⁷ See generally Ira C. Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 B.C. L. REV. 1139 (2002). The principle dissenter to this view is Professor Laycock, who argues that separation and neutrality are complementary strategies for implementing a policy of "substantive neutrality" that minimizes governmental coercion and influence with respect to individual religious choices. See Laycock, *supra* note 6, at 1001; Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997). A similar view is espoused by Professor Esbeck, although he does not articulate any role for separation in implementing substantive neutrality. Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 26 (1997) (arguing that religious liberty is maximized by minimizing "the government's influence over personal choices concerning religious beliefs and practices," and that this goal is "realized when government is neutral as to the religious choices of its citizens"); Esbeck, *supra* note 4, at 316-17 (arguing that the "common baseline" for measuring "the government's influence over personal choices concerning religious beliefs and practices" is that which "minimize[s] the impact of governmental action on individual religious choices").

As I and others have argued, the position that religious belief and practice are unique and especially valuable activities thereby entitled to unique and special protection from burdensome government action is no longer tenable. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555 (1998). For there to be a genuine absence of government influence on individual religious choices, government cannot advantage religion relative to comparable secular beliefs and practices. Because most secular beliefs and practices—even most secular beliefs and practices that are morally comparable to religious belief and practice—have no special claim to insulation from government influence or coercion, allowing such insulation only to religious beliefs and practices is a clear departure from neutrality. Laycock eliminates the tension between separation and neutrality only by begging the question whether religious belief and activity merit special constitutional protection.

⁸ See, e.g., Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357 (1996).

⁹ See, e.g., Laura S. Underkuffler, *Public Funding for Religious Schools: Difficulties and Dangers in a Pluralistic Society*, 27 OXFORD REV. EDUC. 577, 583 (2001).

dents who do not wish to participate are excused from doing so, and even though the government's composition and encouragement of comparable secular ceremonies, such as recitation of the Pledge of Allegiance, is constitutionally unproblematic.¹⁰

On the other hand, the *Church Autonomy Cases* hold that courts may not resolve disputes among the members of religious organizations when doing so requires interpretation of the organizations' dogma or theology, even though courts are free to resolve internal disputes in secular organizations by examining the secular philosophies or principles that inform the self-governance of such organizations.¹¹ Because this rule of abstention frequently renders judicial review of the governance decisions of religious associations unavailable, such associations possess significantly greater freedom to deviate from both legal norms and their own internal rules and practices than do secular associations.¹²

By contrast, government satisfies neutrality when it treats religious beliefs and practices no better, but also no worse, than comparable secular activities.¹³ Under an Establishment Clause doctrine informed by neutrality, religious belief and activity are not thought to be unique, and religion is treated as simply one among many possible activities in which citizens might choose to involve themselves. In *Widmar v. Vincent*, for example, the Court held that a state university which had generally opened up its campus facilities for student activities could not withhold access from students who wished to use the facilities for prayer and Bible study; to have held otherwise, the Court

¹⁰ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). Whether the Pledge constitutes a secular ceremony has recently been placed in doubt. See *Newdow v. United States Congress*, 292 F.3d 597, 606-08 (9th Cir. 2002) (two-to-one decision).

¹¹ *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

¹² This special favorable treatment of religious organizations has been undercut by the interaction of the "neutral principles" exception of *Jones v. Wolf*, 443 U.S. 595 (1979), with the formal neutrality of *Employment Division v. Smith*, 494 U.S. 872 (1990). See Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 943 & nn.97-99 (2000).

¹³ See, e.g., Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 66 (2002).

reasoned, would have violated neutrality by favoring secular student activities over religious student activities.¹⁴

The vitality of both separation and neutrality in Establishment Clause jurisprudence has created a difficult doctrinal situation. Although it is not unusual for the doctrine of a particular Clause of the Constitution to be informed by multiple values,¹⁵ confusion is inevitable when doctrine is informed by mutually antagonistic ones. For example, incongruities of Equal Protection Clause doctrine result from constructions that understand the Clause as a warrant for both "color-blind" government (which ignores race in making government decisions) and remediation of past racial discrimination through "affirmative action" (which expressly takes race into account in making decisions).¹⁶ The fact that the Establishment Clause is animated by both separation and neutrality makes articulation of a coherent theory of that Clause similarly challenging because, as with Equal Protection Clause doctrine, the competing values often point towards opposing resolutions of cases.

The puzzle of antagonistic values that neutrality and separation pose for Establishment Clause doctrine is not unique. Speech Clause doctrine has operated for decades with such a value conflict under the so-called "two-track" theory of freedom of speech. The two "tracks" of Speech Clause doctrine are content-based and content-neutral analysis, which correspond to contrasting values of social order and the free flow of ideas and information. In its original form, the two-track theory held that certain kinds of expression were simply not protected by the Speech Clause, and thus were subject to regulation and even prohibition on the basis of their content. The Speech Clause protected all other expression, which was accordingly subject only to content-neutral regulation of time, place, or manner. The category of "unprotected" speech has evolved into a category more accurately described as "low-value" speech, but the two competing

¹⁴ 454 U.S. 263 (1983); see *Good News Club v. Milford Cen. Sch.*, 533 U.S. 98 (2001); *Capitol Square Review & Adv. Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. of Westside County Schs. v. Mergens*, 496 U.S. 226 (1990).

¹⁵ See, e.g., THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 1 (1966) (asserting that the Speech Clause is animated by values of self-fulfillment, truth-seeking, democratic participation, and social balance).

¹⁶ Compare *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995), and *Richmond v. Croson Co.*, 488 U.S. 469, 494 (1989), with *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971), *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968), and *Griffin v. County Sch. Bd.*, 377 U.S. 218, 233-34 (1964).

analyses of content-based and content-neutral regulation continue to organize Speech Clause doctrine.

I propose to compare Establishment Clause doctrine and the two-track Speech Clause in the hope of illuminating how neutrality and separation might coexist under the Establishment Clause. I will argue that, just as Speech Clause doctrine provides an absolute minimum of protection for freedom of expression against even content-neutral regulation, so also Establishment Clause doctrine provides a minimum level of church-state separation against even religiously neutral government actions. In other words, not only has the separation of church and state not been eclipsed by religious neutrality, but separation is actually the more fundamental Establishment Clause value. As such, separation remains a necessary check on interactions between religion and government that pass muster under neutrality analysis.

I will begin with a description of how the two-track theory developed and functions under the Speech Clause,¹⁷ and will follow that with a discussion of how an analogous theory might function under the Establishment Clause.¹⁸ I will close with some observations on what the two-track theory might mean for areas of Establishment Clause doctrine involving education vouchers, faith-based delivery of social services, and public school prayer.¹⁹

I. THE TWO-TRACK THEORY OF THE SPEECH CLAUSE

A. *Doctrinal Development: Content-Based and Content-Neutral Analyses*

The two-track theory has its origin in a dictum voiced by the majority in *Cantwell v. Connecticut*, in which the Supreme Court reviewed the conviction of a Jehovah's Witness for common-law breach of the peace for having played an offensive phonograph recording for passersby on a public sidewalk. Although the Court reversed the conviction, it nevertheless observed that "epithets or personal abuse" do not constitute "communication of information or opinion safeguarded by the Constitution," so that criminal punishment of such expressions would raise no Speech Clause issues.²⁰

Two years later, the Court cited the *Cantwell* dictum in holding that "insulting or 'fighting' words"—that is, words that "by their very

¹⁷ See *infra* notes 20–56 and accompanying text.

¹⁸ See *infra* notes 57–106 and accompanying text.

¹⁹ See *infra* notes 107–131 and accompanying text.

²⁰ *Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940).

utterance inflict injury or tend to incite an immediate breach of the peace"—are not protected by the Speech Clause.²¹ The Court justified its holding with the twin observations that "the right of free speech is not absolute at all times and under all circumstances," and that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."²² The Court went on to suggest that, along with fighting words, defamatory, profane, and obscene speech are also unprotected by the Speech Clause.²³ Shortly thereafter, the Court added commercial speech to the list of constitutionally unprotected utterances,²⁴ and subsequently confirmed that defamatory and obscene speech are indeed outside the bounds of Speech Clause protection.²⁵

As originally conceived and applied, the two-track theory relieved the government of the need to prove that unprotected speech posed a "clear and present danger" to legitimate governmental or social interests.²⁶ Once the government demonstrated that expression fell into an unprotected category, it could justify punishment of such expression merely by showing that it bore a conceivable relationship to a legitimate objective—a showing that is easily made.²⁷ As time went on, however, the Court narrowed the definitional boundaries of unprotected speech,²⁸ at the same time that it began to give some constitu-

²¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-74 (1942) (quoting *Cantwell*, 310 U.S. at 309-10)).

²² *Id.* at 571-72.

²³ *Id.* at 573.

²⁴ *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

²⁵ *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (group libel).

²⁶ See, e.g., *Beauharnais*, 343 U.S. at 266; see also MARTIN SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 70 (1966) (arguing that the two-track theory was developed precisely to avoid application of the clear-and-present-danger test to speech that was traditionally punishable at common law).

²⁷ See, e.g., *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949) (upholding rationality of traffic safety regulation prohibiting advertising on delivery trucks unless related to the business using the trucks, because "local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use").

²⁸ E.g., *Miller v. California*, 413 U.S. 15, 24 (1973) (defining a work as obscene only if: (1) "the average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest"; (2) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law"; and (3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value"); *Cohen v. California*, 403 U.S. 15 (1971) (holding public profanity not punishable absent strong and detailed proof that it would provoke a violent audience reaction or seriously

tional protection to categories of speech that had previously been thought to lie entirely outside the ambit of the Speech Clause.²⁹ This trend has persisted to the point that regulation of speech based upon its "unprotected" character has virtually disappeared.³⁰ Although the two-track theory remains, contemporary doctrine associates content-based regulation with "low-value" rather than "unprotected" speech.³¹

undermine public morality); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding advocacy of criminal behavior punishable only when the speaker expressly advocates commission of a criminal act under circumstances which make the act highly likely to occur in the immediate future).

²⁹ *E.g.*, *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (commercial speech); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation of government official).

³⁰ See DANIEL A. FARBER, *THE FIRST AMENDMENT* 14 (1998) (Categories of unprotected speech "continue to receive special treatment," but it is a "gross oversimplification . . . to say that any of these categories is currently unprotected by the First Amendment. For each category, the Court has now created a set of rules detailing the boundaries of permissible government regulation."); GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 103 (1999) (observing that the Court has not upheld conviction of a speaker for advocating subversive or criminal activity or provoking a hostile audience response since 1951); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 217-18 (arguing that *New York Times* eliminated the doctrinal concept of "unprotected" speech).

