Choice Programs and Market-Based Separationism

Paul E. Salamanca
University of Kentucky College of Law, psalaman@uky.edu

Click here to let us know how access to this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub
Part of the Constitutional Law Commons, and the First Amendment Commons

Repository Citation
Salamanca, Paul E., "Choice Programs and Market-Based Separationism" (2002). Law Faculty Scholarly Articles. 570.
https://uknowledge.uky.edu/law_facpub/570

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
Choice Programs and Market-Based Separationism

PAUL E. SALAMANCA†

INTRODUCTION

The Supreme Court's recent decision in *Zelman v. Simmons-Harris*\(^1\) appears to clear the way for a wide variety of educational and charitable choice plans. In this decision, the Court upheld against Establishment Cause Challenge a formally neutral school choice program that encompassed a wide variety of options in the public and private sector, including private sectarian schools. The Court reasoned that, when the government makes aid available to a broad class of recipients without regard to their religious or non-religious affiliation, and when the recipients have a genuine choice as to whether to obtain that aid from a religious or non-religious provider, the Establishment Clause is not offended.\(^2\)

If taken to its logical limits, the rule of law announced in *Zelman* appears competent to sustain any of a number of

---

† Associate Professor of Law, University of Kentucky College of Law. Copyright © 2002 by Paul E. Salamanca. I am indebted to a number of individuals who helped me in putting this paper together, including Richard Ausness, Tom Farrell, Michael Healy, Dayna Matthew, Frank Ravitch, John Rogers, and Jerry Sumney. I am also indebted to the participants in the 2001 Annual Meeting of the Central States Law School Association, as well as to the participants in the 2001 Annual Meeting of the Southeastern Association of American Law Schools, for their helpful suggestions. This paper is based in part on an address given at the Lexington Theological Seminary in Lexington, Kentucky, as part of its Convocation Series.

2. See id. at 2467:

   Where 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 choice, the program is not readily subject to challenge under the Establishment Clause.
public programs in which the government joins with private organizations, both secular and non-secular, to provide secular services. For example, in accordance with Zelman, the government might be able to make available to needy recipients vouchers for "substance abuse group therapy," which could be directed toward both public and private programs, including such religiously based programs as Alcoholics Anonymous. To say that such programs would continue to implicate the Establishment Clause would be to understate the case, but Zelman appears to impose a burden upon persons challenging such programs that they have not historically been called upon to bear.  

Arguably, this is all for the good, because several of the animating purposes behind the Speech, Press, and Exercise Clauses of the First Amendment support the constitutionality of educational and charitable choice plans. Most importantly, such plans facilitate a plurality of approaches to thinking, learning, and individual maturation. Whereas some parents might want their children to study secular subjects in school and theological subjects elsewhere, others might want their children to study these subjects together. Similarly, whereas some might want to address their emotional illness or substance abuse in a strictly non-sectarian environment, others might prefer an environment that

3. See generally Ira C. Lupu & Robert Tuttle, Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers, 18 J. L. & POLITICS (forthcoming Summer/Fall 2002). The authors' elucidation of the issues regarding what I have described as a voucher program for "substance abuse group therapy" is particularly insightful.

4. For purposes of this paper, I am defining an "educational choice plan" as a plan pursuant to which the government directs money to private schools, without reference to their sectarian or non-sectarian nature, on a per-student basis to defray the cost of such students' tuition, strictly in accordance with a decision by that child's parents that he or she should attend that school. The details of any such plan could vary considerably, but, provided enrollment in any particular school is voluntary, most variation among plans would be immaterial to this paper. My definition of a charitable choice plan is similar, but obviously would relate to social services other than education.

5. See generally Nomi Maya Stolzenberg, "He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of Liberal Education, 106 HARV. L. REV. 581 (1993). Cf. Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819, 831 (1995) (requiring a public university to pay certain expenses of an explicitly Christian evangelical newspaper as part of a general program supporting publications by students) ("It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought.").
relies upon overtly sectarian or broadly deistic principles.\textsuperscript{6} If the Speech, Press, and Exercise Clauses of the First Amendment are designed to facilitate study, reflection, individual development, and the interchange of ideas,\textsuperscript{7} then encouraging a plurality of approaches to such activities promotes values that underlie the amendment.

Moreover, educational choice plans can also be used to implement goals underlying the Equal Protection Clause, including the goal of promoting greater harmony among the various peoples who inhabit the United States.\textsuperscript{8} Research indicates that true harmony among people of different faiths can come about effectively at the theological level, at which people of sometimes rival faiths manage to bridge gaps between their own traditions and those of others.\textsuperscript{9} If this bridge-building can occur at the theological level, it follows that theological study should be encouraged, not marginalized.\textsuperscript{10}

\begin{footnotes}
\item[6] See \textit{Alcoholics Anonymous World Services, Inc., Alcoholics Anonymous} 59 (3d ed. 1976) (setting forth the steps of the A.A. program) (Step Two: “Came to believe that a Power greater than ourselves could restore us to sanity.”).
\begin{quote}
not in technical legal materials but in such political and ethical desiderata as improving the position of blacks; adopting a principle of racial (and implicitly also religious and ethnic) equality to vindicate the ideals for which World War II had recently been fought; raising public consciousness about racial injustice; promoting social peace through racial harmony; [and] breathing new life into the equal protection clause.
\end{quote}
\item[10] Id.
\item[10] Some may argue that certain religions are naturally inward looking, or so disposed to an aggressive form of conversion, that facilitating instruction in such religions would only exacerbate gaps between religious groups. To the extent this is true, the Fourteenth Amendment’s broad purpose of encouraging harmony between groups of people would not be promoted immediately. On the other hand, religious traditions in the United States often become Americanized, no matter how isolationist they may originally be. See \textit{generally Rodney Stark & Roger Finke, Acts of Faith: Explaining the Human Side of Religion} (2000) (noting that growth tends to result in the lowering of a religious group’s
The foregoing considerations lend affirmative support to the Supreme Court's decision in Zelman. But, in order to prevail, these considerations must overcome highly regarded principles that tilt in the opposite direction. Specifically, these considerations must engage the tradition of strict separationism and "no aid" to pervasively sectarian institutions, which dominated the Court during much of the period following the Second World War and which still enjoys strong support from the four justices who dissented vociferously from the Court's decision in Zelman. But this is not an impossible task. In fact, the time seems propitious for a continued, substantial realignment of the Court's basic approach to non-establishment.

The five justices who formed the majority in Zelman appear to be committed to a form of separationism that I would like to call "market-based separationism." Taking its cue from classic liberal economics, this form of separationism presumes that the government can subsidize some or all consumers in a market, without violating the Establishment Clause, if the supply in the market is sufficiently large and variegated to make choice the operative principle in uniting consumers with producers, if the subsidy is formally neutral with regard to religious and non-religious options, and if the product at issue can be defined in strictly secular terms.

This approach to non-establishment has several advantages. First, it accurately reflects the economic theory to which most Americans subscribe. Second, it does not overestimate the impact of official policy on religious choices, which are in actuality driven by a wide variety of factors, some of which are impervious to governmental influence.  

11. Justices Stevens, Souter, Ginsburg, and Breyer dissented from the Court's decision in Zelman. At one point in his dissent, Justice Souter described the majority's opinion as having reached "doctrinal bankruptcy." Zelman v. Simmons-Harris, 122 U.S. 2460, 2486 (2002) (Souter, J., dissenting). See also id. (Souter, J., dissenting) (describing two of the majority's criteria for a program that satisfies the Establishment Clause as "nothing but examples of verbal formalism"). Similarly, Justice Breyer described the majority's opinion in Zelman as "turn[ing] the clock back." Id. at 2508 (Breyer, J., dissenting).

12. Religious behavior can be analyzed like other economic phenomena. See generally STARK & FINKE, supra note 10, at 86 ("When people change churches
Third, it eschews a radically substantive or empirical approach to non-establishment, thus enabling public officials to formulate policy with a relatively clear idea of what the Constitution permits and forbids. Finally, because it retains some substantive components, market-based separationism may appeal in the long run to those who resist formally neutral interpretation of the Establishment Clause. Because it requires a certain minimum breadth and variegation in the class of providers, and because it presumably limits public subsidies to strictly secular products and services, this form of separationism arguably coheres with the traditional separationist notion that the Clause requires close assessment of the actual impact of governmental programs on religious choices.\textsuperscript{13}

It is my thesis that the Court should continue to move cautiously in this direction. Notwithstanding a slight restoration of faith in government arising from the "war on terrorism," the idea of looking beyond the public sector in the provision of public goods continues to attract the attention of policy-makers. Formerly public industries have been privatized in many countries, and the process of privatiza-

\textsuperscript{13. In this regard, candor compels the observation that, among the justices who dissent in Zelman, this may appeal only to Justice Breyer, who joined Justice O'Connor's separate opinion in Mitchell v. Helms, 530 U.S. 793, 836 (2000) (O'Connor, J., concurring in the judgment, joined by Breyer, J.). Justice Breyer has demonstrated some fondness for liberal economic theory. See generally Edward A. Fallone, The Clinton Court is Open for Business: The Business Law Jurisprudence of Justice Stephen Breyer, 59 Mo. L. REV. 857, 866 (1994) ("Justice Breyer approaches regulatory questions with a general bias towards the free market and against regulation."). A choice program is a form of deregulation, in that it expands the category of providers beyond the public sector, although in so doing it may encompass both religious and non-religious providers. If Justice Breyer can be persuaded to see the market-based and deregulatory aspects of a choice program more readily than the unintended religious aspects, then he may be persuaded to uphold such a program.}
Public activities are often managed by private concerns.\(^\text{14}\) Governmental domination of the healthcare industry was decisively rejected in the political arena during President Clinton's first term.\(^\text{15}\) Home-schooling has become increasingly common.\(^\text{16}\) Serious proposals have been made to privatize at least a portion of the retirement aspects of social security, although they may not be faring well in the post-Enron environment.\(^\text{17}\) Thus, there is a general trend, supported by a broad spectrum of the public, to outsource governmental operations.\(^\text{18}\) Choice plans fit

---


15. See, e.g., Robert W. Poole, Jr., Transport at the Millennium: Privatization: A New Transportation Paradigm, 53 Annals Am. Acad. Pol. & Soc. Sci. 94 (1997) (discussing various means by which governments and the private sector share responsibility for managing highways and airports). Mr. Poole has noted that:

> In the United States, contracting out, or outsourcing, is the most common mode of privatization. A large variety of public facilities are being operated by private firms under relatively short-term contracts (typically with a duration of five years or less). Among these are airports, convention centers, data-processing centers, golf courses, jails, sports arenas, toll collection systems, and water and wastewater plants or systems.

Id. at 96.

16. See David Gergen, Eyewitness to Power: The Essence of Leadership: Nixon to Clinton 304 (2000) (commenting on the failure of President Clinton's health-care proposal) ("To propose a health care plan that smacked of governmental control ran directly counter to our core national beliefs in individualism and laissez-faire."); id. at 300 (describing the initial plan as "immensely complex and requiring far more governmental intrusion into health care than I thought appropriate or politically viable."); Dick Morris, Behind the Oval Office: Getting Reelected Against All Odds 111 (1999) (noting that First Lady Hillary Clinton "became fascinated with the idea of a complete reworking of the health-care system and fashioned a white elephant that wouldn't sell and undermined the president's credibility").


