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THE DISTINCTIVE PLACE OF RELIGIOUS ENTITIES IN OUR CONSTITUTIONAL ORDER

Ira C. Lupu and Robert Tuttle¹

ABSTRACT: Although much has been written on the special place of “religion” in American law, there has been considerably less commentary on the distinctive quality of religious institutions as compared with their secular counterparts. The current law of the Religion Clauses, and the characteristics of institutions as compared to religiously motivated individuals, however, both suggest that institutions deserve discrete attention. In this paper, a revised version of the Donald Giannella Memorial Lecture recently delivered at Villanova, the authors focus on three different legal contexts in which questions of distinctiveness of religious institutions arise -- their exemption from civil rights law with respect to the employment of clergy, their exemption from historic preservation law with respect to noncommercial real property, and their inclusion in programs of government financial support for privately delivered social services (*a/k/a* charitable choice).

The paper develops a taxonomy of scholarly and judicial positions on such questions, including Religionists (who tend to favor whatever helps such institutions), Secularists (who tend to disfavor whatever helps religious entities), Separationists (who tend to favor distinctive treatment of such institutions, whether it helps or hurts them), and Neutralists (who tend to disfavor such distinctive treatment). In connection with the three examples, the authors develop their own position, which starts from a presumption of Neutralism but requires departures from that position if and only if the government’s policy exceeds constitutional limits designed to maintain the state’s penultimate, while leaving ultimate concerns to private institutions dedicated to them.

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At the end of the eleventh century, Pope Gregory VII revoked the traditional authority of temporal rulers to select and govern bishops in their territories.² In both political consequence and philosophy, Gregory's declaration was revolutionary. Because priests and bishops functioned not only as spiritual leaders but as political administrators, rulers demanded – and depended upon – their feudal loyalty. Gregory desired to reverse this order. In his view, civil government should no longer regard the church as an instrument of temporal rule; instead, civil government should be subordinated to the rule and purposes of the church. In his *Dictatus Papae*, Gregory asserted the pope's sole power to name and remove ("invest") bishops, and then went much further. The pope, he claimed, "may depose Emperors" and "may absolve subjects of unjust men from their fealty."³ Emperor Henry IV rejected the papal claims, and when Gregory named a rival emperor, much of Europe erupted in war. The Wars of Investiture lasted for fifty years, until the Concordat of Worms effected an uncertain truce that promised a sphere of autonomy for the church, yet allowed temporal rulers a measure of continued control over the selection of bishops.⁴

² Berman, *Law & Revolution* 94-99; Tierney, *The Crisis of Church & State*.

³ Gregory VII (Hildebrand), *Dictatus Papae*, in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought*, 242-43.

⁴ Berman, 99. The Investiture Controversy lasted for nearly another half-century in England, and ended only with the murder of Thomas Becket (and King Henry II's penitential submission to the pope in its wake). Berman, 255-56.

The compromise of the Concordat of Worms may have been uneasy, but it reflected the range of alternative relations between religious and civil authority that would dominate the next seven centuries.⁵ Civil governors would continue to attempt to exercise religious authority in support of their temporal rule, and ecclesial authorities would attempt to exercise the powers of secular government to further their religious mission. At times, church and state would share both temporal and spiritual rule, with religious courts adjudicating cases ranging from matters of marriage law to those involving personal property, and the state prosecuting heresy and blasphemy to guard religious purity. At other times, the church asserted its complete autonomy, including claims of immunity of its clergy and its possessions from the reach of civil authority.

Looking back on this history, the American founding generation did not perceive a successful, albeit messy, compromise. Instead, from our shores, church-state relations in Europe reflected episodic eruptions of bloodshed and tyranny. With great hopes for religious purity and civil peace, the founders agreed that the only way to break free from this destructive course was a new experiment, one that decoupled religious and civil institutions. This new government would have no jurisdiction over religious matters, thus ensuring the autonomy of religious institutions and simultaneously depriving these same institutions of any incentive to capture the organs of government to further their religious missions. Two centuries later, we see and enjoy the fruits of this experiment. Religious activity and pluralism in the United States far outstrip that of any other western nation, yet religious strife has played no significant part in our

⁵For general discussions of the relation between civil government and religious institutions in medieval and early modern Europe, see: Roland H. Bainton, *The Travail of Religious Liberty* (1951); Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (1957); Oliver O'Donovan, *Desire of the Nations: Rediscovering the Roots of Political Theology* (1996); Rene Remond, *Religion and Society in Modern Europe* (trans. A. Nevill, 1999); Thomas J. Renna, *Church and State in Medieval Europe, 1050-1314* (1974); John A.F. Thomson, *Popes and Princes, 1417-1517 – Politics and Polity in the Late Medieval Church* (1980); Gerd Tellenbach, *Church, State and Christian Society at the Time of the Investiture Contest* (trans. R.F. Bennett 1959); John Witte, Jr. *Religion and the Constitutional Experiment: Essential Rights and Liberties 11-19* (2000). For primary source material relating to church-state controversies in Western Europe, see O. O'Donovan & J.L. O'Donovan, *From Irenaeus to Grotius*, supra note **.*.*.