³¹ See FARBER, *supra* note 30, at 14-15; see also Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech: A First Amendment Odyssey*, 139 U. PA. L. REV. 1333, 1344 (1991).

[B]y abandoning the strict "two-level" theory of "protected" and "unprotected" expression, Brennan's opinion in *New York Times* ushered in a new era of first amendment doctrine in which the Court, freed from the rigid constraints of the past, has been able to adopt a more flexible mode of analysis to deal with a broad range of "low value" expression.

Id. The insertion of low-value speech into Speech Clause doctrine, however, has blurred the distinction between content-based and content-neutral analysis. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-51 (1986) (arguing that zoning regulation of the secondary effects of sexually oriented businesses does not constitute content-based regulation). Compare *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728, 1741 (2002) (Kennedy, J., concurring in the judgment) (arguing that the purported content-neutrality of *Renton*-style zoning ordinances is a fiction, and concluding that a zoning ordinance that applies only to sexually oriented businesses is necessarily content-based), with *id.* at 1745-46 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting) (arguing that regulation of the secondary effects of sexually oriented businesses "occupies a kind of limbo between full-blown, content-based restrictions and regulations that apply without any reference to the substance of what is said," and that such regulation should be called "content correlated" to remind judges of the increasing constitutional risk of censorship "when a law applies selectively only to speech of particular content").

As before, speech is presumed to be high-value unless it is shown to fit within one of the low-value categories.³²

The two tracks of Speech Clause doctrine, then, are content-based and content-neutral analysis. Content-based regulation of expression is suspect when applied to so-called "high-value" speech like criticism of the government, but is generally permitted (although subject to limitations) in case of low-value speech like private libel, commercial speech, profanity, and pornography. High-value speech, on the other hand, may be regulated only by content-neutral laws that restrict only the time, place, or manner of such speech.

B. *The "Central Meaning" of the Speech Clause:
Preservation of Self-Government*

The two-track theory stems from the widespread intuition that not all expression is of the same value. It is based on a "tolerance" model of the Speech Clause, which presupposes the ability reliably to distinguish valuable speech from deviant expression, presumptively permitting only speech that "serves a positive social function."³³ If one grants the premise that some speech has more social value than other speech, something like the two-track theory is inevitable. Without it, the heavy burden of justification generally imposed on government regulation of speech would have to be diluted in order to permit the regulation of speech of dubious value, like child pornography; otherwise, the same heavy burden of justification generally imposed on government regulation of high-value speech would have to be im-

³² See, e.g., *Cohen*, 403 U.S. at 15 (concluding that profane expression of a political view was entitled to full Speech Clause protection because it did not constitute obscenity, fighting words, or speech that provoked a hostile audience reaction).

³³ Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1565 (1988). Gey is, of course, relying on the classic definition of governmental "tolerance" under which the government presupposes the existence of a "correct" view of a matter, but nevertheless permits a certain degree of dissent. See, e.g., 18 THE OXFORD ENGLISH DICTIONARY 199, 200 (2d ed. 1989) (defining "tolerate" as "to put up with" and "toleration" as "the disposition to be patient with or indulgent to the opinions or practices of others"). An exemplar of such "toleration" was the seventeenth century English Act of Toleration, which reaffirmed the Anglican establishment as the official state church of England, but permitted non-Anglican Protestants a right to practice their religion subject to considerable civil disabilities. See THOMAS J. CURRY, *FAREWELL TO CHRISTENDOM: THE FUTURE OF CHURCH AND STATE IN AMERICA* 24-25 (2001). This classic definition is not to be confused with the more widely used contemporary understanding of "tolerance" as openness to, or acceptance of, opposing views.

posed on regulation of low-value speech.³⁴ Across-the-board dilution of the burden of justification would seriously undermine constitutional protection of high-value speech, whereas across-the-board application of a heavy burden of justification would place speech that probably should be regulated beyond government control.³⁵ The two-track theory permits substantial regulation of low-value speech without directly threatening protection of high-value speech.

The two-track theory of the Speech Clause thus depends on a routing mechanism that determines whether the Court will apply content-based or content-neutral analysis by distinguishing high-value from low-value speech. This routing function is performed by the relation of the speech to self-government. A multitude of commentators throughout the twentieth century have argued that the predominant purpose of the Speech and Press Clauses is to secure popular control over political decision making and the operation of government generally by prohibiting punishment of speech that criticizes government or otherwise discusses matters of public import.³⁶ The Court declared

³⁴ CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 233–34 (1993); Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech*, 58 WASH. & LEE L. REV. 195, 202–05 (2001); cf. ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 131–32 (3d rev. ed. 2000) (arguing that the Court's reflexive application of stringent review to state actions that only modestly infringed upon the freedom of speech during the 1930s left it with no doctrinal flexibility in its review of antisubversion statutes during the "Red scare" of the 1950s).

³⁵ SUNSTEIN, *supra* note 34, at 234.

³⁶ See, e.g., ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 19 (1967) ("It is obvious that under [early American common] . . . law liberty of the press was nothing more than absence of the censorship, as Blackstone said. All through the eighteenth century, however, there existed beside this definite legal meaning of liberty of the press, a definite popular meaning: the right of unrestricted discussion of public affairs. There can be no doubt that this was in a general way what freedom of speech meant to the framers of the Constitution."); MICHAEL KENT CURTIS, *FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE"* 18–19 (2000) (The "popular tradition" of freedom of speech from the time of the founding into the twentieth century "especially emphasized free speech in relation to democracy, as well as free speech as an inherent human right."); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 93–94, 112 (1980) (The Speech, Press, Assembly, and Petition Clauses serve the "central function of assuring an open political dialogue and process" and "were centrally intended to help make our government processes work, to ensure the open and informed discussion of political issues, and to check our government when it gets out of bounds."); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); JOHN RAWLS, *POLITICAL LIBERALISM* 342–43 (1996) (observing that the crime of seditious libel would prevent "the public press and free discussion [from] play[ing] their role in informing the electorate" and would "undermine the wider possibilities of self-government"); SUNSTEIN, *supra* note 34, at 237 ("There can be little doubt that suppression by the government of political ideas that it disapproved of or found threatening was the central motivation for the [Speech C]lause."); Kalven, *supra* note 30, at 208 ("The [First] Amendment has a 'central meaning—a core of protection of speech without which democracy cannot function, with which,

this principle to be the "central meaning" of the First Amendment in *New York Times v. Sullivan*,³⁷ and has repeatedly affirmed it in subsequent decisions.³⁸

To identify the protection of speech relating to political and public matters as the central purpose of the Speech Clause is not to deny the importance of other kinds of expression protected by the Speech Clause, particularly expression relating to self-fulfillment or the search for truth.³⁹ As Justice Brandeis famously argued, the framers of the First Amendment believed that the ultimate purpose of government was to protect the freedom of citizens to live their lives as they saw fit, thus making the freedom of speech not only a means of creat-

in Madison's phrase, 'the censorial power' would be in the Government over the people and not 'in the people over the Government.') (quoting *N.Y. Times*, 376 U.S. at 275).

³⁷ 376 U.S. at 273-75 (declaring that the controversy surrounding the Sedition Act of 1798 "crystallized a national awareness of the central meaning of the First Amendment," which is that the "right of free public discussion of the stewardship of public officials" is a "fundamental principle of the American form of government").

³⁸ *E.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 533 n.20 (2001) ("The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas.") (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985)); *Buckley v. Valeo*, 424 U.S. 1, 57 (1976) ("The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues . . ."); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); see also *Roth*, 354 U.S. at 484 (The contemporary purpose of the Speech and Press Clauses is "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940).

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Id.

³⁹ See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) ("[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection.").

ing a government that would protect self-realization, but an end of self-realization itself.⁴⁰ But Brandeis also emphasized the close link between self-government and self-fulfillment.⁴¹ Although the category of high-value speech is hardly exhausted by political speech, no other kind of high-value expression is so consistently placed at the "core" of expression protected by the Speech Clause.⁴²

⁴⁰ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty as both an end and a means."); accord *Cohen*, 403 U.S. at 24.

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id.

⁴¹ *Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring).

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.

Id.; see also Vincent Blasi, *The First Amendment and the Ideal of Civil Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 672 (1988) (arguing that Brandeis understood self-development to affirm the concept of self-government, "the point that the state exists for the benefit of its citizens and not vice versa"); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263 (arguing that self-development underwrites self-government because the latter is possible only if voters acquire "intelligence, integrity, sensitivity, and generous devotion to the general welfare").

⁴² See, e.g., *Republican Party v. White*, 122 S. Ct. 2528, 2530 (2002) ("[S]peech about the qualifications of candidates for public office" is "at the core of First Amendment freedoms."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("[H]anding out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression."); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) ("Core political speech" consists of "both the expression of a desire for political change and a discussion of the merits of the proposed change."); RONALD DWORKIN, *FREEDOM'S LAW* 203 (1996) (arguing for constitutive over instrumental justifications for the freedom of speech on the ground that the former do not protect "the First Amendment's political core"); McCLOSKEY, *supra* note 34, at 155 (observing that modern Supreme Court decisions permit the regulation of "core 'political speech' only in extreme circumstances"); RAWLS,

The two-track theory thus rests on the proposition that the pre-eminent purpose of the Speech Clause, though obviously not the only one, is to ensure popular control of government by protecting the free flow of information necessary for citizens to assess whether the government is doing what they wish, and to criticize it vigorously and publicly when it is not.⁴³ As measured by this purpose, some speech is simply not as important as other speech.⁴⁴ Which doctrinal track one uses in a Speech Clause case—content-based or content-neutral analysis—depends on the proximity of the speech to this central purpose. Professor Sunstein, for example, lists three of the four characteristics that seem to characterize low-value speech as (1) a tenuous relation to “governmental process” and “popular control of public affairs,” (2) a noncognitive message that does not expressly “transmit ideology or ideas,” and (3) a likelihood that regulation or prohibition of the speech is not motivated by government self-interest.⁴⁵ The further that speech strays from the Speech Clause’s core purpose of assisting popular control of government by ensuring the free flow of information about political and public affairs, the more likely it is that such speech will be accorded low-value status.

supra note 36, at 348 (arguing that the “central range” of the freedom of speech consists of the “free public use of our reason in all matters that concern the justice of the basic structure [of government] and its social policies”).

⁴³ SUNSTEIN, *supra* note 34, at 238 (“Restrictions on political speech have the distinctive feature of impairing the ordinary channels for political change.”); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 622–23 (“The guarantee of free speech is designed largely to combat the evils of factional tyranny and self-interested representation, and to ensure that government outcomes are the product of some form of deliberation on the part of the citizenry. If portions of the citizenry are powerless and for that reason unable to participate in deliberative processes, free speech will not serve its goals.”).