18. See Kathryn L. Moore, The Privatization Process: Redistribution Under a Partially Privatized Social Security System, 64 Brook. L. Rev. 969, 971 (1998) (footnote omitted) ("Once viewed as a radical recommendation, proposals to privatize Social Security abound. Moreover, proposals to privatize partially Social Security are beginning to receive serious consideration.").

19. See generally David Osborne & Peter Plastrik, Banishing Bureaucracy: The Five Strategies for Reinventing Government (1997) [hereinafter Osborne & Plastrik, Banishing Bureaucracy]. In fact, not only are public services often provided by private concerns, but even the distinction
squarely into this trend, and the Zelman majority’s approach to separationism may play an instrumental role in this process.

Needless to say, however, the Establishment Clause is not a plebiscite. In fact, traditional separationists are likely to argue that one of the purposes of the clause is to prevent majoritarian preferences from skewing the religious debate. But the majoritarian sentiment that would support market-based separationism derives not from a desire to impose religious views on dissenting minorities, nor from a desire to promote religious views on the whole, but instead from a desire to facilitate a broad variety of approaches to important social projects and intractable social ills. Moreover, market-based separationists can point out, quite accurately, that the Establishment Clause has been a matter of policy since the inception of the separationist era. In light of this, they can argue that they are merely proposing a better policy to inform the non-establishment principle than traditional separationism. In addition, they can point to other policy-based aspects of the First Amendment that support decentralization of responsibility and private choice. On this view, choice plans promote values underlying the First Amendment because they facilitate a variety of cognitive and emotional approaches to such important social ac-

---

between public and private authority in many contexts is no longer what it once was. Cf. Peter J. Spiro, New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions, 18 WASH. Q. 45, 46 (1995) (discussing non-governmental organizations in the international arena):

It is almost as if the world has arrived at a sort of neomedievalism in which the institutions and sources of authority are multifarious. Just as the leader of the Knights Templars or of the Franciscan order outranked all but the most powerful princes, so too the secretary general of Amnesty International and the chief executive officer of Royal Dutch Shell cast far longer shadows than do the leaders of Moldova, Namibia, or Nauru. The state may not be quite ready to wither away, but it’s not what it used to be.

20. See Thomas C. Berg, Anti-Catholicism and Modern Church-State Relations, 33 LOY. U. CHI. L.J. 121, 121 (2001) (reasoning that “cultural currents” affect the Court’s rulings on the Establishment Clause):

[As Justice White once wrote, the courts, left with discretion by the broad words and ambiguous history of the Religion Clause, have used it to “carve out what they deemed to be the most desirable national policy governing various aspects of church-state relationships.”]

tivities as education, charity, and reformation of the emotionally ill and the substance dependent.

Before one can engage traditional separationism on the level of policy, however, one must engage its safe harbors. These include its claim to originalism and its claim to be the well-settled judgment of the polity. Accordingly, this article has several parts. In Parts I and II, I will examine the predicate for traditional separationism—its claim to rest upon original intent, its implicit claim to be free of antipathetic origins, and its claim to be founded in a coherent, vital line of precedent. In this regard, I conclude that traditional separationism rests upon several vulnerable suppositions. First, any claim that strict separationism can lay to a foundation in original intent is modest at best. Second, circumstantial evidence suggests that traditional separationism arose from antipathy toward a particular religious tradition, Roman Catholicism. To the extent this evidence is accurate, the bona fides of this form of separationism are suspect. Third, even if traditional separationism did not arise from antipathy toward Roman Catholicism, the historical record amply demonstrates that apprehension of that religious tradition's growing strength, antipathetic or not, underlay some of the Court's most important decisions implementing the Establishment Clause in the modern era. Because this apprehension, even if rational at one time, is no longer well-founded, its role in traditional separationism is properly subject to reevaluation. Fourth, traditional separationism has lost much of its creativity and vitality in the Supreme Court's jurisprudence, having been eclipsed by a growing, vital jurisprudential interest in treating all claimants to the government's largesse equally, without reference to religious orientation. Given this trend, unwavering adherence to this form of separationism may no longer be justified. Finally, in Part III, I will explore from a constitutional and from a policy perspective some of the advantages that choice programs present.

21. This is not simply an argument about stare decisis. See infra note 75 and accompanying text.
22. See infra Part I, notes 30-73 and accompanying text.
23. See infra Part II-A, notes 78-110 and accompanying text.
24. See infra Part II-B, notes 111-57 and accompanying text.
25. See infra Part II-C, notes 158-77 and accompanying text.
In fact, it would not take much doctrinal movement in traditional separationism to accommodate a choice program and to sustain the rough contours of *Zelman*. Aside from a rule against direct financial aid to religiously affiliated entities that itself is problematic, traditional separationism amounts to an honest yet ultimately subjective assessment of the "primary effects" of governmental programs, with doubts historically resolved against the provision of public aid, at least in the context of primary and secondary education. By the simple expedient of redefining what constitutes a "primary effect"—such as by focusing on the secular impact of public programs rather than their unintended impact on religion, the egalitarian nature of the criteria by which a program is administered, or the role of private choice in the selection of service provider—traditional separationism could accommodate many choice programs.

I. STRICT SEPARATIONISM’S WEAK CLAIM TO ORIGINALISM

As an interpretive maxim for the Establishment Clause, traditional separationism dates not so much from 1791 as from the modern era. In fact, the relationship between this form of separationism in the late eighteenth century and the impetus behind the clause was modest at best. Modern understandings to the contrary are perhaps

---


29. Indeed, as one scholar has argued, the idea of "strict" or "no-aid" separationism—which I refer to as "traditional separationism"—has never commanded a majority of the Court, except in the context of aid to primary and secondary schools, and has never fully prevailed even in this context. See Laycock, *Underlying Unity*, supra note 26, at 54-55.

30. See Jeffries & Ryan, supra note 28, at 281.
best explained by George Orwell’s insight that “those who control the present control the past”—an insight that is not so much an indictment of human nature as a statement of fact. Orwell’s insight was demonstrated literally in Justice Black’s opinion for the Court in Everson v. Board of Education of Ewing, the seminal case for modern strict separationism. In this opinion, Justice Black wrote a tract on religious establishment and disestablishment in the United States that suffered from a fair degree of ahistoricism. His argument essentially ran as follows: First, he described in general terms the “turmoil, civil strife, and persecutions” that characterized the Reformation and Counter-Reformation in Europe. He then observed that the “practices of the old world were transplanted to and began to thrive in the soil of the new America,” noting that “[t]hese practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence.”

After this, he described at length the movement to disestablish the Anglican Church in Virginia in the late eighteenth century, a movement in which Thomas Jefferson and James Madison played major roles, and which culminated in Virginia’s now-famous “Bill for Religious Liberty.” Finally, he equated the impetus behind Virginia’s disestablishment with the impetus behind the Religion Clauses of the First Amendment:

This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.

34. See Everson, 330 U.S. at 8.
35. Id. at 9.
36. Id. at 11.
37. Id. at 11-13.
38. Id. at 13. Justice Black’s claim in Everson that the Court had previously
Opinions since *Everson* have built upon Justice Black's narrative, and Justice Souter, one of the leading separationists on the current Court, continues to cite to this passage in *Everson*.

Justice Black's history is not entirely accurate, and no amount of compounding his inaccuracy can rectify the error. James Madison may well have been shocked into a feeling of abhorrence by establishmentarian practices, and perhaps all fair-minded people in the founding era opposed religious persecution of the kind that vexed Madison. But the record reveals that many colonials preferred a religious establishment, and this included John Adams, the second President of the United States, who helped launch the Massachusetts religious establishment of 1780. Nowhere connected Virginia’s disestablishment to the Religion Clauses of the First Amendment was literally accurate, up to a point, but only because he combined the two Religion Clauses. Of the three cases he cited in support of this claim, *Reynolds v. United States*, 98 U.S. 145 (1878), *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), and *Davis v. Beason*, 133 U.S. 333 (1890), only *Reynolds* included an explicit discussion of the Virginia experience, and that case involved a federal practice challenged under the Free Exercise Clause. See *Reynolds*, 98 U.S. at 162-63. Neither *Davis* nor *Watson* included a discussion of the Virginia experience in the opinion of the Court. In any case, these decisions have no more claim to originalism than *Everson* itself.


40. See Mitchell v. Helms, 530 U.S. 793, 870 & n.1 (2000) (Souter, J., dissenting); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 868 (1995) (Souter, J., dissenting) (“[Madison’s] authority on questions about the meaning of the Establishment Clause is well settled.”). It is entirely possible, of course, that Justice Souter means only to say that the *Everson* Court’s equation of the Virginia experience with the Establishment Clause is entitled to the protection of *stare decisis*, not that it is historically accurate. If so, his assertion is well taken and the equation must be addressed on those terms, as a new interpretive maxim for the clause. It still remains true, however, that the equation cannot readily be grounded in originalism, as a matter of historical fact.

41. See *Everson*, 330 U.S. at 11 & n.9.

in his analysis in *Everson* did Justice Black acknowledge the existence of state-level establishments after 1791.

Notwithstanding frequently expressed beliefs to the contrary, the connection between Virginia's experience and the Establishment Clause is quite attenuated. Considerable scholarship indicates that the original intent behind the Establishment Clause was not nearly as substantive, in an anti-establishmentarian sense, as the intent that underlay Virginia's disestablishment. In fact, this scholarship indicates that the original thinking behind the clause was considerably more federalist than anti-establishmentarian, and not much more ambitious than the words of the clause suggest.

In 1789, when Congress was debating the text of what became the Establishment Clause, six states retained religious establishments of one form or another. Massachusetts, most notably, retained an increasingly complex religious establishment that at first was predominantly Trinitarian Congregationalist, but that became more radically non-preferential over time, until it was finally disbanded in 1833. Meanwhile Virginia, in sharp contrast to such establishmentarian states as Massachusetts, suspended mandatory tithes in favor of the Anglican Church in continued to believe that government regulation of religion in the states was an indispensable aspect of responsible government.

43. See, e.g., Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 44 (1993) ("James Madison proposed the federal First Amendment in large part as a result of his experience in Virginia battling Patrick Henry's Bill for Religious Assessments.").

44. See Jeffries & Ryan, supra note 28, at 285-86 ("The *Everson* Court not only ascribed to the Establishment Clause separationist content; it imagined a past to confirm that interpretation. Both the majority and the dissent treated the history of the United States as if it were the history of Virginia.").


47. See Witte, supra note 42 (describing the adoption of the Massachusetts establishment in the late eighteenth century); LEVY, supra note 31, at 29-42 (describing the Massachusetts establishment from its genesis in 1780 until its abandonment in 1833). *See also* JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT* 218-44 (2001) (collecting cases and other primary source material).
1776, 1777, and 1778, and in 1785 enacted its famous “Bill for Establishing Religious Liberty,” permanently precluding a religious establishment within its borders. Thus, the landscape at the time the nation ratified the Establishment Clause was highly variegated. Some states had affirmatively and deliberately chosen to retain an established faith in the face of stiff opposition and contrary choices being made elsewhere, whereas at least one other state had chosen to disestablish religion with a comparable degree of engagement and deliberation.