⁴⁴ See, e.g., SUNSTEIN, *supra* note 34, at 233 (“The absence of [Speech Clause] protection for conspiracies, purely verbal workplace harassment of individuals on the basis of race and sex, unlicensed medical and legal advice, bribery, and threats appears to owe something to a distinction between political and nonpolitical use of speech.”); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1352 (1983) (“[T]here are compelling reasons rooted in first amendment theory for affording more constitutional protection to ‘public ideological solicitation’ than to ‘private nonideological solicitation.’ Advocating robbery or murder for private gain surely stands on a different constitutional footing than advocating principled resistance to politically unpopular government policies.”).

⁴⁵ Sunstein, *supra* note 43, at 603–04. Sunstein identifies the fourth characteristic as a low probability that regulation has been undertaken for “constitutionally impermissible reasons” or to produce “constitutionally troublesome harms.” *Id.* at 604. Sunstein has elsewhere emphasized, however, that “[t]he Court has yet to offer a clear principle to unify the categories of speech that it treats as ‘low value.’” SUNSTEIN, *supra* note 34, at 233.

To summarize, a speech regulation is routed between the content-based and the content-neutral analytic tracks on the basis of the proximity of the speech it regulates to democratic self-government. The more political the speech, the more closely it relates to matters of public policy and interest, and the more it communicates a cognitive ideological message, the more likely that the speech will be considered high-value and the less likely that content-based regulation of it will be upheld.

C. *The Absolute Value of the Freedom of Speech*

Content-based regulation of high-value speech is suspect under the Speech Clause, and is upheld only if narrowly tailored to a compelling state interest.⁴⁶ Content-neutral regulation of such speech, by contrast, is generally upheld. Even so, content neutrality is not a sufficient condition for upholding a regulation of speech under the Speech Clause. Content-neutral regulations must also be "narrowly tailored" to a "significant" or "substantial" regulatory interest and must leave open "adequate alternative avenues of communication."⁴⁷

The narrow-tailoring and substantial-interest requirements have proved to be less significant protections of freedom of expression than one might assume from their rhetorical similarity to the classic formulation of strict scrutiny under the Equal Protection Clause. Narrow tailoring does not demand that government use the least restrictive or intrusive means of regulating speech, but requires only a showing that the government's regulatory interest "would be achieved less effectively" in the absence of regulation, and that the regulation does not burden "substantially more speech" than is necessary to protect the government's interest.⁴⁸ Because it does not require any balancing at the margin, narrow tailoring results in invalidation of content-neutral speech regulations only when the fit between the government's interest in regulation and the speech actually regulated is ex-

⁴⁶ See, e.g., *Republican Party*, 1225 S. Ct. at 2530; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

⁴⁷ E.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-51 (1981).

⁴⁸ *Ward*, 491 U.S. at 797-800; see, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 297 (1984) (holding that because the government had a legitimate interest in protecting the environment of national parks, and that environment might be harmed by allowing protestors to sleep at national park sites not open for camping, "the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out").

ceptionally loose.⁴⁹ Similarly, relatively lightweight regulatory interests, such as preservation of aesthetic appearance, have been held to satisfy the substantiality standard.⁵⁰

In contrast to narrow tailoring and substantiality, the adequate communicative alternatives prong of the content-neutrality test has a more consistent bite. The Court will often strike down a content-neutral law if it prevents a speaker's communication of the message.⁵¹ For example, the Court applies heightened scrutiny to content-neutral regulations that eliminate or substantially restrict an entire mode of communication.⁵² Even when a law leaves numerous alternative means of communicating the speaker's message, it may nevertheless be struck down if it leaves a particular speaker with no alternative

⁴⁹ See, e.g., *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 122 S. Ct. 2080, 2089–90 (2002) (striking down door-to-door solicitation permit designed to prevent fraud and crime and to protect residential privacy, because permit interfered with “a significant number of noncommercial ‘canvassers’ promoting a wide variety of ‘causes,’” including religious and political ones, and virtually eliminated anonymous and spontaneous solicitation). The Court has sometimes understood a less restrictive means requirement to demand only that there exist no regulatory alternative that would be equally as effective as the one chosen by the government. See, e.g., *Scott H. Bice, Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 38 (1980) (citing *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951)). Under heightened scrutiny, however, a least restrictive means requirement is usually understood to impose upon the government the much heavier burden of showing that all regulatory alternatives would substantially undermine the government's interest, rather than undermining it to some slight degree. See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1486–87 (1975). Under this analysis, an alternative regulation that is substantially less restrictive of speech while only modestly undermining the government's interest is a “less restrictive alternative” even though it is not as efficient as the means chosen by the government. See Bice, *supra*, at 38–39.

⁵⁰ See, e.g., *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806–07 (1984). Additionally, seven Justices in *Metromedia, Inc. v. City of San Diego* agreed that aesthetics constituted a regulatory interest sufficiently substantial to justify a complete prohibition of billboards. 453 U.S. 490, 507–08 (1981) (four-justice plurality opinion); *id.* at 552 (Stevens, J., dissenting in part); *id.* at 560 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

⁵¹ See Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 67 (1987) (observing that the Court ordinarily subjects to heightened scrutiny “laws that substantially or wholly prohibit particular means of expression”).

⁵² See, e.g., *Watchtower Bible*, 122 S. Ct. at 2089–90 (anonymous and spontaneous door-to-door solicitation); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (residential lawn and window signs); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (political boycotts); *Metromedia, Inc.*, 453 U.S. at 516 (billboards); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (nude dancing); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (charitable solicitation); *Buckley*, 424 U.S. at 14–15 (spending money); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (sound trucks); *Martin v. Struthers*, 319 U.S. 141 (1943) (door-to-door solicitation); *Schneider v. State*, 308 U.S. 147 (1939) (leaflets).

means that are "readily interchangeable" with the prohibited means.⁵³ In evaluating alternate means, the Court has been particularly protective of relatively inexpensive modes of communication that have traditionally been used by persons of limited finances.⁵⁴ These tendencies are even more pronounced among lower courts.⁵⁵

⁵³ See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963) (invalidating as applied to NAACP the rule prohibiting retention of attorney in matter in which one is not a party and has no right or liability, because the rule would have blocked most NAACP lawsuits, and NAACP had no effective alternative to litigation as a means of pursuing its civil rights goals); see also *Stone*, *supra* note 51, at 61 (Although the regulation in *Button*, unlike the one in *Buckley*, left open numerous alternative means by which the NAACP might have pursued its objectives, "these alternatives are not interchangeable with litigation. Litigation is a distinct means of political expression.").

⁵⁴ E.g., *Watchtower Bible*, 122 S. Ct. at 2087 ("[B]ecause they lack significant financial resources, the ability of the [Jehovah's] Witnesses to proselytize is seriously diminished by regulations that burden their efforts to canvass door-to-door. . . . In addition, the [Court's] cases discuss extensively the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas."); *Ladue*, 512 U.S. at 57 (The ban on residential yard and window signs left inadequate communicative alternatives because residential signs are "an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility . . ."); *Martin*, 319 U.S. at 146 (invalidating ban on door-to-door distribution of leaflets because such distribution "is essential to the poorly financed causes of little people"); see also *Members of City Council*, 466 U.S. at 812 n.30 (The Court has shown "special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry."). But see *Metromedia, Inc.*, 453 U.S. at 549-50 (upholding ban on graffiti even though graffiti is an "inexpensive means of communicating political, commercial, and frivolous messages to large numbers of people" and "some creators of graffiti have no effective alternative means of publicly expressing themselves").

⁵⁵ See Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 CONST. COMMENT. 101, 115 n.45 (1999). For lower court decisions applying heightened scrutiny to content-neutral regulations that eliminate or substantially restrict an entire mode of communication, see, for example, *Perry v. Los Angeles Police Department*, 121 F.3d 1365, 1371-72 (9th Cir. 1997); *Bery v. City of New York*, 97 F.3d 689, 699 (2d Cir. 1996); *Cleveland Area Board of Realtors v. City of Euclid*, 88 F.3d 382, 390-91 (6th Cir. 1996); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 959 (D.C. Cir. 1995); *Grossman v. City of Portland*, 33 F.3d 1200, 1207-08 (9th Cir. 1994); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 580 (9th Cir. 1993); *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587, 596 (4th Cir. 1993); *Hays County Guardian v. Supple*, 969 F.2d 111, 121 (5th Cir. 1992); *Gaudiya Vaishnava Society v. City of San Francisco*, 952 F.2d 1059, 1066 (9th Cir. 1990); *Ameritech Corp. v. United States*, 867 F. Supp. 721, 737 (N.D. Ill. 1994); *International Eateries of America, Inc. v. Broward County*, 726 F. Supp. 1556, 1568 (S.D. Fla. 1987). For lower court decisions that strike down a content-neutral law because it leaves no alternative means that is readily interchangeable with the prohibited means, see, for example, *Bery*, 97 F.3d at 699; *Euclid*, 88 F.3d at 390-91; *Grossman*, 33 F.3d at 1207-08; *Arlington County*, 983 F.2d at 596. For lower court decisions in which relatively inexpensive and traditional modes of communication are protected against content-neutral regulation, see, for example, *Euclid*, 88 F.3d at 390-91; *ISKCON*, 61 F.3d at 959; *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1107 (6th Cir. 1995); *Gerritsen*, 994 F.2d at 580; *Gaudiya Vaishnava Society*, 952 F.2d at 1066.

Professor Kalven described heightened scrutiny of content-neutral regulation of important or traditional means of communication as an appropriate placement of "the thumb of the Court . . . on the speech side of the scales" in the constitutional balance of government regulation against freedom of expression.⁵⁶ Once speech is classified as high-value, it should be accorded a presumption of importance that need not attach to low-value speech. Accordingly, even speech regulations that are content-neutral must leave open realistic alternative avenues for expression.

In short, the predominance of democratic self-government over other justifications for speech is reflected in the communicative alternatives prong of content-neutral analysis, which embodies special concern to ensure the free flow of information even when regulation of high-value speech is content-neutral and justified by a substantial government interest.

II. A TWO-TRACK THEORY OF THE ESTABLISHMENT CLAUSE

A. Doctrinal Development: Separation and Neutrality Analyses

Although in *Everson v. Board of Education* the Supreme Court had emphasized the importance of both neutrality and separation,⁵⁷ it was separation that dominated the first three decades of Establishment Clause decisions.⁵⁸ Invoking neutrality rhetoric largely as a matter of form during this era,⁵⁹ the Court struck down most government action that helped or encouraged religious belief and practice, such as public school prayer and government aid to religiously sponsored elementary and secondary schools.⁶⁰

⁵⁶ Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 28; see also Stone, *supra* note 51, at 79–80 ("In deciding whether and to what extent particular content-neutral restrictions diminish the opportunities for free expression, the Court should err on the side of free speech. It should allocate the risk of uncertainty to the government, not to speakers.").

⁵⁷ See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

⁵⁸ See Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 233 (1994).

⁵⁹ See FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE* 1–2 (1995) (Although "[t]he Court has long purported to ground its establishment clause doctrine in government neutrality," the decisions themselves seem to have no such pattern.).

⁶⁰ For decisions invalidating public school prayer, see *School District v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). For decisions invalidating government aid to religious elementary and secondary schools, see *Wolman v. Walter*, 433 U.S. 229 (1977); *Meech v. Pittenger*, 421 U.S. 349 (1975); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See also Walz v. Tax

Although the Court continued to invalidate government aid to religion on separationist grounds into the 1980s,⁶¹ by then it had also become clear that an Establishment Clause doctrine based primarily on separation was unsatisfactory. The dramatic growth of the welfare state during the twentieth century created positive rights that separation analysis generally denied to religion.⁶² In a world in which most individuals and groups are entitled to receive government benefits and funding, withholding such benefits and funding solely because the recipient is religious constitutes a penalty on religious belief and activity.⁶³ This clearly violates *Everson's* injunction that the government remain neutral, not only as between religious denominations, but also as between religion and nonreligion.⁶⁴

The inequity entailed in preventing religious individuals and groups from receiving benefits and funds that are freely available to secular individuals and groups made the development and application of neutrality analysis inevitable. The Court began to incorporate neutrality reasoning into its decisions during the 1980s and 1990s,

Comm'n, 397 U.S. 664 (1970) (upholding on separationist grounds exemption of churches from property tax); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating for lack of a secular purpose curriculum policy that forbade teaching of any theory of human origin); Ill. *ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (invalidating on separationist grounds religious instruction in public schools). *But see Bd. of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding on neutrality grounds participation by religious schools in textbook loan program); *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws on ground that they had a secular purpose and effect); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding released time program of off-campus religious instruction for fear that contrary decision would constitute hostility to religion). *See generally* GEDICKS, *supra* note 59, at 45-52, 64-74 (summarizing the doctrines set forth in the public school prayer and religious school aid decisions).

⁶¹ *See, e.g., Aguilar v. Felton*, 473 U.S. 402, 414 (1985); *Sch. Dist. v. Ball*, 473 U.S. 373, 398 (1985); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 366 (2001) ("Through the 1980s and the early 1990s, the Court continued along a twisting path of prohibiting all but incidental aid to religious schools.").

⁶² *See* Esbeck, *supra* note 4, at 289-90; Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II.—The Nonestablishment Principle*, 81 HARV. L. REV. 513, 514-15 (1968); Lupu & Tuttle, *supra* note 13, at 67.

⁶³ GEDICKS, *supra* note 59, at 57; *see also* JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 183 (2000) (arguing that the presence of the modern government in virtually all aspects of modern life renders the Madisonian understanding of liberty as the absence of government unrealistic in practice); Giannella, *supra* note 62, at 522-24 (arguing that a wholly collectivized state committed to both religious liberty and separation of church and state must give substantial aid to religious individuals and institutions notwithstanding its commitment to separationism, so that such persons and entities would have equal opportunities with secular individuals and institutions for self and community development).

⁶⁴ *See* 330 U.S. at 15-16.

repeatedly holding, for example, that the Establishment Clause does not justify the use of a student's religious viewpoint as a basis for excluding the student from accessing public education facilities or funds that the student would otherwise be eligible to use for expressive purposes.⁶⁵ This reasoning was soon extended to government benefits generally, with the concomitant narrowing or overruling of prior separationist decisions that had prohibited receipt of such benefits by religious individuals and institutions.⁶⁶ Indeed, for a time it seemed that neutrality analysis would wholly displace separation analysis under the Establishment Clause.⁶⁷

But complete displacement never occurred. The Court's most recent school prayer decision confirmed that separation remains an important element of Establishment Clause doctrine,⁶⁸ and significant

⁶⁵ See *Good News Club v. Milford Ctr. Sch. Dist.*, 533 U.S. 98, 107 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 842-26 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 396-97 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248-49 (1990); *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981).

The Court abandoned the religious exemption doctrine and installed neutrality as the governing Free Exercise Clause value during this period. See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). It has reaffirmed its core holding in *Smith* on two subsequent occasions. See *City of Boerne v. Flores*, 521 U.S. 507, 512-16 (1997); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). For an account of the shift in Free Exercise doctrine during this period, see GEDICKS, *supra* note 59, at 99-109.

⁶⁶ *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2472 (2002) (limiting *Nyquist*, 413 U.S. at 798); *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (overruling *Wolman*, 433 U.S. at 255; *Meek*, 421 U.S. at 352 (plurality opinion)); *id.* at 837 (O'Connor, J., joined by Breyer, J., concurring in the judgment); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (overruling *Aguilar*, 473 U.S. at 402; overruling in part *Ball*, 473 U.S. at 373; and limiting *Lemon*, 403 U.S. at 602); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8-10 (1993); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 486-89 (1986); *Mueller v. Allen*, 463 U.S. 388, 395-99 (1983); see also *Tex. Monthly v. Bullock*, 489 U.S. 1, 10 (1989) (invalidating sales tax exemption for religious magazines); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-11 (1985) (invalidating state law requiring that religious employees be excused from working on their Sabbath).

⁶⁷ Lupu, *supra* note 58, at 246-47. For an account of the development of neutrality doctrine under the Establishment Clause, see Frederick Mark Gedicks, *Neutrality in Establishment Clause Interpretation: Its Past and Future* [hereinafter Gedicks, *Establishment Clause Neutrality*], in *CHURCH-STATE RELATIONS IN CRISIS: DEBATING NEUTRALITY* 191 (Stephen V. Monsma ed., 2002) [hereinafter *CHURCH-STATE RELATIONS*].

⁶⁸ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305-06 (2000) (citing *Lee v. Weisman*, 505 U.S. 577, 590 (1992)) (striking down practice of student invocations prior to high school football games because, *inter alia*, the school had "failed to divorce itself from the religious content in the invocations," with the result that the prayers bore "the imprint of the State" and were correctly perceived as having been invited and encouraged by the school).

aspects of the doctrine remain informed largely by separation.⁶⁹ Neutrality analysis now appears to control cases involving government distribution of financial and tangible benefits and services to religious persons and organizations, whereas separation analysis continues to determine cases involving religious worship and speech by government, internal disputes among the members of religious organizations, and the delegation of government power to religious persons or organizations.⁷⁰

The two tracks of Establishment Clause doctrine, then, are separation and neutrality analysis. Separation analysis prohibits most government aid to, and interactions with, religion, even when these are undertaken on the same basis as aid to comparably situated secular individuals and organizations. Neutrality analysis, by contrast, permits government aid to and interaction with religious individuals and organizations, so long as this is done on the same basis as aid to comparably situated secular individuals and organizations.

B. *The "Central Meaning" of the Establishment Clause: Prevention of the Government-Established Church*

In contrast to the model of government tolerance that underwrites the two-track Speech Clause, the two-track Establishment Clause presupposes a model of government skepticism with respect to religion. Because moral or ethical certainty about religion is not possible—there is no way of demonstrating that any particular set of religious beliefs is the “true” or “right” one—the government must remain agnostic and uncommitted in relation to all religions, a posture suitably maintained by separation analysis.⁷¹ The entitlement of religious

⁶⁹ See, e.g., Underkuffler, *supra* note 9, at 579 (summarizing religious freedom under the First Amendment as consisting of government recognition and enforcement of religious toleration and freedom of conscience, equal treatment of religious and nonreligious persons, and institutional separation of church and state).

⁷⁰ See Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 802–07 (2001); see also Gedicks, *Establishment Clause Neutrality*, *supra* note 67, at 201.

[Separation] is likely to remain the controlling establishment clause value in two kinds of cases: those in which neutrality cannot give a plausible account of the relationship between church and state . . . and those in which the relationship between church and state too closely approaches the paradigm of the state-established church, despite a plausible account of neutrality.

Id.

⁷¹ See Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 108–09 (2002) (“The Establishment Clause forbids the state from declaring religious truth. . . . It means that the

individuals and groups to their fair share of welfare state largesse, however, requires the application of neutrality analysis to ensure that religious individuals and groups are treated equally with respect to their secular counterparts. The two-track Establishment Clause attempts to guard simultaneously against government-established religion by use of separation analysis, and discrimination against religion in the distribution of positive social welfare rights and benefits by use of neutrality analysis. Establishment Clause doctrine thus requires some means of routing church-state interactions to one analysis or the other. This function is performed by the resemblance of a church-state interaction to one of the classic attributes of the government-established church in the eighteenth century: church-state interactions that resemble one of these attributes trigger separation analysis; other church-state interactions undergo neutrality analysis.

Father Curry has persuasively argued that the phrase "establishment of religion" in the Establishment Clause was understood by Americans of the founding era to refer to a church which the government funded and controlled and in which it used its coercive power to encourage participation, like the Anglican church in England, or the Roman Catholic church in southern Europe.⁷² A church "established" in this manner was understood to have three signal characteristics. First, as the guardian of the official government religion, the established church properly exercised the coercive power of government, including the power to enforce as criminal infractions of the church's denominational rules and moral requirements,⁷³ as well as the power to reserve governmental offices and other privileges exclusively for its congregants.⁷⁴ Second, the established church was en-

state may not declare articles of faith. The state may not express an opinion about religious matters. It may not encourage citizens to hold certain religious beliefs."); cf. Gey, *supra* note 33, at 1566 (arguing that under a skepticism model of the Speech Clause, it is presumed that no theory of moral certainty exists that would permit a determination that deviant speech is sufficiently antisocial that it may properly be suppressed).

⁷² CURRY, *supra* note 33, at 16, 37, 109; THOMAS CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 191-92* (1986).

⁷³ WITTE, *supra* note 63, at 190 (noting that "[c]ontraventions of royal religious policy were punishable both as heresy and as treason"); see, e.g., 4 WILLIAM BLACKSTONE, *BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND* *52 (describing the system of monetary fines imposed by the Crown on those who did not frequent Anglican services).