Given this landscape, it is unlikely that the proponents of the Establishment Clause sought to accomplish much, if anything, beyond keeping Congress out of the fray. This simple goal was achieved with the spare language of the clause: “Congress shall make no law respecting an establishment of religion.” This left the states free to establish religion, if they so desired, or to disestablish it. Moreover, it left the federal courts free to exercise subject matter jurisdiction and to provide remedies in cases where the parties were diverse and the case called for the enforcement of an obligation to tithe.

49. See id. at 68.
50. See Witte, supra note 42, at 227-32 (describing the prolonged debate over Article III of the Massachusetts Constitution of 1780, the most controversial component of the state’s religious establishment).
51. See Levy, supra note 31, at 67 (describing Virginia’s debate on establishment as “intensive and prolonged.”).
52. See Bybee, supra note 45, at 1560 (footnote omitted) (noting that the final change in the language of the clause, substituting “respecting an establishment of religion” for “establishing religion,” “ensured that Congress could not dis-establish religion any more than it could establish it; it placed the matter beyond Congress’s competence.”); Levy, supra note 31, at 95 (“Perhaps the word ‘national’ [in Madison’s proposed language for the Establishment Clause, ‘nor shall any national religion be established’] was superfluous, but Madison aimed at allaying apprehensions on the part of those states that maintained their own establishments of religion.”). Cf. Joseph M. Snee, Religious Disestablishment and the Fourteenth Amendment, 1954 Wash. U. L.Q. 371, 373 (arguing that the First Amendment imposes a “political” limitation on the federal government, rather than conferring upon individuals a constitutional right).
53. See Levy, supra note 31, at 97-98 (reprinting the record of the debate in the House on the Establishment Clause) (statement of Benjamin Huntington). See also Bybee, supra note 45, at 1560-62. Of course, it is hard to imagine a church seeking to enforce a tithe and the delinquent congregant being of diverse citizenship.
Because the original meaning of the Establishment Clause was essentially federalist, when the Supreme Court interpreted the Due Process Clause of the Fourteenth Amendment to make the clause applicable to the states in *Everson*, the clause was not so much extended as renovated. It was no longer a rule that simply eliminated one category of decision-making from the federal government, a government of already limited powers; it was now a substantive limitation on the states, governments of general powers. Such a transformation requires its own "original" intent and cannot depend upon the original intent of a substantially different constitutional provision.\textsuperscript{1} If the original intent of the Establishment Clause in 1791 was primarily to protect a particular state choice from federal interference,\textsuperscript{5}\textsuperscript{6} the thinking behind the incorporation in 1947 had to be markedly different, for the clause as renovated now eliminated the very choice that it was originally designed to protect.\textsuperscript{56}

There is at least one plausible non-federalist interpretation of the Establishment Clause, but it does not fit as comfortably with the full historical record as the federalist interpretation. Some have suggested that the clause may have been intended to serve as a substantive


\textsuperscript{55} Cf. Bybee, *supra* note 45, at 1560 (discussing the First Amendment as a whole). Bybee writes:

The records we have [of the state ratifying conventions for the First Amendment] suggest the First Amendment applied only to Congress, and the general lack of interest confirms that the Founders had successfully deferred the difficult questions of the content of freedom of expression to other fora, the states.

*Id.*

\textsuperscript{56} See Jeffries & Ryan, *supra* note 28, at 294-95 ("If the original Establishment Clause aimed to confirm the exclusive authority of the States over religion, invoking that provision to disallow state aid to religion is paradoxical and perverse."). This does not mean, of course, that modern separationism is limited to the original intent behind the clause. Were that the case, then incorporation of the clause into the Due Process Clause of the Fourteenth Amendment would itself be suspect. Moreover, insistence upon a strictly originalist—and largely federalist—interpretation of the Establishment Clause would require similar interpretation of the remaining clauses of the First Amendment, which I do not do elsewhere in the article. I am not making a strictly originalist argument. I am simply arguing that traditional separationism must be justified on modern, non-originalist terms. I am indebted to Ron Krotoszynski for pointing out this distinction.
limitation on establishmentarianism at the federal level, maintaining that the authors of the provision wrote that “Congress shall make no law respecting an establishment of religion,” rather than “Congress shall establish no religion” in an effort to prohibit even legislation that tended in such a direction, however feebly. On this view, the authors of the provision were not simply trying to protect state establishments, but instead sought to implement a broad form of anti-establishmentarianism at the federal level. If this were true, then importing Jefferson and Madison’s sentiments in support of the clause would follow with some plausibility.

The substantive interpretation of the clause finds some support in the record and certainly can be defended as a secondary concern. For example, it appears that certain members of the House could not agree on what kinds of legislation should fall within the proposed anti-establishmentarian provision. A path out of this dilemma arguably lay in proscribing not only an establishment, but also a law “respecting” such an establishment. But this interpretation does not present itself as the most plausible inference from the record, because it fails to account for the dominant strain in deliberations over the clause. Set forth in the Appendix is a record of the debate in the House on the proposed amendment to the Constitution that “no religion shall be established by law, nor shall the equal rights of conscience be infringed.”

Although several strands of argument were evident in this debate, certain lines of coherence did emerge. First, three members—Representatives Sylvester, Gerry, and Huntington—did appear to speak to the substantive question, that is, to what kinds of establishmentarian laws the provision would proscribe. But the actual debate in this regard was relatively thin. Representative Sylvester appeared to fear that religion would fail without establish-

57. See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (“A law may be one ‘respecting’ the forbidden objective while falling short of its total realization.”). See also Witte, supra note 46, at 78-79 (describing this interpretation as “a second plausible reading”); Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 881 (1986) [hereinafter Laycock, Nonpreferential Aid] (“The establishment clause actually adopted [was] one of the broadest versions considered by either House. It [forbade] not only establishments, but also any law respecting or relating to an establishment.”).

58. See Witte, supra note 46, at 78-79.
ment. This was conventional wisdom among many New Englanders (although Sylvester himself was a New Yorker).\textsuperscript{59} Perhaps he was agitating here for a weaker rule, such as one prohibiting preference for one sect over another.\textsuperscript{60} Representative Gerry then proposed, perhaps in response to Sylvester's observation, that the language be changed to read that "no religious doctrine shall be established by law." Sylvester's and Gerry's remarks were brief, and they elicited no response from the other members present. The fairest inference from this lack of response was a dearth of interest in the substantive scope of the clause.

After Gerry spoke, the debate moved on to a lengthy discussion by Representatives Sherman, Carroll, and Madison about whether the Constitution needed an anti-establishmentarian clause at all. This discussion took up roughly four times as much space in the records of the debate as the remarks of Sylvester and Gerry, and concluded with a gentle reminder from Madison, the Bill of Rights' shepherd, that certain ratifying conventions in the states had feared that Congress might use its powers under the Necessary and Proper Clause to "establish a national religion."

Representative Huntington then spoke at length, expressing one concern of an essentially federalist nature, that the proposed language would apply so comprehensively to the various branches of the federal government that an obligation to tithe could not be enforced in federal court. He also expressed a second, substantive concern, that latitudinarian construction of the provision could lend support to atheists. Again, Madison responded by bringing the debate back to a strictly federalist posture, proposing that the word "national" be inserted into the provision under consideration, such that it read "no national religion shall be established by law." He opined that, were this word insert-


\textsuperscript{60} It is also possible that Sylvester is articulating a simple, linguistic objection to the proposal that no religion shall be established by law. Specifically, his objection might be that this language appears to impose an affirmative injunction upon government to "establish no religion"—that is, to abolish it. Although this is an unlikely interpretation of the language, it is not grammatically precluded.
ed, "it would point the amendment directly to the object it was intended to prevent."  

Representative Livermore then represented that he was "not satisfied" with Madison's proposal, although he appeared to want the House to move on to completely different matters. He then proposed the language that the House ultimately adopted, that "Congress shall make no laws touching religion." Given Madison's immediately preceding comment, which was quite federalist in its focus, it is entirely reasonable to assume that Livermore offered his proposal in this vein as well. Of course, his comment had the added benefit of addressing Huntington's essentially federalist concern about the enforceability of tithes in federal court.

Although the debate did reflect a lack of consensus as to what would constitute a prohibited establishment, it did not indicate that this was a concern to more than a few people. The small amount of attention paid to substantive issues, in comparison to the significant attention paid to federalist issues, strongly supports the federalist interpretation of the clause.

It is difficult to glean much information about the genesis of the Establishment Clause after the measure left the House, because the Senate did not keep records of its debate. But we do know that the Senate adopted varying

---

61. Professor Laycock has argued that it is "hard to know what Madison was thinking" when he made his remarks on the floor of the House, contending that Madison's "two statements are inconsistent with all his previous and subsequent statements concerning establishment." Laycock, Nonpreferential Aid, supra note 57, at 893. Madison's statements are cryptic if one looks to them for guidance as to whether Madison wanted the Establishment Clause to ban all support for religion, or simply preferential support for one religion, but they are not cryptic if one simply looks to them for guidance as to whether the clause was intended to accomplish a federalist or substantive objective. With regard to that subject, they are arguably quite clear.

62. Professor Laycock has also argued that the similarity of substantive remarks such as those of Gerry to arguments made in state controversies suggests a substantive intent behind the Establishment Clause, as I have used that term. See id. at 908. Professor Laycock's argument appears to be that such individuals as Gerry simply restated in the House ongoing substantive concerns from state establishmentarian debates. But analysis of the entire debate in the House tends to support the opposite conclusion. Granted that Gerry and others (Sylvester, Huntington) sought to limit the overall substantive significance of the clause, their remarks had no discernible impact on the course of the debate and were subsumed in the larger federalist discussion.

63. See id. at 883.
versions of the clause, some of which would have proscribed only preference for one religion over another, and others of which were written more broadly. Although one can infer from the Senate's adoption of these various proposals a familiarity with the difference between broad disestablishment and simple "non-preferentialism," the Senate's flip-flopping is also fair evidence of a lack of consensus on substantive issues, or perhaps a sense that the substantive differences between the drafts, although important to us, struck them as being of minor importance once the federalist issue was resolved. All of the versions adopted by the Senate built upon the House's resolution of the federalist issue by limiting the clause's application to Congress.

In addition, the substantive interpretation of the clause assumes that Congress could not have enacted a law "respecting an establishment of religion" that applied solely to the District of Columbia or to the territories. Although this is—by widely shared consensus—the interpretation given to the clause today, the forbidden status of such a law under the original intent of the clause is not self-evident. If Congress was expected to respect states' prerogatives regarding religious establishments, it would not necessarily follow that it was expected to refrain from exercising similar prerogatives in places over which it enjoyed the police power, such as the District and the territories. In fact, the opposite might have been the case, and Congress seems to have acted on the assumption that it could exercise such

64. See id. at 879-81 (noting that the Senate adopted in turn the following three anti-establishmentarian provisions: (1) "Congress shall make no law establishing one religious sect or society in preference to others"; (2) "Congress shall make no law establishing religion"; and (3) "Congress shall make no law establishing articles of faith or a mode of worship").

65. See id. at 880 (arguing that the various drafts considered by the Senate "show that if the First Congress intended to forbid only preferential establishments, its failure to do so explicitly was not for want of acceptable wording").