⁷⁴ See WITTE, *supra* note 63, at 190 ("The [English] common law . . . proscribed various forms of heresy, dissent, and nonconformity. Communicant status in the established church was a condition for citizenship status in the commonwealth. Religious dissenters, if tolerated, were foreclosed from most political and ecclesiastical offices and various social and economic opportunities."); see, e.g., 4 BLACKSTONE, *supra* note 73, at *52-53 (observing that reserving offices of trust and profit for communicants of the Church of England is an appropriate way for the magistrate to discharge his legal obligation to

titled to a share of general tax revenues and other government financial assistance in direct support of its worship, rituals, and other denominational activities, often in the form of mandatory tithes collected from members and nonmembers alike.⁷⁵ Third, significant aspects of the established church were subject to government control or approval, such as the definition of doctrine and the selection of leaders.⁷⁶

Many of the repressive attributes of the Anglican establishment in England were replicated in the colonies.⁷⁷ Under the Anglican estab-

appropriate way for the magistrate to discharge his legal obligation to protect the Church of England); *id.* at *58-59 (describing the Corporation and Test Acts, which prohibited, on penalty of fine and disqualification, any municipal or corporate officer from holding office unless he received communion in the Church of England and swore an oath disavowing belief in transubstantiation); MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 23 (2002) (observing that Anglican bishops sat in the House of Lords as a matter of right, and noting that as a nontrinitarian, Isaac Newton, required special leave of Parliament to teach at Cambridge); Benjamin Franklin, *Letter to the London Packet* (June 3, 1772) (observing that in England dissenters are excluded from all offices of trust and profit, and university education is restricted to the sons of Church of England communicants), *reprinted in* 5 *THE FOUNDERS' CONSTITUTION* 58-59 (Philip B. Kurland & Ralph Lerner eds., 1987).

⁷⁵ *E.g.*, Franklin, *supra* note 74, at 58-59 (observing that in England, dissenting churches are not entitled to any of the mandatory tithes collected from their congregants); *see* WITTE, *supra* note 63, at 30, 32 (noting that one of the colonists' grievances against England was their subjection to the religious taxes and assessments of the Church of England).

⁷⁶ MCCONNELL ET AL., *supra* note 74, at 21 (summarizing royal control over the Church of England, including royal power to correct doctrinal errors, to prescribe liturgical requirements and ministerial qualifications, and to appoint the Archbishop of Canterbury and other high church officials); WITTE, *supra* note 63, at 190 ("The [English] common law prescribed orthodox doctrine, liturgy, and morality . . . [and] governed the form and function of the established church polity. It delineated the boundaries of the parishes and the location of the churches. It determined the procedures of the vestries and the prerogatives of the consistories. It defined the duties of the clerics and the amount of their compensation. It dictated the form of the church corporation and the disposition of its endowments.").

⁷⁷ *See, e.g.*, Carolina Fundamental Constitutions of 1669 ¶ 96, *reprinted in* 5 *THE FOUNDERS' CONSTITUTION*, *supra* note 74, at 51 (providing that colonial parliament shall establish parishes and provide for public maintenance of churches and ministers "according to the Church of England; which being the only true and orthodox, and the national religion of all the King's dominions, is so also of Carolina; and, therefore, it alone shall be allowed to receive public maintenance, by grant of parliament"); The Body of Liberties of the Massachusetts Collonie in New England § 58 (1641), *reprinted in* 5 *THE FOUNDERS' CONSTITUTION*, *supra* note 74, at 47-48 (providing that the rites, ordinance, "peace," and "Rules of Christ" observed in the Congregational churches shall be enforceable by civil authorities); *see also* Underkuffler, *supra* note 9, at 578.

In the 17th and 18th centuries, religious oppression and persecution characterised virtually all of the American colonies. Quakers, Baptists, Roman

lishment in Virginia, for example—the “most rigid and exclusive establishment of religion in America”—the Church of England enjoyed the benefit of land grants, financial support by a mandatory tithe, enforcement of compulsory Anglican worship, and the harassment and prohibition of religious competitors.⁷⁸ Baptist, Congregationalist, and Roman Catholic clergy were routinely fined and imprisoned, and were subject to summary expulsion from the colony.⁷⁹ Quakers were frequently subjected to imprisonment and expulsion, and Roman Catholics were prohibited from holding public office.⁸⁰ Between 1720 and 1750, more Virginians were indicted for failing to attend Anglican services than for any other crime, with evasion of mandatory tithes a close second.⁸¹

It is widely accepted that the Establishment Clause (as well as the Religious Test Clause before it) was included in the Constitution primarily to prevent the federal government from establishing a national church, and secondarily to insulate then-existing state-established churches from federal interference.⁸² State establishments disap-

Catholics, Jews, and Unitarians were particular targets for persecution. Criminal penalties, civil disabilities, and other sanctions were imposed if individuals persisted in the exercise of forbidden faiths, refused to affirm the tenets of the dominant faith, or otherwise offended majority religious sensibilities. Citizens were also taxed for their support of established Christian churches, a practice which engendered particularly bitter opposition.

Id. For a succinct description of the general characteristics of state-established churches at the time of the founding, see 1 MELVIN UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 71–73 (2d ed. 2002).

⁷⁸ See Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 *TULSA L. REV.* 7, 8 (2001); see also Lupu & Tuttle, *supra* note 7, at 1142 (“[T]here can be no doubt that the Founding Generation saw compulsory taxation to pay for the salary of clergy, and the construction of houses of worship, as a constitutional problem of the highest magnitude.”).

⁷⁹ See, e.g., LEO PFEFFER, *CHURCH, STATE AND FREEDOM* 80 (1953); McConnell, *supra* note 78, at 8–9.

⁸⁰ See, e.g., PFEFFER, *supra* note 79, at 80.

⁸¹ See A.G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680–1810*, at 141–42 (1981).

⁸² On the original purposes of the Establishment Clause, see DAVID P. CURRIE, *THE CONSTITUTION OF THE UNITED STATES* 86 (2d ed. 1997); MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* 3, 15–16 (1978); WITTE, *supra* note 63, at 77–78, 163; Lupu & Tuttle, *supra* note 13, at 38. On the original purposes of the Religious Test Clause, which provides that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States,” U.S. CONST. art. VI, cl. 3, see MCCONNELL ET AL., *supra* note 74, at 23; 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 705, 709 (Hilliard, Gray 1833); WITTE, *supra* note 63, at 63.

peared by the early 1800s, however, and the federalism rationale dropped out of the Establishment Clause altogether with incorporation in 1947,⁸³ leaving only the anti-establishment rationale, now applicable to the states as well as the federal government.⁸⁴

The three characteristics of the classic eighteenth century established church—exercise of government authority, entitlement to government financial support, and subjection to government control—are reflected in the prohibitions of contemporary separationism: Government may not act in the name of religion (and vice versa), may not fund the denominational activities of religious organizations, and may not interfere in the internal governance decisions of religious denominations and groups.⁸⁵ The constitutionality of church-state interactions that resemble one of these characteristics, such as the religious exercise of government power,⁸⁶ government funding or support of religious worship or ritual,⁸⁷ or government interpretation of religious doctrine or interference in the selection of religious leaders,⁸⁸ are determined by separation analysis. On the other hand, the constitutionality of other church-state interactions—by definition,

Father Curry has challenged the conventional understanding, arguing that all formal state establishments had been dismantled by the 1790s, and that practices constituting an informal or "de facto" Protestant establishment were never understood by the framers to have been implicated by the Establishment Clause. See CURRY, *supra* note 33, at 41–43.

⁸³ See *Everson*, 330 U.S. at 15–16.

⁸⁴ See CURRIE, *supra* note 82, at 86; WITTE, *supra* note 63, at 115.

⁸⁵ Lupu & Tuttle, *supra* note 13, at 52; accord *Lemon*, 403 U.S. at 612 (citing *Wab*, 397 U.S. at 668) ("The three main evils" of establishment are "sponsorship, financial support, and active involvement of the sovereign in religious activity."); WITTE, *supra* note 63, at 183 (reading the three elements of separationism as preventing "[r]eligious officials" from "converting the offices of government into instruments of their mission and ministry," "[g]overnment" from "funding, sponsoring, or actively involving itself in the religious exercises of a particular religious group or religious official," and "[r]eligious groups" from "drawing on government sponsorship or funding for their core religious exercises"); Underkuffler, *supra* note 9, at 580–81 (describing the "three forms of establishment of religion by government that are particularly problematic from a constitutional point of view" as "state favoritism toward particular religious (or nonreligious) groups; the granting of state financial support to religious institutions; and the assumption by religious institutions of essentially public functions").

⁸⁶ *E.g.*, *Bd. of Educ. v. Grumet*, 512 U.S. 687, 698 (1994); *Larkin v. Grendel's Den*, 459 U.S. 116, 127 (1982).

⁸⁷ *E.g.*, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 316–17; *Lee*, 505 U.S. at 597–99; *Wallace v. Jaffree*, 472 U.S. 38, 60–61 (1985); *Schempp*, 374 U.S. at 226–27; *Engel*, 370 U.S. at 431–32.

⁸⁸ *E.g.*, *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116, 120–21 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 710–11 (1871).

those that do not raise separationist concerns—such as government benefits which religious individuals qualify to receive under secular criteria, or government aid to or funding of secular services performed by religious groups, is properly determined by neutrality analysis.

In other words, a government interaction with religion is routed onto one Establishment Clause track or the other on the basis of its similarity to the attributes of the eighteenth century government-established church. The more that a government interaction with religion displays these attributes, the more likely it is that it will be evaluated by separation rather than neutrality analysis.

C. *The Absolute Value of the Separation of Church and State*

Just as mere content-neutrality is not a sufficient condition for upholding a restriction on expression under the Speech Clause, so also mere neutrality among religious denominations, or between religion and nonreligion, is not sufficient by itself to sustain a government action under the Establishment Clause. For example, for many years the Court analyzed the constitutionality of direct government aid to religious organizations in terms of whether the aid was susceptible to diversion from the secular use for which it was provided to a sectarian use.⁸⁹ Aid that was capable of being diverted to sectarian uses was deemed to violate the Establishment Clause, even in the absence of evidence that the aid was actually so diverted. Under this analysis, a private religious school's receipt of, say, a computer from the government under secular disbursement criteria would have normally been held to violate the Establishment Clause because the computer could easily be used by the priest or minister of the congregation sponsoring the religious school to track attendance at worship services, to write sermons delivered at those services, to list potential persons or areas to target for proselytizing, or for other sectarian religious purposes. This was true even if it was clear that the computer had not, in fact, been diverted to any such use.