66. See Gerard V. Bradley, The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself, 37 CASE W. RES. L. REV. 674, 713 (1987); Lash, Power and Subject, supra note 42, at 1120 (footnote omitted) ("[W]hen Congress authorized territorial laws prohibiting blasphemy and mandating observance of the Sabbath, it acted as a proto-state government, presumably preparing the territory—and the population therein—for admission to the Union, at which time such laws would continue to be enforced.").
prerogatives in such places, passing legislation to incorporate an Episcopal Church in the District, and providing for the support of religion in the Northwest Territories, both before and after the Establishment Clause became part of the Constitution. Although Madison vetoed the District bill, it is not unreasonable to attribute this choice at least in part to his own separationist ideas. Virginia had long forbidden the incorporation of religious bodies. Moreover, there is no evidence that Madison opposed the Northwest Ordinance.

The foregoing analysis indicates that casual equation of the intent behind the Establishment Clause with the intent behind Virginia’s disestablishment is not justified. Consequently, traditional separationism cannot claim the mantle of eighteenth-century originalist intent to the exclusion of other, more accommodating approaches to the separation of church and state.

II. TRADITIONAL SEPARATIONISM’S QUESTIONABLE MODERN BASIS

Traditional separationism’s other safe harbor is its claim to represent the well-settled judgment of the polity. This is more than just a reliance upon stare decisis, although it is also that. Under the doctrine of stare decisis, a rule of law that is arguably “wrong” in a platonic sense is

67. See generally Bradley, supra note 66, at 713.
68. See Lash, Power and Subject, supra note 42, at 1121 n.182.
69. The Northwest Ordinance was enacted well before the First Amendment was ratified. See Act of Aug. 7, 1789, 1 Stat. 50. This ordinance included the following language: “[R]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” Id. at 52, n.(a). Other statutes came after the First Amendment in time. See Lash, Power and Subject, supra note 42, at 1118.
70. See Lash, Power and Subject, supra note 42, at 1121 n.182.
72. See Witte, supra note 46, at 76 (noting that Congress reenacted the Continental Congress’ Northwest Ordinance “without issue”).
73. In fact, it has been argued by at least one scholar that the Virginia experience and Jefferson’s Bill for Religious Liberty were retrieved from an obscure position in the historical record in service of the separationist movement in the United States in the mid-twentieth century. See John T. McGreevy, Thinking on One’s Own: Catholicism in the American Intellectual Imagination, 1928-1960, J. AM. HIST., June 1997, at 97, 113.
nevertheless entitled to some degree of protection simply because continuity in judicial decisionmaking has independent value. But traditional separationism's claim to a safe harbor in this regard goes beyond simply claiming that it is correct enough to merit the protection of *stare decisis*. It also claims that it is correct, and that it reflects the considered judgment of the polity.

This claim is subject to challenge on several fronts. First, examination of the historical record supports the conclusion that antipathy toward Roman Catholicism in the United States in the mid-twentieth century may have exerted a subtle influence on the Court's early separationist decisions. Second, whatever rational fears may have influenced the Court at that time no longer have the foundation that they once had, and therefore can no longer be used to justify traditional separationism, at least absent reassessment. Finally, the growth of formal neutrality in the Court's approach to non-establishment has significantly eclipsed traditional separationism, thereby undermining much of its claim to the protection of *stare decisis*.

A. Anti-Catholic Animus

A scholar is naturally hesitant to suggest invidious motives on the part of people who dedicate their lives to public service. Nevertheless, more than one responsible scholar has gently chided the early and mid-separationist Court for handing down decisions that reflect anti-catholic animus.

74. See Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 573 (2001) (noting that the doctrine of *stare decisis* "gives the Justices a Warrant (of some weight) to affirm initially erroneous decisions that would be costly to overrule").

75. See *infra* Part II-A, notes 78-110 and accompanying text.

76. See *infra* Part II-B, notes 111-57 and accompanying text.

77. See *infra* Part II-C, notes 158-77 and accompanying text.

78. See, e.g., Jeffries & Ryan, *supra* note 28, at 280 ("The constitutional disfavor of 'pervasively sectarian' institutions is indeed a doctrine born, if not of bigotry, at least of a highly partisan understanding of laws 'respecting an establishment of religion.'"); Berg, *supra* note 20, at 123 ("[T]he late 1940s and the early 1950s saw a resurgence in fear and distrust of Catholicism, and these contributed to the rise of church-state separationism in constitutional decisions, especially in decisions limiting aid to religious, overwhelmingly Catholic, schools."); Lupu, *Increasingly Anachronistic Case*, *supra* note 26, at 385-86 (describing Justice Jackson's dissenting opinion in *Everson v. Board of*
tially circumstantial, it is not minuscule. To the extent this
evidence is persuasive, it weakens traditional separation-
ism's claim to be the well-settled judgment of the polity.

By the mid-1940s, fear of Roman Catholicism had
become common among the intellectual elite of the United
States. It was neither a passing fancy, nor a minor subject.
Even today, this apprehension is easy to substantiate
because of its breadth and because it showed few signs of
internal ambivalence, in contrast to such apprehension in
earlier periods of American history, when it was mixed with
a general mistrust of unassimilated immigrant populations.79
One particularly comprehensive treatment of the
subject is a recent article by John T. McGreevy published in
the Journal of American History.80 In this article, McGreevy
meticulously described the extent and fervor of intellectual
attitudes toward Catholicism in the United States during
this period.

As one can readily imagine, these attitudes had
complex sources. They ranged from continuing theological
opposition to Roman Catholicism on a wide array of sub-
jects—most particularly, with regard to its authoritarianism
and attachment to naturalistic philosophy81—to fear and

---

79. See McGreevy, supra note 73, at 102-04. See also Laycock, Underlying
Unity, supra note 26, at 57.

80. McGreevy, supra note 73. McGreevy's central argument is that
discussion of Catholicism, along with criticism of racial segregation and op-
position to fascism and Communism, helped define the terms of mid-twentieth-
century American liberalism. Those terms included the insistence that religion,
as an entirely private matter, must be separated from that of the state, that
religious loyalties must not threaten national unity, and that only an emphasis
on individual autonomy, thinking on one's own, would sustain American demo-
cracy. See id. at 98.

81. See McGreevy, supra note 73, at 100 (describing the importance of "the
experimental spirit" to American intellectuals' "self-identity" in the mid-
twentieth century) ("In all areas of inquiry, the false security of a priori
assertions would be traded for hypothesis testing."). McGreevy goes on to note
that, with the exception of certain neo-Aristotelians:

Catholic intellectuals provided the most sustained opposition to such
notions. That opposition stemmed from Leo XIII's 1879 insistence that
unrelieved anger at the Church’s perceived role in supporting fascism at home and abroad.\(^2\) This fear was no doubt potentiated by the fact that Protestantism was losing its status as the defining religion of the United States, and that Catholicism had become the single largest denomination in the country.\(^3\) In some cases, this fear even included association of Catholicism with Communism.\(^4\)

At a more topical level, these attitudes were precipitated by such events as President Roosevelt’s designation of Myron C. Taylor as his “personal representative” to the Vatican in 1939,\(^5\) and President Truman’s later appointment of General Mark W. Clark to serve as ambassador to the Vatican in 1951.\(^6\)

These attitudes were reflected in, and enhanced by, various articles and books published in the scholarly and mainstream presses. One example is a series of articles that began running in late 1944 in the mainline Protestant periodical *Christian Century* under the general title of “Can Catholicism Win America?” The author was Harold E. Fey, one of the *Century*’s editors.\(^7\) Another, more famous example is a series of articles by Paul Blanshard, a former Congregationalist minister, that ran in the *Nation* in 1947, on the threat that Catholicism posed to the American way of life.\(^8\) These articles were collected into a best-selling book entitled *American Freedom and Catholic Power*. This book,

---

Catholic theology work from strict natural law premises, part of a revival of Thomas Aquinas’s scholastic philosophy that had immense importance for European and American Catholic intellectual life.

*Id.* at 101.

\(^2\) See *id.* at 108-11; Jeffries & Ryan, *supra* note 28, at 302 (footnote omitted) (“American Protestants saw their faith as allied with republicanism and feared Catholicism as inimical to democracy.”)

\(^3\) See *Jeffries & Ryan, supra* note 28, at 305-06.

\(^4\) See McGreevy, *supra* note 73, at 118.

\(^5\) See *Curry, supra* note 9, at 37-40. See also *Christopher J. Kauffman, Patriotism and Fraternalism in the Knights of Columbus: A History of the Fourth Degree* 114 (2001).

\(^6\) See *Curry, supra* note 9, at 47-49. See also Mark A. Noll, *The Eclipse of Old Hostilities between and the Potential for New Strife among Catholics and Protestants Since Vatican II*, in *Uncivil Religion: Interreligious Hostility in America* 86 (Robert N. Bellah & Frederick E. Greenspahn eds., 1987); *Kauffman, supra* note 85, at 114.

\(^7\) See *Curry, supra* note 9, at 42-44. See also *Kauffman, supra* note 85, at 115-17.

\(^8\) See *Curry, supra* note 9, at 57-59. See also *Kauffman, supra* note 85, at 119-20.
which was also a Book-of-the-Month-Club selection,99 received favorable reviews from a wide range of influential people, including the philosopher and educator John Dewey and the noted scholar Lewis Mumford.98 Blanshard’s book also attracted close attention from Justice Black, author of the Supreme Court’s opinion in Everson.91

Much of Blanshard’s book was a free-wheeling broadside against Catholicism in the United States, combining strong words of disapproval with respect to theoretical matters with express conspiracy theories and gratuitous pokes at Church traditions.92 For purposes of this paper, his most important theme was that, although the Catholic laity living in the United States were doing their level best to assimilate, they were being controlled and oriented in another direction by the clergy of the Church, which itself was tied hierarchically to Rome.93 Catholics, he urged, were not

89. See McGreevy, supra note 73, at 97.
90. See id. at 97-98.
91. See id. at 124 (noting that Justice Black “painstakingly” marked his copy of Blanshard’s book). See also id. (quoting HUGO T. BLACK, MY FATHER: A REMEMBRANCE 104 (1975)) (“[Justice Black] suspected the Catholic Church. He used to read all of Paul Blanshard’s books exposing power abuse in the Catholic Church.”).
92. On Catholic religious orders for women, see PAUL BLANSHARD, AMERICAN FREEDOM AND CATHOLIC POWER 67 (1949) (“[Teaching nuns] belong to an age when women allegedly enjoyed subjection and reveled in self-abasement. Their unhygienic costumes and their medieval rules of conduct establish a barrier between themselves and the outside world. . . .”). On science and Catholicism, see id. at 224 (“[In practice . . . the ‘honest’ Catholic scientist disregards the whole relics industry, and keeps his mouth shut. He concentrates, if possible, on those subjects furthest removed from priestly exploitation. Catholic scientists are famous for their investigations of the weather and earthquakes.”). On Catholic tradition and its deployment to serve ulterior motives:
   The Roman Church in America has a great gift for showmanship, and its ceremonialists and costumes lend themselves naturally to pageantry in the grand manner. Ten thousand Quakers can live in an American community all their lives and not attract half the attention that ten thousand Catholics do, especially if the Catholics have an energetic bishop who understands modern publicity methods.

Id. at 11.