The Court recently abandoned *potential* diversion to sectarian uses as a constitutional test under the Establishment Clause, but a ma-

⁸⁹ *E.g.*, *Agostini*, 521 U.S. at 203; *Ball*, 473 U.S. at 373; *Wolman*, 433 U.S. at 229; *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976); *Nyquist*, 413 U.S. at 756; *see also* 42 U.S.C. § 604a(j) (2000) (providing that federal funds supplied directly to faith-based welfare service providers pursuant to government contract may not be used for "sectarian worship, instruction, or proselytization").

jority of the Court still clings to *actual* diversion as a constitutional test. In *Mitchell v. Helms*, four Justices maintained that both potential and actual diversion of government aid to sectarian uses are irrelevant to the constitutionality of an aid program under the Establishment Clause, arguing that when aid does not have an impermissibly religious content its distribution according to religiously neutral criteria does not violate the Establishment Clause, even if the aid is subsequently diverted to sectarian uses.⁹⁰ Two Justices agreed with the plurality on the irrelevance of potential diversion, but flatly rejected the plurality's abandonment of actual diversion and its adoption of neutrality as the sole test, labeling it a rule of "unprecedented breadth."⁹¹ The three dissenters argued for retention of potential diversion as the appropriate test, which necessarily encompasses actual diversion.⁹²

Although one can argue that even prohibitions on actual diversion of direct aid to worship, denominational instruction, and other denominational activities have no real economic effect,⁹³ such prohibitions serve a useful symbolic purpose. Direct assistance of such activities implies government endorsement of a particular religion and the use of government power, prestige, and largesse to assist that relig-

⁹⁰ 530 U.S. at 820 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., & Scalia & Kennedy, JJ.).

⁹¹ *Id.* at 837-38 (O'Connor, J., joined by Breyer, J., concurring in the judgment); accord Underkuffler, *supra* note 9, at 583 ("The idea that government aid—no matter how massive—can be given to religious institutions, as long as it is done on a 'neutral' basis, is a radical departure from previously existing Establishment Clause doctrine."); see also *Agostini*, 521 U.S. at 234-35 (discarding the presumption that public employees will inevitably teach religion when performing their secular functions on religious school campuses, in favor of a standard that inquires whether actual religious teaching by public employees has taken place).

⁹² *Mitchell*, 530 U.S. at 884 (Stevens, J., joined by Souter & Ginsberg, JJ., dissenting) ("The insufficiency of evenhandedness neutrality as a stand-alone criterion of constitutional intent or effect has been clear from the beginning of our interpretive efforts . . .").

⁹³ Whenever government supplies aid to religious schools, they relieve the school of an expense that the school would otherwise have had to pay for with its own, privately raised funds, even if the aid is neither potentially divertible nor actually diverted. Government aid, even if undivertible and undiverted, frees funds for worship, sectarian instruction, and other such activities that would otherwise be used to purchase the goods or services supplied by the government. *E.g.*, *Lemon*, 403 U.S. at 461 (Douglas, J., concurring) ("The [religious] school is an organism living on one budget. What the taxpayers give for salaries of those who teach only the humanities or science without any trace of proselytizing enables the school to use all of its own funds for religious training."). The Court, however, never accepted this argument. See, *e.g.*, *Agostini*, 521 U.S. at 230 (holding possibility that public services provided to private religious schools might enable such schools to cut spending in the same areas insufficient to violate the Establishment Clause); *Ball*, 473 U.S. at 394 (rejecting "the mere possibility of subsidization . . . as sufficient to invalidate an aid program").

ion's worship and other sectarian activities—both classic attributes of the government-established church. Though this harm is largely symbolic, at least if the aid is supplied on a religiously neutral basis, it is nevertheless significant because of what such direct assistance implies: the unification of government with a particular religion, and the government's providing direct assistance to that religion's worship and sectarian activities, underwritten by taxes generally assessed on the entire population—all three of the classic attributes of the government-established church.

A majority of the Court has adhered to a comparable test, based on a comparable rationale, in some of the equal access cases.⁹⁴ The Court has refused to endorse the proposition that religious speech in a public forum cannot constitute a violation of the Establishment Clause, reasoning that even if access to the forum is regulated by religion-neutral conditions, under some circumstances there could be a reasonable perception that the government endorses the religious speech occurring there and thereby has violated the Establishment Clause.⁹⁵ A reasonable perception that the government, rather than a private individual or group, is sending a message of religious endorsement suggests one of the attributes of the government established church—the use of government power and authority to enforce the established church's rules and requirements.

⁹⁴ *Pinette*, 515 U.S. at 753; *Rosenberger*, 515 U.S. at 819; *Lamb's Chapel*, 508 U.S. at 395.

⁹⁵ In *Pinette*, for example, the Court divided along nearly the same lines as it did in *Mitchell*. See 515 U.S. at 757. The same four-Justice plurality maintained as a *per se* rule that private religious expression occurring in a public forum cannot be attributed to the government and thus cannot under any circumstances violate the Establishment Clause. *Id.* at 770 (plurality opinion by Scalia, J., joined by Rehnquist, C.J., & Kennedy & Thomas, JJ.). Three Justices concurred in the judgment, but reserved the possibility that the government's operation of a public forum could conceivably create a reasonable perception that it endorsed religious speech occurring there. *Id.* at 777–78 (O'Connor, J., joined by Souter & Breyer, JJ., concurring in part and concurring in the judgment); *id.* at 785–86 (Souter, J., joined by O'Connor & Breyer, JJ., concurring in part and concurring in the judgment). The dissenters argued that the speech in question in fact created a perception of government endorsement notwithstanding its occurrence in a public forum. *Id.* at 807–12 (Stevens, J., dissenting); *id.* at 817–18 (Ginsburg, J., dissenting); see also *Rosenberger*, 515 U.S. at 841–42 (student Christian newspaper's receipt of university subsidy constituting limited public forum did not violate Establishment Clause because, *inter alia*, the university took "pains to disassociate itself" from the Christian newspaper, and any "mistaken impression that the student newspapers speak for the University" would not have been plausible); *Lamb's Chapel*, 508 U.S. at 395 (church's use of school constituting limited public forum to show film series on Christian child-rearing did not violate Establishment Clause because, *inter alia*, there was "no realistic danger that the community would think that the [school district] was endorsing religion or any particular creed").

The use of actual or potential diversion in government aid cases and the perception of government endorsement in equal access cases reflect that separation is both historically and functionally at the core of the Establishment Clause. It was separation, not neutrality, that spoke to the abuses of the established church in the world of the founders.⁹⁶ In the world of limited government inhabited by the framers, the mere separation of government and religious authority created religious liberty. Once government authority was severed from the established church, the church was unable to punish citizens for failure to conform to the church's denominational requirements, nor could it demand exclusive political and governmental privileges for members. Similarly, separation left the established church with no greater claim on general tax revenues than other churches and, indeed, most other private organizations. Finally, the severance of the established church from the government left the church free of the latter's control of its leaders, doctrines, and other internal matters.

Neutrality, on the other hand, is a belated concern brought on by the growth of positive rights in the American social welfare state. It is only when the government is a significant source of benefits and assistance for individuals and private groups that one must invoke neutrality to ensure that religious individuals and organizations are not financially or otherwise penalized simply because of their religious orientation.

Separation is closer to the core of the Establishment Clause in a functional as well as a historical sense. If one imagines alternate regimes respectively governed solely by separation and solely by neutrality, it seems clear that the latter holds more potential for the repression and persecution that characterized the classic establishment of religion. A purely separationist regime would handicap religions by denying them financial and other benefits of the social welfare state, but separation's prohibition on most church-state interactions would still leave considerable private, unregulated space for the practice of religion.⁹⁷ A pure neutrality regime, however, would permit a substantial amount of government action that resembles the classic estab-

⁹⁶ The historical claim that the founders understood the Establishment Clause to be primarily about neutrality between religious denominations has been decisively refuted by Professor Laycock. See, e.g., CURRY, *supra* note 33; Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1985/86).

⁹⁷ See Douglas Laycock & Oliver Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 224 (1994) (arguing that the *Sherbert-Yoder* mandatory exemption doctrine abandoned by *Smith* was a manifestation of separationism).

lishment. For example, religious organizations could exercise government power and government could directly encourage and fund religious worship in a regime of neutrality so long as these were done on a religiously even-handed basis—that is, on the basis of secular criteria.⁹⁸ As long as the distribution criteria were secular, it would apparently be of no constitutional significance that the overwhelming majority of the aid was directed to religious schools.⁹⁹ For example, a local government might give religious groups—along with private schools, daycare centers, and other nonprofit businesses—the power unilaterally to prevent the operation in their vicinity of a business to which they have moral objections.¹⁰⁰ Public school prayer would be permissible, so long as religious and secular belief systems were given equal access to the prayer opportunity.¹⁰¹ Sectarian religious instruction could be present in the schools, as one choice among many de-

⁹⁸ See, e.g., *TRIBE*, *supra* note 4, § 14-7, at 1188 (arguing that under a regime of strict neutrality, restrictions based on a recipient's religious character would be prohibited, and governmental programs that benefit religion, including direct subsidies, would be permitted so long as no religious classifications were employed in defining the recipients); Ira C. Lupu & Robert Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, J.L. & POL. (forthcoming Summer/Fall 2002) ("A fully committed Neutralist would include religious piety, along with health, safety, and morals, among the purposes encompassed by government's broad powers to advance the general welfare."), available at http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID303837_code020422140.pdf?abstractid=303837.

⁹⁹ See, e.g., *Zelman*, 122 S. Ct. at 2460 (upholding tuition voucher program in which ninety-six percent of the voucher funds were directed to religiously affiliated schools); *Mueller*, 463 U.S. at 388 (upholding tax deduction and credit program in which ninety-six percent of those who received such tax benefits sent their children to religiously affiliated schools).

¹⁰⁰ Cf. *Larkin*, 459 U.S. at 120 (striking down statute which granted churches and other private groups the power to veto operation of a bar within the vicinity).

¹⁰¹ Cf. Erwin Chemerinsky, *Neutrality in Establishment Clause Interpretation: A Potentially Radical Right Turn*, in *CHURCH-STATE RELATIONS*, *supra* note 67, at 216 ("If equality were the only constraint imposed by the establishment clause, a school could begin each day with a prayer so long as every religion got its due."); Clarke E. Cochran, *Neutrality and Public Policy: Hidden Public Policy Traps in Mitchell v. Helms*, in *CHURCH-STATE RELATIONS*, *supra* note 67, at 223, 231.

[T]he door may be opened, if the Thomas plurality opinion [in *Mitchell v. Helms*] becomes the Court's controlling view, to religious devotions in public schools. For the argument could be made that school authorities who allow, rather than sponsor, students to recite prayers, lead devotions, and the like do not indoctrinate students. Indoctrination is not present . . . because the prayers and devotions of all religions that want to participate would be welcome (neutrality) and because the devotions themselves would be the private choices of students and parents.

nomination and ethical secular ones.¹⁰² Tax dollars could even be used to build churches and to pay ministers and priests, so long as such funds were also available to build the meetinghouses and to pay the leaders of comparable secular organizations.¹⁰³

It should come as no surprise, then, that the Court's own decisions have repeatedly invoked prevention of the attributes of the classic establishment of religion as the "core" purpose of the Establishment Clause.¹⁰⁴ Whereas the principle of neutrality protects against disadvantaging religion by denying it the rights and benefits of the social welfare state, the separation of church and state serves the more important purpose of protecting against the unification of coercive government power with religious authority, as well as the funding of denominational worship, ministry, and teaching with general tax revenues. It also protects against governmental control of the leadership, doctrine, and other internal matters of religious organizations.¹⁰⁵ The dramatic expansion of government during the twentieth century meant that for the government to satisfy equality concerns, religious individuals and organizations had to receive the same benefits as those received by comparably situated secular individuals and organizations. It is in this sense that one might speak of the contemporary welfare state's having created a "presumption of neutral-

Id.

¹⁰² See GEDICKS, *supra* note 59, at 58-61; Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 723-27 (2002).

¹⁰³ Cf. *Roemer*, 426 U.S. at 736 (invalidating provision of statute that lifted requirement of secular use of buildings constructed with public money at religious university after twenty years).

¹⁰⁴ E.g., *Lee*, 505 U.S. at 601 (An "essential precept of the Establishment Clause" is its prohibition of "the use of the power or prestige of the government to control, support, or influence the religious beliefs and practices of the American people."); *Ball*, 473 U.S. at 389 (When "close identification of [governmental] powers and responsibilities with those of any—or all—religious denominations . . . conveys a message of government endorsement or approval of religion, a core purpose of the Establishment Clause is violated."); *Larkin*, 459 U.S. at 126 (The unification of governmental and religious authority violates the "core rationale underlying the Establishment Clause."); see also *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 303 n.13 ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . .") (quoting *Weisman*, 505 U.S. at 587); *County of Allegheny v. ACLU*, 492 U.S. 573, 590-91 (1989) ("[T]his Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious organization, and may not involve itself too deeply in such an institution's affairs.").

¹⁰⁵ See Gedicks, *supra* note 7, at 568-69.

ity."¹⁰⁶ The notion that separation is the more fundamental value guarding against more serious constitutional evils, however, means that even if a government relation with religion fully satisfies neutrality, it should still be found to violate the Establishment Clause if that relation partakes of the attributes of the classic government-established church.

III. THREE DOCTRINAL OBSERVATIONS

The basic insight provided by the two-track theory of the Establishment Clause is that separation, not neutrality, is the more fundamental Establishment Clause value. Just as the government's interest in maintaining majoritarian social order must ultimately yield to the free flow of information and ideas, so also separation defines the limit of neutrality analysis. The two-track theory of separation and neutrality supplies analytic focus and clarity to several current Establishment Clause controversies.

A. Tuition Vouchers for Education at Private Schools

With respect to religious school tuition vouchers, the two-track theory suggests that, in general, voucher programs do not violate the Establishment Clause. *Zelman v. Simons-Harris* merely confirmed what was already clear from the Court's previous decisions: The Establishment Clause permits government monetary aid to flow to religious schools if the schools qualify for aid under secular criteria and the determination whether any particular school receives aid is made by an individual parent or student rather than the government.¹⁰⁷ Indi-

¹⁰⁶ See Lupu & Tuttle, *supra* note 13, at 78; see also Lupu & Tuttle, *supra* note 98, at 12 ("In an era in which equality norms dominate constitutional understandings, claims of disparate treatment—whether the exclusion of religious entities from government-controlled benefits, or the exemption of such entities from government regulation—demand justification.").

¹⁰⁷ Gedicks, *Establishment Clause Neutrality*, *supra* note 67, at 199; e.g., 122 S. Ct. 2460, 2467–68 (2002) (upholding elementary and secondary school tuition voucher program which included religious schools among eligible participants); see *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997) (upholding provision of remedial education, guidance, and job counseling services by public school employees to low-income students attending qualified private elementary or secondary school); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993) (upholding provision of state-salaried sign language interpreter to deaf student attending Roman Catholic high school); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 489 (1986) (upholding payment of state vocational rehabilitation grant on behalf of blind recipient studying for ministry at Bible college); *Mueller v. Allen*, 463 U.S. 388, 402 (1983) (upholding income tax deduction for tuition, textbook, and

vidual choice plays an indispensable role in upholding the facial validity of voucher programs under the Establishment Clause. Unlike in-kind aid that is allocated directly to a religious school by government, voucher funds are fully fungible with the school's privately raised funds. Voucher support for even an unambiguously secular activity of a religious school frees the school's private funds that otherwise would have been devoted to the secular activity, and thus constitutes support for every other activity of the school, including undeniably sectarian activities.¹⁰⁸ Application of a diversion test to voucher programs would require participating religious schools to segregate voucher funds or otherwise to track the goods and services on which they expend such funds, to demonstrate that the funds had actually been spent on secular activities and had not been diverted to sectarian uses.¹⁰⁹ Voucher programs generally do not provide for the segregation or tracking of voucher funds¹¹⁰ and the Court has never required it.¹¹¹ As the Court recently explained in *Zelman*, "[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choices," any advancement or endorsement of the schools' religious mission "is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits."¹¹² Any advancement or endorsement of religion, in other words, is "caused" by the individual recipient, and not by the government, so that the Establishment Clause is not violated.¹¹³

Given the pervasive government funding of education, allowing religious schools to accept voucher funds bears no greater resem-

transportation expenses incurred in sending child to public or qualified private elementary or secondary school).

¹⁰⁸ Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 20, 31 (1989).

¹⁰⁹ Cf. 42 U.S.C. § 604a(j) (2000) (prohibiting faith-based contractors from using federal funds paid directly to such contractors in "sectarian worship, instruction, or proselytization"); Esbeck, *supra* note 4, at 304-05 (acknowledging the duty of the government to account for how appropriated tax funds are utilized by institutional recipients).

¹¹⁰ See Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 786 (2002).

¹¹¹ See, e.g., *Witters*, 474 U.S. at 488.

¹¹² 122 S. Ct. at 2467.

¹¹³ See GEDICKS, *supra* note 59, at 49-50. For a critical assessment of this analysis, see Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167 (2000).

blance on its face to a classic religious establishment than does the provision of police or fire protection to such schools.¹¹⁴ Nevertheless, there may be circumstances in which separation analysis would properly apply to invalidate voucher programs.¹¹⁵ First, separation analysis should apply when voucher funds are directed to religious schools that discriminate in favor of members of their sponsoring denomination, or that otherwise discriminate on the basis of religion. If most private school participants in voucher programs are religiously sponsored, as appears to be the case, and if private schools provide a significantly better education, as some voucher proponents claim,¹¹⁶ then admissions discrimination by religious schools in favor of the congregants or members of the sponsoring religion will resemble the reservation of educational privileges that characterized the classic religious establishment.¹¹⁷ Separation analysis thus demands, at a minimum, that voucher participants employ nondiscriminatory admissions policies.

Second, if most private school participants in voucher programs are religious, and if educational gains by such participants are in fact achieved at the expense of public schools, as some voucher opponents predict,¹¹⁸ then parents in areas subject to voucher programs may find

¹¹⁴ See Gedicks, *Establishment Clause Neutrality*, *supra* note 67, at 200 ("[I]t is clearly permissible to allow government aid to flow directly to religious schools, so long as the schools qualify for the aid under secular criteria, and the amount of the aid is determined by student or parental choice and not by a government decision maker.").

¹¹⁵ For an insightful theoretical model analyzing challenges to voucher programs under the Establishment Clause, see Lupu & Tuttle, *supra* note 98, at 22-56.

¹¹⁶ See, e.g., Joseph P. Viteritti, *School Choice and American Constitutionalism*, in CHARTERS, VOUCHERS, AND PUBLIC EDUCATION 114, 130 (Paul E. Peterson & David E. Campbell eds., 2001); Jay P. Greene, *The Surprising Consensus on School Choice*, PUB. INT. (Summer 2001), available at <http://www.thepublicinterest.com/archives/2001summer/article2.html>; Nina Shokraii Rees, *Public School Benefits of Private School Vouchers*, 93 POL'Y REV. (Jan.-Feb. 1999), available at <http://www.policyreview.org/jan99/rees.html>.

¹¹⁷ I am grateful to Professor Tuttle for this suggestion. This analysis does not call into question *Corp. of the Presiding Bishop v. Amos*, 479 U.S. 1052 (1987), which upheld the power of Congress to exempt nonprofit institutions using their own funds from the religious antidiscrimination provisions of Title VII, see 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, 255 & n.33 (1999), as opposed to the use of government funds in such discrimination, see *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding revocation of tax exempt status of religious university acting on racially discriminatory religious beliefs).

¹¹⁸ See, e.g., Bob Chase, *Voucher System Would Hurt Schools Not Help*, Wisconsin Education Association Council, at <http://www.weac.org/news/dec96/neavouch.htm> (posted Dec. 2, 1996); Anti-Defamation League, *School Vouchers: The Wrong Choice for Public Education*, at http://www.adl.org/vouchers/vouchers_main.asp (last visited Sept. 2002).

that they are forced as a practical matter to place their children in private religious schools to obtain an adequate education, irrespective of preference.¹¹⁹ This bears a strong resemblance to the classic religious establishment's reliance on government financial assistance to force participation in its services and activities. Thus, even a voucher program that requires a nondiscriminatory admissions policy on the part of religious participants may still be found invalid under the Establishment Clause if the program does not provide adequate secular schools as an alternative.¹²⁰

Finally, neutrality analysis would permit the situation in which all of the activities of a participating religious school, including religious instruction and worship, are fully funded by voucher monies. Although the secular component of the education offered by a religious school may be quite high in comparison to the religious component,¹²¹ it necessarily constitutes less, perhaps substantially less, than the entire educational experience, combining secular and religious components, offered by the school. If government funding exceeds the secular value of the education provided by a religious school, then it may reasonably be argued that this excess is funding the school's

¹¹⁹ Blasi, *supra* note 110, at 810 (suggesting that the Establishment Clause might be violated "if a voucher system resulted in so many students in a school district choosing a particular religious school that it became the only local educational institution, public or private, able to provide a decent education," or "if the pattern of choices resulted in a variety of religious schools but no viable secular schools, public or private"); Lupu & Tuttle, *supra* note 98, at 55 ("The combination of legal compulsion to educate their children, and the practical compulsion to avoid substandard schools, means that parents are not entirely free to accept or decline the offered exits from the neighborhood schools."); Martha Minow, *Reforming School Reform*, 68 *FORDHAM L. REV.* 257, 267 (1999) ("Experts predict the emergence of a two-tiered system [as the result of voucher programs]: elite schools benefiting from competition and other schools declining—but not shutting down—as their student enrollments shrink and resources accordingly diminish."). Professor Eugene Volokh argues that this situation would be rare, and in any event, is easily remedied by, for example, requiring that a school board keep open at least one public school in every locality, or placing a cap on the percentage of voucher funds going to religious schools. See Eugene Volokh, *Equal Treatment is Not Establishment*, 13 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 341, 350 & n.14 (1999).