For an example of a gratuitous slap, see id. at 14 (noting that “[t]he Committees of the [Catholic Church’s] International Eucharistic Congress included even a Committee on Bells and Whistles”).
93. See id. at 5; id. at 10 (emphasis in original) (“The American Catholic people have done their best to join the rest of America, but the American Catholic hierarchy . . . has never been assimilated. It is still fundamentally Roman in its spirit and directives. It is an autocratic moral monarchy in a liberal democracy.”). Indeed, “[t]he whole Catholic system of global discipline
permitted to think for themselves, and this hybrid sociological-doctrinal fact, combined with the growing demographic of Catholicism in the United States, posed a serious threat to the American political system.  

It is entirely reasonable to accept some, and perhaps many, of Fey and Blanshard's denunciations as well-taken—as offered in the spirit of constructive criticism, or reluctant witness to a disturbing presence in American society. But it is hard to imagine that all of their denunciations were offered in this spirit, or that, given their variety and intensity, they were not predicated at least in part upon something more than mere rational opposition. Gratuitous mocking, for example, with which Blanshard's work is rife, is not consistent with a spirit of constructive criticism.

Fey and Blanshard wrote their philippics at the very time that the Supreme Court was first applying the Establishment Clause to the activities of government in way likely to have broad impact. Although the clause had come into play in two earlier cases involving the activities of the federal government, even in the mid-twentieth century those activities were still minor in relation to those of the states, at least with respect to those areas of policy most likely to implicate religion. The ubiquity of praise for Blanshard's work undermines the argument that the justices attending to establishmentarian issues were unaware of it. Moreover, scholarship has demonstrated that a few members of the Court, including Justice Black, were directly influenced by Blanshard, or espoused similar

---

rests fundamentally on its great army of priests. The parish priest is the contact man between the hierarchy and the people, and the agent for Roman spiritual and political goods." Id. at 34.

94. See id. at 4.

95. See Quick Bear v. Leupp, 210 U.S. 50 (1908) (involving a religious school for the education of Sioux children); Bradfield v. Roberts, 175 U.S. 291 (1899) (dealing with a hospital run by a religious order in Washington, D.C.).

96. The federal government did not play a significant role in the educational system of the United States, for example, until Congress enacted the Elementary and Secondary Education Act of 1965.

97. See Jeffries & Ryan, supra note 28, at 281:

We make no effort to probe the subjective motivations of individual justices. Instead, we aim to reveal the correspondences between constitutional doctrine and popular sentiment in the area of church-state relations. Put crudely, this is an exercise in post hoc, ergo propter hoc, which is famous as a fallacy because it is so often true.
sentiments. One particularly famous expression of this sentiment was Justice Jackson's dissent in *Everson*, in which he described Catholic schools of being "parochial only in name—they, in fact, represent a world-wide and age-old policy of the Roman Catholic Church," going on to say that:

Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values . . . . It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion.

This may be competent theology, but it not good law for a liberal state. Moreover, this language is not easily dismissed as the bitter dissent of a disaffected justice. Justice Black, who wrote the opinion for the majority in *Everson*, explained that the Court's decision in that case rested on "the verge" of territory forbidden by the Establishment Clause. It is not unreasonable to assume that he wrote this in part to palliate the discomfort of his dissenting colleagues, although there does not appear to have been any love lost between Justices Black and Jackson. More to the point, Justice Black seems to have promised his colleagues at conference that he would allow no further aid.

The Court's decision in *Everson* provided the rhetorical basis for strict separationism. In 1971, when the Court handed down *Lemon v. Kurtzman*, its first school-funding case of any significance, it began its analysis of the con-

---

98. See McGreevy, supra note 73, at 122-26; see generally Laycock, *Underlying Unity*, supra note 26, at 57-58.
99. 330 U.S. at 22 (Jackson, J., dissenting).
100. Id. at 23-24.
101. Id. at 16.
103. See McGreevy, supra note 73, at 122 at n.79 (citing Wiley B. Rutledge, *Memo After Conference in Wiley B. Rutledge Papers* (*Everson* file, box 143, Library of Congress (1946)).
104. 403 U.S. 602.
105. Cf. Jeffries & Ryan, supra note 28, at 288-89 (referring to the reimbursement for transportation expenses approved in *Everson* and the
stitutional issue by citing *Everson* and quoting Justice Black’s assertion that the decision in that case carried the Court “to ‘the verge’ of forbidden territory under the Religion Clauses.” Similarly, in *Committee for Public Education & Religious Liberty v. Nyquist,* the case from the era of strict separationism most nearly approximating a school choice case, the Court again noted that the program approved in *Everson* “approach[ed] the ‘verge’ of impermissible state aid.” Thus, the traditionally separationist Court hewed as best it could to the (admittedly fuzzy) line drawn in *Everson.* Mere adherence to an announced rule, of course, is neither wrong nor evidence of improper animus. But where improper animus seems to have contributed to the initial drawing of the line, it is at least fair to argue that the line would not be where it is but for that animus. Moreover, at least one scholar has suggested that discomfort with religions perceived as authoritarian, such as Roman Catholicism, may have influenced the Burger Court. To the extent the foregoing arguments are persuasive, they undermine traditional separationism’s claim to be the well-settled judgment of the polity.

**B. Fear, Rational and Irrational**

One plausible response to the charge of negative animus toward Catholicism in the United States on the part of the early separationist Court is that the justices were not so much anti-catholic as pro-democratic. Indeed,
much of the twentieth century was a time of acute fear—fear of communism, fear of fascism, and fear that democracy was not a viable system of government.111 On this view, some might argue that the early strict separationists worked in a time of palpable fear that Roman Catholic hierarchicalism and dogmatism would undermine American democracy from within. As John Dewey argued in 1939:

The serious threat to our democracy is not the existence of foreign totalitarian states. It is the existence within our own personal attitudes and within our own institutions of conditions similar to those which have given a victory to external authority, discipline, uniformity and dependence upon The Leader in foreign countries.112

But the passage of time and the occurrence of a number of intervening events have significantly undermined whatever rational predicate originally may have underlain such fears.113 Certainly the election of a Roman Catholic President in 1960 helped greatly to improve relations between Catholics and non-Catholics in the United States.114 Also important has been the increasing assimilation of Catholic immigrant groups into American culture, as well as the increasing “Americanization” of Catholic schools, both of which trends have been amply described in the legal literature.115 Perhaps most importantly, the many reforms of the Second Vatican Council have changed considerably the terms of the theological and philosophical debate between Catholics and non-Catholics, particularly Protestants.116 Indeed, in 1984 the editor of the Christian

---


112. Id. at 112 (quoting from John Dewey’s essay Freedom and Culture). Paul Blanshard put the matter as follows: “American Catholics are instructed to accept the privileges of American democracy and work to force the lives of all the people, Catholic and non-Catholic, into the pattern laid down in Rome.” BLANSHARD, supra note 92, at 50.

113. See generally Lupu, Increasingly Anachronistic Case, supra note 26, at 386-88.

114. See CURRY, supra note 9, at 70-79.

115. See Lupu, Increasingly Anachronistic Case, supra note 26, at 386-87.

116. See CURRY, supra note 9, at 79-87. Curry notes as follows: Protestants were not always happy with what they felt was too great hesitancy on the part of Rome to adopt specific decrees on some of [the
Century, Martin E. Marty, noted in retrospect that it was "hard to think one's way back to the times before Vatican II, before ecumenical and self-critical Catholicism, before non-Catholic awareness of intra-Catholic conflict and the like," to "reconstruct a plausible basis" for the fear of Catholicism expressed in the mainstream Protestant press in the mid-twentieth century.\footnote{117}

The reforms of the Second Vatican Council were numerous and profound, and many are beyond the scope of this paper. Of particular importance here are changes in the outlook of the Church toward non-Catholic Christian traditions, changes in the outlook of the Church toward non-Christian traditions, changes in the Church's official attitude toward non-establishment, and changes in the Church's basic understanding of itself. These will be addressed in terms of four of the Council's principal declarations, \textit{Unitatis Redintegratio} (Decree on Ecumenism), \textit{Nostrae aetate} (Declaration on the Relation of the Church to Non-Christian Religions), \textit{Dignitatis Humanae} (Declaration on Religious Freedom), and \textit{Lumen Gentium} (Dogmatic Constitution of the Church).

1. \textit{Unitatis Redintegratio} (the restoration of unity). The Decree on Ecumenism, \textit{Unitatis Redintegratio} (the restoration of unity), which was released on November 21, 1964, addressed relations between the Catholic Church and other Christian faiths.\footnote{118} Although it stopped well short of accepting such faiths as full-fledged partners in the Christian confession,\footnote{119} it did express a degree of esteem that

---

\footnote{117. \textit{Id.} at 82.}
\footnote{118. \textit{POPE PAUL VI, DECREE UNITATIS REDINTEGRATIO ON ECUMENISM (1964) [hereinafter UNITATIS REDINTEGRATIO].}}
\footnote{119. For example, the document insists upon the apostolic succession and papal primacy: For it is only through Christ's Catholic Church, which is the "all-embracing means of salvation," that [our separated brethren] can benefit fully from the means of salvation. We believe that the Our Lord entrusted all the blessings of the New Covenant to the apostolic college alone, of which Peter is the head, in order to establish the one Body of
reflected profound progress from combative times past. In particular, this decree recognized a strong form of contingent validity in non-Catholic Christian traditions, disavowed any claim that adherents to such traditions were guilty of the sin of schism, and encouraged patience and humility on the part of Catholics engaging in ecumenical work. In one important passage, it provided that:

There can be no ecumenism worthy of the name without a change of heart. For it is from renewal of the inner life of our minds, from self-denial and an unstinted love that desires of unity take their rise and develop in a mature way. We should therefore pray to the Holy Spirit for the grace to be genuinely self-denying, humble, gentle in the service of others, and to have an attitude of brotherly generosity towards them . . . .

The words of St. John hold good about sins against unity: “If we say we have not sinned, we make him a liar, and his word is not in us.” So we humbly beg pardon of God and of our separated brethren, just as we forgive them that trespass against us.

Christ on earth to which all should be fully incorporated who belong in any way to the people of God.

Id. ¶ 3.

120. See generally THOMAS BOKENKOTTER, A CONCISE HISTORY OF THE CATHOLIC CHURCH 366 (1977). Bokenkotter writes that Unitatis Redintegratio put the whole matter of Protestant-Catholic relations in an entirely new perspective. The ultimate goal of ecumenism was no longer viewed as the return of individual Protestants to the Catholic Church; the objective now was rather the reunion of all the separated brethren, whose status as true ecclesial communities was recognized. Id.

121. See UNITATIS REDINTEGRATIO, supra note 118, ¶ 3 (stating that “some and even very many of the significant elements and endowments which together go to build up and give life to the Church itself, can exist outside the visible boundaries of the Catholic Church”). The decree added:

The brethren divided from us also use many liturgical actions of the Christian religion. These most certainly can truly engender a life of grace in ways that vary according to the condition of each Church or Community. These liturgical actions must be regarded as capable of giving access to the community of salvation.

Id.

122. See id. ¶ 3 (noting that “men of both sides were to blame” for schisms, and that “[t]he children who are born into these [separated] Communities and who grow up believing in Christ cannot be accused of the sin involved in the separation, and the Catholic Church embraces upon them as brothers, with respect and affection”).