¹²⁰ See Lupu & Tuttle, *supra* note 98, at 55, ("The combination of legal compulsion to educate their children, and the practical compulsion to avoid substandard schools . . . should be sufficient to shift to the government the burden of showing that voucher recipients have sufficient nonreligious educational choices, *reasonably equal in quality to the religious choices available*, to preclude an inference that government is responsible for steering children into the religious training actually received by [voucher]-financed students."). This should be the case particularly when religious schools participating in the voucher program are not required to allow students to opt out of worship or sectarian teaching otherwise required by the school. *Id.* at 56–57.

¹²¹ See GEDICKS, *supra* note 59, at 88.

religious activities.¹²² That situation might test the commitment of some members of the *Zelman* majority, particularly Justice O'Connor, to the proposition that individual choice insulates religious schools from facial Establishment Clause review. In any event, such a situation would resemble the funding of ministerial leadership and denominational teaching and worship in the classic religious establishment by mandatory tithes or other general tax revenues.¹²³ Under separation analysis, voucher programs would violate the Establishment Clause if the secular value of the education provided by religious schools receiving voucher funds is less than the amount of such funds received by the school.

B. Faith-based Provision by Government of Social Services

President Bush's promised expansion of faith-based social service initiatives is bogged down in questions about the extent to which (if at all) religious social service providers should be exempt from federal antidiscrimination laws in hiring their employees. In one sense, an exemption permitting religious providers to discriminate in favor of their own members merely gives to such providers what secular nonprofits enjoy as a matter of course. Nonreligious providers are generally permitted to hire only those employees who share their ideological premises. For example, it violates no law for a secular provider to refuse to hire an applicant who is categorically opposed to providing welfare services to the poor. A secular provider who believes that the poor are exploited by capitalists in a worldwide class conflict may discriminate in favor of Marxists, just as a secular provider who believes that the poor are responsible for their own situations may discriminate in favor of economic conservatives who believe that wealth is ac-

¹²² See Blasi, *supra* note 110, at 786 ("[O]pponents observe that the scale of the [voucher] subsidy means that tax revenues supplant rather than supplement the traditional, voluntary sources of funding for religious education, a feature that distinguishes vouchers from the much smaller, more specialized and restricted subsidies that occasionally have been upheld."); Jeffries & Ryan, *supra* note 61, at 288-90 (observing that in some religious school aid cases the Court has emphasized the relative insignificance of government funding as a percentage of a religious school's overall budget); Underkuffler, *supra* note 113, at 181, 187 (same).

¹²³ See Blasi, *supra* note 110, at 786 ("As opponents view the matter, what is distinctive about vouchers is that coercively generated tax revenues pay for unambiguously religious instruction."); cf. Underkuffler, *supra* note 113, at 187 (arguing that "complete funding" of religious schools or other religious institutions "would clearly violate the prerogatives of conscience of individual taxpayers and encourage integration of governmental and religious institutional power").

cumulated only by hard work. Exempting religious providers from antidiscrimination laws permits such providers to hire only those who share the religious beliefs that motivate and inform such providers' decisions to provide welfare services. Such an exemption would give to religious providers the same ideological discretion in hiring that nonreligious providers already have.¹²⁴

On the other hand, antidiscrimination exemptions implicate separation analysis in two opposing ways. Application of external social norms to religious providers' hiring decisions resembles government control over the leadership of the government-established church, particularly if the position being filled requires significant managerial or leadership responsibilities. Yet, the reservation of positions for congregants of the church sponsoring the religious provider clearly resembles the reservation of government and political privileges for communicants that characterized the classic Anglican establishment, particularly if the positions do not entail significant managerial or leadership responsibilities. Separation analysis thus points to a narrow antidiscrimination exemption, reaching only those who, at one extreme, like parish priests or employment counselors, exercise leadership or doctrinal authority in the sponsoring church, and not applying to those, at the other extreme, like receptionists, custodians, or mail clerks, whose jobs would require only a general (and not necessarily religious) commitment to government provision of social services.

C. *Public School Prayer*

The turn to neutrality in the 1980s and 1990s invigorated proponents of organized group prayer in public schools. The tactics currently employed by such proponents—a requirement of “nondenominational” prayers, a statement that the prayer merely “solemnizes” a school event, the delegation to voting student majorities of the decision whether to pray, and allowing such majorities to pick the person delivering the prayer from among a pool that includes potentially the entire student body—are all attempts to evade the strictures of church-state separation by fitting public school prayer under the umbrella of neutrality.¹²⁵

¹²⁴ See Ira C. Lupu, *Why Congress Was Wrong and the Court Was Right—Reflections on City of Boerne v. Flores*, 39 WM. & MARY L. REV. 793, 809 (1998).

¹²⁵ See Blasi, *supra* note 110, at 791 (referring to “the dubious practices, justified in the name of so-called ‘civil religion,’ whereby public institutions invoke assertedly ecumenical

This recourse to neutrality, however, obscures several fundamental issues of school-sponsored prayer, all of which entail separationist analysis. First, if school policy dictates a prayer, and the prayer that is actually delivered retains any theological content, the school is implicated in and responsible for that content, which necessarily violates the Establishment Clause.¹²⁶ It is obvious that in a radically pluralistic society like the United States, even the most "nondenominational" religious observances are bound to offend some believers, and in some contexts may even coerce them.¹²⁷

Second, the use of government to sponsor and to encourage participation in worship and other religious rituals is an attribute of the established church. Indeed, the very attempt to dictate the content of that worship, as many public school prayer policies do, resembles one of the most repressive aspects of the established church. Finally, delegation to religious majorities of government decision making about creation and access to the prayer opportunity constitutes the unconstitutional delegation of governmental power to religion, yet another attribute of the established church.¹²⁸

The only way that group prayer can occur in public schools is when it is initiated by an individual student in a genuinely open forum—that is, a forum open to indiscriminate use by a wide variety of

(though almost invariably theistic) religious rituals, symbols, and precepts to solemnize civic endeavors"); cf. Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1023 (1995) (arguing for the constitutionality of student-initiated prayer and proselytizing in public schools on the basis of content-neutrality and other Speech Clause doctrines).

¹²⁶ E.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306–10 (2000) (finding that because selection process for pre-game speaker invited and encouraged religious messages, those present at the game reasonably perceived the religious message as "a public expression of the views of the majority of the student body delivered with the approval of the school administration" in violation of the Establishment Clause); see Gedicks, *Establishment Clause Neutrality*, *supra* note 67, at 203 (arguing that speaker-identity and subject-matter restrictions that exclude most nonreligious speakers and messages create the reasonable perception that those who deliver a religious message satisfying such restrictions are speaking on behalf of the government).

¹²⁷ E.g., *Newdow v. United States Congress*, 292 F.3d 597, 609 (9th Cir. 2002) (two-to-one decision) ("Although defendants argue that the religious content of 'one nation under God' [in the Pledge of Allegiance] is minimal, to an atheist or a believer in certain non-Judeo-Christian religions or philosophies, it may reasonably appear to be an attempt to enforce a 'religious orthodoxy' of monotheism, and is therefore impermissible."); see Jeffries & Ryan, *supra* note 60, at 327 (discussing *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962)).

¹²⁸ Cf. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 305 (noting that student elections for the purpose of choosing whether a prayer shall occur and who shall deliver it impermissibly place minority views about such prayers at the mercy of majority views).

student speakers other than those who wish to pray.¹²⁹ Few school administrators are willing to risk such lack of control. As a consequence, separation analysis will generally preclude organized group prayer in public schools.

CONCLUSION

An Establishment Clause based solely on neutrality presupposes that the core anti-establishment concerns of the Clause are no longer relevant. Although the possibility of full-scale restoration of the classic religious establishment in the United States is remote,¹³⁰ there is nevertheless a credible threat that theological tolerance might replace theological skepticism as the conceptual model of the Establishment Clause. There is a disturbing insistence on the part of some that the United States is a "Christian nation" whose laws and government must reflect that "fact."¹³¹ Although the nation as a whole is religiously plural, perhaps even radically so, such pluralism does not obtain in every part of the country. For example, Mormons control Utah and exert considerable influence in the rest of the western Rockies; fundamentalist and other conservative Christians dominate the rural South and Midwest; and Roman Catholics and even Jews wield considerable political and cultural power in California, the Northeast, and many ur-

¹²⁹ See Gedicks, *Establishment Clause Neutrality*, *supra* note 67, at 203 ("The Court has consistently invalidated government-sponsored prayer whenever the government seeks to dictate or encourage the selection of a (particular) religious speaker or a (particular) religious message—that is, whenever the government is not willing to open up the opportunity for prayer into a true public forum permitting 'indiscriminate use' by secular as well as religious speakers for secular as well as religious messages.").

¹³⁰ See *Wolman v. Walter*, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights.").

¹³¹ See, e.g., James Dobson, *Family News from Dr. James Dobson*, *Focus on the Family Newsletter*, June 1996, at 3-4 (endorsing both the position that it is the "duty" of Americans "to select and prefer Christians" as their political leaders, and the declaration that the United States "is a Christian nation"); see also GILLES KEPEL, *THE REVENGE OF GOD: THE RESURGENCE OF ISLAM, CHRISTIANITY, AND JUDAISM IN THE MODERN WORLD* 110, 123 (Alan Brakley trans., 1994) (observing that since the mid-1970s, Protestant fundamentalists have endorsed "a political transformation of American by means of re-Christianization," with the goal of "the principles of the Bible" becoming "the law of the land" (quoting GARY NORTH, *CHRISTIAN RECONSTRUCTION*)); GEORGE M. MARSDEN, *UNDERSTANDING FUNDAMENTALISM AND EVANGELICALISM* 95, 110 (1991) (noting the birth of a powerful fundamentalist Protestant coalition in the 1970s opposed to abortion rights, pornography, and the Equal Rights Amendment; supporting school prayer; and stressing theological orthodoxy, rejection of secular morality, and "incivility toward persons with other beliefs" in addition to traditional evangelizing).

ban areas. Thus, even if there is no credible national threat of the imposition of a tolerance model of the Establishment Clause, there is danger of such imposition in many states and localities. Separation and the two-track Establishment Clause speak to that danger. Like the two-track Speech Clause, which allows substantial regulation of low-value speech while preserving maximum constitutional protection for the political speech that is at the core of that Clause, the two-track Establishment Clause allows religious individuals and organizations to enjoy the rights and benefits of the social welfare state, while still safeguarding the anti-establishment concerns at the core of the Establishment Clause.