123. Id. ¶ 7.
In addition to calling for patience and humility, *Unitatis Redintegratio* also called upon Catholics to seek a sincere and improved dialogue with people of other Christian traditions, with particular emphasis upon greater understanding of the principles of such traditions. In fact, the document noted in more than one place that Catholics can be edified by Protestant perspectives on Christian issues. Thirty-one years later, the Church enthusiastically reiterated many of the principles of *Unitatis Redintegratio* in the Encyclical Letter *Ut Unum Sint*, on commitment to ecumenism.

2. Nostrae aetate (in our time). A product of the Council similar to *Unitatis Redintegratio* was *Nostrae aetate* (in our time), the Declaration on the Relation of the Church to Non-Christian Religions. This document, which was released on October 28, 1965, included the following irenic language:

The Catholic Church rejects nothing of what is true and holy in these religions. She has a high regard for the manner of life and conduct, the precepts and teachings, which, although differing in many ways from her own teaching, nonetheless often reflect a ray of that truth which enlightens all men.
Nostrae aetate went on to exhort the Catholic faithful to demonstrate toward non-Christians the same kind of deference and humility as Unitatis Redintegratio contemplated for relations with non-Catholic Christians:

The Church, therefore, exhorts her sons, that through dialogue and collaboration with the followers of other religions, carried out with prudence and love and in witness to the Christian faith and life, they recognize, preserve and promote the good things, spiritual and moral, as well as the socio-cultural values found among these men.  

3. Dignitatis Humanae (the dignity of the human person). The Declaration on Religious Freedom Dignitatis Humanae (the dignity of the human person) on the right of the person and of communities to social and civil freedom in religious matters, promulgated by Pope Paul VI on December 7, 1965, represented a particularly important reform of the Second Vatican Council from the American perspective, for it freed American Catholics from any doctrinal expectation to seek preferential legal status for Roman Catholicism in the United States. Whereas the Church had historically called upon all nations to give it special status among religions, this declaration broke off in a new direction, recognizing the value of individual self-determination and the impossibility of respecting the dignity of human beings without according them the power to follow the truth as revealed to them. This reform was achieved in large measure through the offices of John Courtney Murray, an American Jesuit who comprehended the profound inconsistency between the Church’s position on

129. Id.
130. SECOND VATICAN COUNCIL, DECLARATION ON RELIGIOUS FREEDOM DIGNITATIS HUMANAEE ON THE RIGHT OF THE PERSON AND OF COMMUNITIES TO SOCIAL AND CIVIL FREEDOM IN RELIGIOUS MATTERS (1965) [hereinafter DIGNITATIS HUMANAEE].

131. See BOKENKOTTER, supra note 120, at 363 (referring to the Syllabus of Errors and the principle that “error has no rights”). In the 1864 encyclical Syllabus of Modern Errors, Pope Pius IX identified as one such error the idea that “[e]very man is free to embrace and profess that religion which, guided by the light of reason, he shall consider true.” PIUS IX, SYLLABUS OF MODERN ERRORS: A CONDEMNATION OF MODERNIST, LIBERAL ERRORS (1864) at 15 (citing Allocution Maxima Quidem (1862); Damnatio Multiplices Inter (1851)).

132. See DIGNITATIS HUMANAEE, supra note 130, ¶ 2.
establishment with political custom in such vibrantly
democratic nations as the United States.¹³³ Without deviat-
ing from the theological principles of Roman Catholic
faith,¹³⁴ Dignitatis Humanae nevertheless recognized that
true religious growth comes from within, and joined in
promoting the voluntarism central to the American reli-
gious experience, noting that “it is upon the human con-
science that [the obligations to seek and embrace the truth]
fall and exert their binding force. The truth cannot impose
itself except by virtue of its own truth, as it makes its
entrance into the mind at once quietly and with power.”¹³⁵

4. Lumen Gentium (the light of nations). This brings us
to the Church’s internal, theological reforms. Given the
substance of the intellectual indictment of Catholicism in
the United States in the mid-twentieth century—that it dis-
couraged individual thought and was overly authoritari-
an—perhaps the most important reform of the Second Vati-
can Council lay in its re-characterization of the Church’s
own understanding of itself.¹³⁶ This was particularly evident
in the Dogmatic Constitution of the Church Lumen Gen-
tium (the light of nations), promulgated by Pope Paul VI on
November 21, 1964.¹³⁷ This document represented a funda-
mental change in the nature of the Church’s perception of
itself. Although the sociology of the Church—in the field, as
it were—may have continued to be relatively authoritarian,

¹³³ See BOKENKOTTER, supra note 120, at 397-98.
¹³⁴ See DIGNITATIS HUMANAEC, supra note 130, ¶ 1 (explaining that “God
Himself has made known to mankind the way in which men are to serve Him”).
¹³⁵ Id. See also WITTE, supra note 46, at 39 (describing liberty of conscience
as “the general solvent used in the early American experiment in religious
liberty”); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 50-52 (1996) (discussing
voluntarism in several religious traditions).

The Second Vatican Council also effected a relative demotion of Thomist
philosophy, reducing it to a status somewhat commensurate to that of other
philosophic traditions. In particular, the Council demonstrated a greater
openness to the role of history in the revelation of divine truth. This
represented a compromise of sorts with the modernist tradition. See
BOKENKOTTER, supra note 120, at 366-67; cf. RICHARD JOHN NEUHAUS, THE
CATHOLIC MOMENT: THE PARADOX OF THE CHURCH IN THE POSTMODERN WORLD 8
(1987) (“For generations Thomism was the reigning theology and habit of
mind in Roman Catholicism. With few exceptions, to be a Roman Catholic
theologian was to be a Thomist. That is no longer the case today.”).
¹³⁶ See generally BOKENKOTTER, supra note 120, at 365-66.
¹³⁷ SECOND VATICAN COUNCIL, DOGMATIC CONSTITUTION OF THE CHURCH
LUMEN GENTIUM (1964).
the Church’s official teaching and understanding of itself, as set forth in Lumen Gentium, became much less authoritarian than it had been in times past.

The specific reforms of this document were several. First, it recognized the universality of the Church, greatly reducing the significance of the distinction between clergy and laity. Second, it recognized, to a degree, the legitimacy of the so-called “Doctrine of Collegiality,” pursuant to which the collected bishopric of the Church may by right participate in the exercise of papal authority. It is difficult to assess the long-term impact of Lumen Gentium, but it has been perceived by many as an important step toward egalitarianism within the structure of the Church. In fact, the historian Thomas Bokenkotter has argued that “[t]he practical import of [Lumen Gentium’s changes] created a veritable revolution in the machinery of the Church as a greatly increased number of persons were drawn into the decision-making process at every level.”

5. Reflections on the Second Vatican Council. The impact of the Second Vatican Council on the character of the Roman Catholic Church in the United States is difficult to assess, but surely it was substantial. Catholics were instructed to reach out to people of other faiths, to renounce an intention to establish their faith before others in the political arena, and to “think more for themselves.” Although one cannot reasonably assume that all Catholics living in the United States were in the 1960s, or are today, prepared to heed the call of such documents as Unitatis

138. See id. ¶ 10. This document indicates that “Christ the Lord, High Priest taken from among men, made the new people ‘a kingdom and priests to God the Father.’ The baptized, by regeneration and the anointing of the Holy Spirit, are consecrated as a spiritual house and a holy priesthood . . . .” Id. (footnotes omitted). See also id. ¶ 10:

Though they differ from one another in essence and not only in degree, the common priesthood of the faithful and the ministerial or hierarchical priesthood are nonetheless interrelated: each of them in its own special way is a participation in the one priesthood of Christ.

139. See id. ¶¶ 21-22. See also BOKENKOTTER, supra note 120, at 361-62.

140. BOKENKOTTER, supra note 120, at 366.

141. See NEUHAUS, supra note 135, at 4 (“Anti-Roman polemicists . . . say that Rome has not changed; Roman Catholic traditionalists say it should not have changed. But it has changed and dramatically so.”). See also id. at 10 (suggesting that “the spirit of Vatican II” was the lively ghost of the renegade monk from Wittenberg”—meaning Martin Luther).
Redintegratio, Nostrae aetate, Dignitatis Humanae, and Lumen Gentium, the exhortations contained in these documents do tend to palliate apprehension that American Catholics will wage an aggressive, papally ordained war with non-Catholics over theological principles. Indeed, in this regard the hierarchical nature of the Roman Catholic Church may have a salutary effect. Because the Church remains more hierarchical than most, it can, colloquially speaking, “turn on a dime,” calling upon its clergy in the field, as well as its most faithful, to accommodate new principles in a relatively short space of time.\textsuperscript{142} In any case, to the extent the reforms of Vatican II have taken hold, fear of Roman Catholicism in the United States loses much of its predicate.

Against this backdrop, the recent declaration Dominus Iesus (The Lord Jesus), on the unicity and salvific universality of Jesus Christ and the Church,\textsuperscript{143} promulgated on August 6, 2000, must be considered. This document has been perceived by some as a throwback to pre-Vatican II principles, in the sense that it reads somewhat like a new Syllabus of Errors.\textsuperscript{144} In this regard, the document does identify and, colloquially speaking, anathematize certain beliefs. And in fact the document does reject certain “relativistic theories” that “seek to justify religious pluralism, not only \textit{de facto} but also \textit{de jure}.”\textsuperscript{145} As part of this rejection, Dominus Iesus reiterates a substantial amount of theological doctrine, calling upon Catholics to assent to certain fundamental principles. Perhaps most significantly, the document emphasizes the unique role of

\textsuperscript{142} I am indebted to Tom Berg for this insight. Unitatis Redintegratio provides a rhetorical example of this principle in action. Certain parts of this document were expressly directed to clergy and other leaders in the Church:

Sacred theology and other branches of knowledge, especially of a historical nature, must be taught with due regard for the ecumenical point of view, so that they may correspond more exactly with the facts. It is most important that future shepherds and priests should have mastered a theology that has been carefully worked out in this way and not polemically, especially with regard to those aspects which concern the relations of separated brethren with the Catholic Church.

Unitatis Redintegratio, supra note 118, \S\ 10.

\textsuperscript{143} Congregation for the Doctrine of the Faith, Declaration Dominus Iesus on the Unicity and Salvific Universality of Jesus Christ and the Church, 92 Acta Apostolicae sedis 742 (2000) [hereinafter Dominus Iesus].

\textsuperscript{144} See Pius IX, supra note 131.

\textsuperscript{145} Dominus Iesus, supra note 143, \S\ S 3, 4.
the Catholic Church in the salvation of humankind. “Therefore, in connection with the unicity and universality of the salvific mediation of Jesus Christ, the unicity of the Church founded by him must be firmly believed as a truth of Catholic faith.”

Although this does not preclude salvation for non-Catholics, it rests upon a belief that salvation of such persons lies through the good offices of the Catholic Church. In addition, Dominus Iesus reiterates the centrality of the apostolic succession to Church doctrine, calling upon Catholics to affirm that principle. Along the way, the document refers to non-Catholic Christian traditions as “deriv[ing] their efficacy from the very fullness of grace and truth entrusted to the Catholic Church.”

Needless to say, mature religious traditions do not enjoy being referred to as “derivative,” and Dominus Iesus provoked a significant negative reaction. As the leaders of the Christian Church (Disciples of Christ), a Protestant denomination, wrote in measured response to Dominus Iesus:

It seems inconsistent to us for the Roman Catholic Church to proclaim that ecumenism is central to the church’s life and witness, and then to issue a statement that does not reflect that basic commitment. The response to the Declaration recently released by the World Council of Churches speaks for the Disciples: “What a tragedy if this witness to a hurting (and unbelieving) world were obscured by the Churches’ dialogue about

---

146. Id. ¶ 16.
147. See id. ¶ 12.
148. See DOMINUS IESUS, supra note 143, ¶ 16.
149. Id.
their relative authority and status—however important they may be.

But *Dominus Iesus* must be read in perspective. Not many faiths claim to be non-exclusive. In essence, *Dominus Iesus* simply provides that claiming to be Roman Catholic means some things and does not mean others. Thus, it calls upon the Roman Catholic faithful to distinguish between Roman Catholic precepts and those of other faiths:

> [T]he distinction between theological faith and belief in the other religions... must be firmly held. If faith is the acceptance of revealed truth, which makes it possible to penetrate the mystery in a way that allows us to understand it coherently, then belief, in the other religions, is that sum of experience and thought that constitutes the human treasury of wisdom and religious aspiration, which man in his search for truth has conceived and acted upon in his relationship to God and the Absolute.

It is hard to imagine that language like this, even if it is coupled with an unfortunate description of other traditions as "derivative," would provoke a new age of religious intolerance on the part of Roman Catholics in the United States. Although *Dominus Iesus* does persevere in identifying Catholic doctrine as more completely valid than the doctrine of other traditions, it also reiterates a desire for continued communication among people of different faiths:

> "Inter-religious dialogue, which is part of the Church's evangelizing mission, requires an attitude of understanding and a relationship of mutual knowledge and reciprocal enrichment, in obedience to the truth and with respect for freedom."

---


152. In fact, the most successful faiths—in terms of the religious economy—do not make this claim. See STARK & FINKE, supra note 10, at 142 ("Among religious organizations, there is a reciprocal relationship between the degree of lay commitment and the degree of exclusivity.").

153. *Id.* ¶ 7 (emphasis removed, quotation marks and footnotes omitted).

In light of the foregoing reasoning, it is difficult to sustain the argument that extending a choice program to include students at Roman Catholic elementary and secondary schools would endanger our traditions of intellectual liberty and democratic self-governance.

It is also important to bear in mind the distinction between Roman Catholic doctrine and the practice of Roman Catholics in the United States. The Church is understandably famous for some of the positions it has taken on controversial social issues, such as abortion, contraception, and divorce, to name a few. But these positions are not in themselves relevant to the question whether the Church, through the exercise of its authority, threatens American democracy. There is nothing inherently wrong about the leadership of a church bearing witness to the faith they espouse, nor is there anything wrong with members of that church being persuaded by leadership. The relevant questions, therefore, are whether Catholics in the United States are doctrinally bound to implement the positions of the Church's leadership, and as a sociological matter whether they will in fact do so. The democratization of the Church recognized in the Second Vatican Council indicates that the Catholic laity in the United States will be encouraged to participate in the political process as individuals.\(^{155}\) And to the reforms of Vatican II must be added the continuing "Americanization" of Catholics living in the United States,\(^{156}\) as well as the very real tradition of dissent within the Catholic Church.\(^{157}\) In sum, judicial fear of the growth of Roman Catholicism in the United States cannot easily be based upon dogma, the dogma having grown in its subtlety over the past forty years. On the other hand, judicial fear based on the sociology of American

---

155. See generally Neuhaus, supra note 135, at 270-73 (discussing the role that the "sense of the faithful" (sensus fidelium) plays in the development of Catholic theology); id. at 270 ("As Eastern Orthodox theologians are fond of pointing out, the faithful sometimes rejected heresies before the theologians recognized them as such. The fourth-century crusade against Arianism, which denied the full divinity of Christ, was largely led by laypeople.").

156. To this may be added the increasing "Mexicanization" of American Catholicism, for example, which suggests that calls for orthodoxy will lose some of their potency. See Gregory Rodriguez, A Church, Changing, WALL ST. J., March 8, 2002, at W13 (discussing how a "Mexican religious observance . . . concentrates more on cultural practice than orthodoxy").

Catholicism is either misplaced, given the variegation within that population, or difficult to justify.

C. Formal Neutrality

The final element in the case against treating traditional separationism as the well-settled judgment of the polity lies in realistic assessment of traditional separationism's continuing role in Establishment Clause jurisprudence. Because this form of separationism has been substantially eclipsed in some of its most important applications by a focus upon the equal treatment of all claimants to public largesse, without regard to religious or non-religious orientation, it can no longer claim the kind of adherence that *stare decisis* would otherwise demand.

Strict separationism dominated the Supreme Court's approach to the Establishment Clause from 1947 until sometime in the early to mid-1980s. During that period of thirty to forty years, the Court struck down a wide variety of programs and policies designed to promote religion or deemed to have such promotion as their primary effect. This separationism reached its height of influence in the 1970s, when the Court struck down a number of programs that provided financial aid to private, sectarian schools.

The 1980s, however, saw a new trend in the Court's implementation of the Establishment Clause. Figuratively speaking, the Court backed into this trend, because it introduced this new theme to Establishment Clause jurisprudence as a byproduct of adjudicating challenges under the Speech, Press, and Exercise Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment.

One watershed case was *Widmar v. Vincent*, decided in 1981. In this case, the Court held that the University of Missouri at Kansas City could not bar a Christian evangelical student group from using facilities that were generally open for use by student groups. The facts of the case were as follows: From 1973 until 1977, the group regularly used the University's facilities for meetings that included prayer,

---

158. 454 U.S. 263 (1981). I am indebted to David Wagner for emphasizing the significance of this decision, although the perception of *Widmar* as a watershed case is not universally held. See Laycock, *Underlying Unity*, supra note 26, at 63.
hymns, Bible commentary, and discussion of various religious issues. In 1977, the University informed the students that they could no longer use its facilities for their meetings, on the ground that such use constituted an establishment of religion. The students brought suit against the University's officials, arguing that the decision to exclude them from public facilities constituted discrimination on the basis of the content of their speech. The students argued that religious speech is entitled to the same degree of protection from the Constitution as any other form of speech. The University argued that excluding the group from public facilities served the compelling interest of preventing an establishment of religion.

In a decision that flowed seamlessly from free speech law, but represented something of a break from Establishment Clause law, the Supreme Court ruled in favor of the students, and ordered UMKC to let the group use its facilities. The Court based its opinion on the nature of meeting space at a public university, and reasoned that no one familiar with the wide variety of student groups on a campus like that of UMKC would perceive the students' use of the University's facilities as a union of church and state.

So many decisions have followed in Widmar's wake that numerous scholars of the Establishment Clause have opined that the era of strict separationism is coming to an end. Indeed, these decisions have been far-reaching. In Rosenberger v. Rector and Visitors of the University of Virginia, for example, the Court ordered the University to release money from a student activities fund to pay the expenses of Wide Awake, an explicitly evangelical student newspaper. This was a particularly controversial decision because it required the University, a public entity, to expend money on behalf of an explicitly religious organiza-

161. See id. at 845-46.
Dissenting Justice Souter decried this requirement as a violation of a cardinal principle of separationism.\footnote{162. See id. at 868 (Souter, J., dissenting). See also Laycock, Underlying Unity, supra note 26, at 65 (describing Rosenberger as “a case that fell near the core of both [no-aid and non-discrimination] theories [of the Establishment Clause]”).} 

Other decisions following in \textit{Widmar}'s train have included \textit{Board of Education of Westside Community Schools \textit{v.} Mergens},\footnote{163. \textit{Rosenberger}, 515 U.S. at 873-74 (Souter, J., dissenting).} in which a divided Court upheld the Equal Access Act, which requires public secondary schools that receive federal funding and that maintain a “limited open forum” to allow any student group to use that forum, without regard to the content of its speech; \textit{Lamb's Chapel \textit{v.} Center Moriches Union Free School District},\footnote{164. 496 U.S. 226 (1990).} in which the Court required a school district to allow a private group to show religiously oriented films in a generally available school facility during off-hours, even though the facility was not itself a public forum; \textit{Capitol Square Review and Advisory Board \textit{v.} Pinette},\footnote{165. 508 U.S. 384 (1993).} in which a divided Court required a permitting agency to allow the Ku Klux Klan to place an unattended cross in a public park across the street from the Ohio State Capitol; and \textit{Good News Club \textit{v.} Milford Central School},\footnote{166. 515 U.S. 753 (1995).} in which the Court required a school board to allow a Christian students’ club to meet at a public school after school hours.

In each of these instances, as in \textit{Widmar} itself, certain factors could be adduced to support the argument that the overall effect of allowing the religious group to use the public facility or resource in question was less to promote religion than to promote equality, or that no reasonable person would perceive such use of public facilities as governmental promotion of religion. In \textit{Rosenberger}, for example, the majority was able to capitalize on the fact that money from the student activities fund went directly to \textit{Wide Awake}'s third-party vendors, and not to the newspaper itself.\footnote{167. 121 S.Ct. 2093 (2001).} Additional devices were found in that case, and similar devices were found in each of the other cases that followed in \textit{Widmar}'s train. But the trend is un-
mistakable, and undermines the doctrinal significance of these devices.\footnote{See generally Laycock, Underlying Unity, supra note 26, at 66-67 (explaining that “the majority [in Rosenberger] hedged the opinion with unpersuasive distinctions and reservations”).}

The constant through all these cases is that the religious group prevailed. The rule is therefore emerging, at least where claims are predicated on the Speech, Press, Exercise, and Equal Protection Clauses, that any governmental resource made broadly available to the public must be made available to religiously oriented groups on a non-discriminatory basis. It is difficult to argue that this “equal treatment” approach has not vigorously captured the attention of the Court.

Indeed, this approach has also captured the attention of the Court in claims not predicated on other provisions of the Constitution. Since 1985, the Court has upheld the inclusion of religiously oriented entities in public programs in at least three different cases, with no examples to the contrary.\footnote{See Zelman v. Simmons-Harris, 122 S.Ct. 2460 (2002) (holding that Ohio’s school choice program does not offend the Establishment Clause); Mitchell v. Helms, 530 U.S. 793 (2000) (plurality) (holding that the provision of educational equipment by a public agency to private, sectarian schools is not an endorsement of religion); Agostini v. Felton, 521 U.S. 203 (1997) (holding that remedial educational services by public employees on private, sectarian premises was consistent with the Establishment Clause).}

For example, in 1997 the Court overruled one of its earlier decisions and held that public employees could provide remedial education to disadvantaged children on the premises of private, sectarian schools as part of Title I of the Elementary and Secondary Education Act of 1965.\footnote{See Agostini, 521 U.S. at 235, overruling Aguilar v. Felton, 473 U.S. 402 (1985). The Agostini Court also overruled part of Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985).}

In 2000, the Court went on to uphold certain other aspects of that statute, as amended, and doing so entailed overruling two decisions from the 1970s that had prohibited various practices.\footnote{See Mitchell v. Helms, 530 U.S. at 692-93, overruling Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229 (1977).}

Finally, in the recent Zelman case, the Court upheld a formally neutral educational choice plan.\footnote{See Zelman, 122 S. Ct. at 2473.}

These decisions stand in sharp contrast to the period before 1985, in which the Court rarely upheld programs that provided aid to private, sectarian institutions.
It should not come as a surprise that such an approach has captured the attention of legally trained minds. Formal neutrality reflects an approach to rulemaking that is inherently appealing—that of treating all similarly situated phenomena alike.\textsuperscript{174} Indeed, the strategy of challenging rules and practices as discriminatory, rather than challenging them as deficient in some substantive sense, has proven to be effective for other groups perceiving themselves as being in the political minority.\textsuperscript{175} Moreover, formal neutrality neatly avoids one of the most significant faults of substantive neutrality, namely, the difficulty of ever knowing precisely where the line is, or precisely why the courts draw lines as they do.\textsuperscript{176}

As noted much earlier in this paper, the decision in \textit{Zelman} was close, but the wide-angle picture should not be missed. The trend over last two decades has been decidedly in the direction of formal neutrality, even if it has never quite gotten there—and even if it never should quite get there. Consequently, it would be difficult to argue, at this

\textsuperscript{174} As Eugene Volokh has written, “Equality rings truer to our notions of the government’s proper role with regard to religion than does discrimination.” Eugene Volokh, \textit{Equal Treatment Is Not Establishment}, 13 NOTRE DAME J.L. ETHICS & PUB. POL‘Y 341, 345 (1999); \textit{id.} at 346 (“Equal treatment . . . fits with most people’s intuitive responses [to hypotheticals regarding public programs and the Establishment Clause].”). \textit{See generally} Herbert Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 HARV. L. REV. 1, 19 (1959) (“A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”).


\textsuperscript{176} \textit{See Zelman}, 122 S. Ct. at 2470 (“The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.”); Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 767-68 (1995) (plurality opinion of Scalia, J.) (“Petitioners’ rule [allowing a court to find an ‘endorsement of religion’ in the absence of actual endorsement by the government] would require school districts adopting similar policies in the future to guess whether some undetermined critical mass of the community might nonetheless perceive the district to be advocating a religious viewpoint.”).
point, that unreconstituted strict separationism continues to function as a vital source of new jurisprudence on the Court. This, in itself, is a signal of its weakness.\textsuperscript{177}

III. CHOICE PROGRAMS

The traditional approach to separation of church and state is certainly entitled to respect in the Supreme Court's Establishment Clause jurisprudence, not only because of its longevity, but also because of its consistency with many people's understanding of the prerequisites for religious freedom.\textsuperscript{178} Although traditional separationism asserted a basis in original intent well beyond what the historical record can sustain, and although it appears to have found roots in religious tensions and perhaps even uncharitable opinions prevalent in the mid-twentieth century, it was nevertheless substantially infused with good faith from the beginning. But this is not enough to sustain a constitutional tradition on a permanent basis.\textsuperscript{179} A tradition with the kind of mixed record described in the foregoing sections of this paper, and a somewhat exhausted tradition at that, merits re-evaluation, particularly where the opportunity cost of continued adherence is high.

As I argued earlier in this paper, choice plans can facilitate myriad approaches to learning and thinking, as well as new approaches to building bridges between people

\textsuperscript{177} Cf. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 855 (1992) (noting that the applicability of \textit{stare decisis} depends in part on whether growth in the law since an earlier decision has left that decision a "doctrinal anachronism discounted by society").

\textsuperscript{178} As the Court noted in \textit{Casey}:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

\textit{Casey}, 505 U.S. at 865-66.

\textsuperscript{179} See generally Lupu, \textit{Increasingly Anachronistic Case}, supra note 26, at 386 (footnote omitted) ("The Protestant paranoia fueled by waves of Catholic immigration to the U.S., beginning in the mid-nineteenth century, cannot form the basis of a stable constitutional principle, and the stability of the principle has been undermined by the amelioration of those concerns . . . ").
of different religious traditions. Some people sincerely believe that learning, group therapy and self-help are most effective and enduring if they take place in an atmosphere suffused with normative considerations and even reference to revealed truth. Others very reasonably and sincerely disagree. The First Amendment need not take sides in this debate, at least where the government's role in the educational and charitable system is no less attenuated than it is in the health care context. Choice plans exploit the government's ability to raise and distribute revenue—and nothing more—in favor of a pluralistic approach to education and the administration of charity. Choice programs enable people to secure important social services in contexts congenial to their world views.

Such plans also enable religious traditions to develop and articulate their beliefs in ways that are likely to foment increased engagement between traditions at a theological level. The historian Lerond Curry described in detail the many forms of ecumenical dialogue between Catholics and Protestants in the United States in the years before and after Vatican II, noting in particular the depth and endurance of many of the connections that were forged in this process. Although concern for both religion and the

180. See supra notes 5-11 and accompanying text.
181. See Lupu, Increasingly Anachronistic Case, supra note 26, at 375 (defending a situation in which the federal government paid for medical care provided by a sectarian institution by stating that "[n]o Religion Clause scholar or advocate of whom I am aware would argue that government payment to St. Peter's Hospital for the cost of medical service for my father's benefit violated the Establishment Clause").
182. A plausible objection at this point could be that some religious schools would teach hatred, or that some religiously affiliated charities would divert some of the public funding they receive toward illegal purposes. The first response to these objections is that a judicial determination that choice programs do not violate the Establishment Clause is not equivalent to a legislative determination to adopt such a program. Moreover, there are non-discriminatory means by which the government can monitor the use of its funds to prevent undesirable outcomes. For example, the government can institute strict accounting controls, requiring religiously affiliated schools and charities to demonstrate that public funds are put to their intended uses. Also, a requirement that participating schools and charities not discriminate on the basis of race or religion should deter the teaching of hatred. Finally, we should not lightly presume illegal behavior on the part of religiously affiliated organizations.
183. See Curry, supra note 9, at 61-70, 75-76, 79-87. Regarding ecumenist efforts during the Kennedy years, Curry wrote:

Once again, though, it was not American politics which would bring the
state dictates that theological study as such should not take place in public schools, religiously oriented schools attended by children on a voluntary basis can provide this valuable service without detriment to either religion or the state.\footnote{184}

All that is required to facilitate choice plans is a more deferential approach to separationism than the Court has traditionally pursued. In many ways, the Court has already begun to venture in this direction. The Court's increasing focus upon the importance of private choice is one aspect of this deference. Another aspect is the Court's willingness to presume that public employees providing secular services on sectarian premises will remain mindful of the Establishment Clause.\footnote{185} A third is the Court's willingness to explore the possibility of aggregating all meaningful choices when deciding whether a choice plan provides a sufficiently broad array of options to satisfy the rigors of the Establishment Clause, as it did in \textit{Zelman}.\footnote{186} On this view, even if one hundred percent of private institutions participating in a choice plan are sectarian in nature, the Establishment

---

\footnote{184}{Choice plans offer a variety of additional benefits that are beyond the scope of this article. For example, they provide alternatives to public programs, allowing for greater experimentation and facilitating reform of public institutions due to increased competition from the private sector. \textit{See Osborne \& Plastrik, Banishing Bureaucracy}, supra note 19, at 11 ("Asset sales, contracting out, and other tools that fall under the heading of privatization are part of the reinventor's tool kit. But... it is competition and customer choice that force improvement, not simply private ownership."). \textit{See also} Mueller v. Allen, 463 U.S. 388, 395 (1983) (reasoning that private schools provide a "benchmark" for public schools).

In addition, educational choice programs will dramatically relieve pressure on the public schools to include religious text and iconography into their curriculum. Although it is impractical to believe that the Court will reverse its position and allow public schools to include such text and iconography in their curriculum (except in limited ways), \textit{see Jeffries \& Ryan, supra note 28}, at 283, many constituencies still clamor for such inclusion. They will have significantly less cause to complain if private, sectarian schools exist as a financially viable option for them.}

\footnote{185}{\textit{See Agostini}, 521 U.S. at 226-27.}

\footnote{186}{\textit{See Zelman}, 122 S. Ct. at 2469.}
Clause is still satisfied if meaningful secular options are available in the public sector. Although the Establishment Clause would not permit the government to set up a choice program that permitted only religiously affiliated non-public options, there is still no cogent reason to exclude public sector options in assessing the degree of choice available in a formally neutral choice program. But there is at least one point that should be explored further. The Court has not yet fully explored the extent to which sophisticated accounting methods could be used to ensure that $100 of public money buys $100 of education, group therapy, or soup. Were this option explored, it could support the conclusion that the state is only implicated in that for which it pays, no matter how mixed religion, education and charity might otherwise be. Although certain firewalls would undoubtedly be appropriate—such as a firewall preventing the public financing of an institution that has no non-ritual function— the mere need for such firewalls need not justify precluding religiously oriented institutions from competing with secular institutions in the provision of services capable of being defined as secular in the general market.

187. Cf. Volokh, supra note 174, at 348 ("Right now, all standard K-12 spending goes to secular education; this itself is a powerful 'disparate impact' favoring secular uses and disfavoring religious uses. School choice will diminish this disparate impact.").
APPENDIX

Mr. Sylvester had some doubts of the propriety of the mode of expression used in this paragraph. He apprehended that it was liable to a construction different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether.

Mr. Vining suggested the propriety of transposing the two members of the sentence.

Mr. Gerry said it would read better if it was, that no religious doctrine shall be established by law.

Mr. Sherman thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments; he would, therefore, move to have it struck out.

Mr. Carroll—As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred in the opinion that they are not well secured under the present constitution, he said he was much in favor of adopting the words. He thought it would tend more towards conciliating the minds of the people to the government than almost any other amendment he had heard proposed. He would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community.

Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.
Mr. Huntington said that he feared, with the gentleman first up on the subject, that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it. The ministers of their congregations to the Eastward were maintained by the contributions [mandatory tithes] of those who belonged to their society; the expense of building meetinghouses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers, or building of places of worship might be construed into a religious establishment.

By the charter of Rhode Island, no religion could be established by law; he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it. He hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.

Mr. Madison thought, if the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.

Mr. Livermore was not satisfied with that amendment; but he did not wish them to dwell long on the subject. He thought that it would be better if it was altered, and made to read in this manner, that Congress shall make no laws touching religion, or infringing the rights of conscience.

Mr. Gerry did not like the term national, proposed by the gentleman from Virginia, and he hoped it would not be adopted by the House. It brought to his mind some observations that had taken place in the conventions at the time they were considering the present constitution. It had been insisted upon by those who were called antifederalists, that this form of Government consolidated the Union; the honorable gentleman's motion shows that he considers it in
the same light. Those who were called antifederalists at that time complained that they had injustice done them by the title, because they were in favor of a Federal Government, and the others were in favor of a national one; the federalists were for ratifying the constitution as it stood, and the others not until amendments were made. Their names then ought not to have been distinguished by federalists and antifederalists, but rat[ifier]s and antirat[ifier]s.

Mr. Madison withdrew his motion, but observed that the words “no national religion shall be established by law,” did not imply that the Government was a national one; the question was then taken on Mr. Livermore’s motion, and passed in the affirmative, thirty-one for, and twenty against it. 188

188. 1 ANNALS OF CONG. 759 (Joseph Gales ed., 1789), reprinted in LEVY, supra note 31, at 96-99.