history.⁶

The successful decoupling of religious and civil institutions, however, has left religious institutions with an uncertain place in our polity. In part, this uncertainty can be attributed to religious and cultural developments. Over the past two centuries, the focus of religious life (particularly, but not exclusively, in Protestantism) has become increasingly inward, a matter of personal experience and sensation rather than conformity to objective creeds or regulations.⁷ When joined with a deep cultural individualism, this religious orientation tends to displace the center of religious significance (if not activity) from the institutional to the personal. The place of religious institutions has also been complicated by the dramatic expansion of government (and other public institutions) during the last century. Where religious organizations once

⁶ Of course, there has been real religious persecution in America, though most of it has been the result of private bigotry and violence, only occasionally aided by government policy. The case of mistreatment of Mormons in the 19th century, and Jehovah's Witnesses in the twentieth, are probably the starkest examples of combined public-private religious persecution in America. For an account of the government-backed campaign against the Church of Jesus Christ of Latter-Day Saints, see Elizabeth Harmer-Dionne, *Once A Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 *Stan. L. Rev.* 1295 (1998). For details of the persecution of the Witnesses, see William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 *U. Cin. L. Rev.* 997 (1987).

⁷ Charles Taylor has provided the richest description of these developments. See Taylor, *Sources of the Self: The Making of Modern Identity* (1989) (especially pp.368-418). See also Robert Bellah, et. al., *Habits of the Heart: Individualism and Commitment in American Life*, 232-37 (1985); Conrad Cherry, *Nation, Church and Private Religion: The Emergence of an American Pattern*, in *Readings on Church and State* 99-108 (James E. Wood, Jr., ed. 1989).

occupied much of the public square – as principal sites of education, charity and moral formation – the activist, post-New Deal state now dominates.

The founders’ experiment took form in provisions that assumed the distinctiveness of religious beliefs and institutions. Provisions like the nonestablishment clause of the First Amendment single out religious institutions for special treatment, originally both limiting the support that the federal government may provide them when compared with their secular counterparts, and insulating state establishments from federal interference.⁸ Guarantees of religious liberty, such as the free exercise clause of the First Amendment, seem to empower religious institutions, creating immunities against state regulation that other entities may not share.

The shift to a subject-oriented religiosity, however, has lead many to question why religious experiences, commitments, and communities are different than other intense sensations, beliefs and associations.⁹ Madison’s confident assertion of the supremacy of religious duties over secular ones no longer seems self-evident.¹⁰ The state’s expansion, which has produced a long and benign history of cooperation between government and religious organizations in public projects,¹¹ calls into question the founders’ special concerns about church-state interactions (and the special disabilities of religious

⁸ For discussion of the original dual function of the Establishment Clause, see Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 17-34 (1995); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction*: 32-45 (?), 246-257 (?) (1998).

⁹ See, e.g., Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. Ark. Little Rock L.J. 555 (1998). William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 *U. Chi. L. Rev.* 308 (1991); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 *U. Chi. L. Rev.* 1245 (1994).

¹⁰ “It is the duty of every man to render to the creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent, both in order of time and degree of obligation, to the claims of Civil Society.” 1 James Madison, *Memorial and Remonstrance*, Par. 1, in *Letters and Other Writings of James Madison* 162 (1865). The *Memorial and Remonstrance* is also reprinted as an appendix to the opinion of Justice Rutledge, dissenting in *Everson v. Bd. of Educ.*, 330 U.S. 1, 63-72 (1947).

¹¹ For a full account of this partnership, see Stephen V. Monsma, *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money* (1996).

institutions). If religious institutions perform important public functions, indistinguishable from those performed by the state, why cannot the state – to further its own secular purposes – assist religious institutions in these activities? By the same token, if religious institutions engage in private activities, such as use of land or employment of agents, ordinarily subject to regulation, why should such institutions not be regulated like other private actors?

The issue of the distinctive place of religious institutions is far more than just a theological or sociological curiosity; doubt concerning its appropriate resolution gives rise to a host of difficult legal problems. In what follows, we will explore three difficult and illuminating cases in which issues of religious distinctiveness are central. The legal contexts for these cases are regulation of the employment relation, government control over the private use of land, and government partnership with faith-based organizations in the delivery of social services (*a/k/a* charitable choice). Part I will describe these cases in some detail, and analyze the need for a general and consistent theory of the distinctive place of religious institutions in order to resolve such cases. Parts II and III will examine two such general theories, Separationism and Neutrality, and explore their application to our representative cases. In Part IV, we will chart our own vision of the topic. We believe that the Religion Clauses are best understood as essential safeguards against a totalitarian state. The Religion Clauses should be read to limit the state's ability – either through support or prohibition – to assert jurisdiction over the transcendent and extra-temporal commitments of its citizens. Part IV of the paper explains how this view facilitates the resolution of our representative cases in a principled and original way.

I. THE PROBLEM OF DISTINCTIVENESS

The question of distinctiveness cannot be addressed adequately in the abstract. We propose instead to focus upon three cases, each of which highlights the question in a different way. Two of them involve regulatory intrusions into the affairs of religious institutions; the third involves affirmative government support for the efforts of such institutions.

A. Reverend Gellington and the Ministerial Exception

Lee Otis Gellington was an ordained minister of the Christian Methodist Episcopal (CME) Church, serving a congregation in Mobile, Alabama. A fellow minister, Veronica Little, confided in Gellington that a supervisor had made sexual advances toward her. Reverend Gellington helped Reverend Little prepare an official complaint about the harassment to church elders. Shortly thereafter, CME officials reassigned Gellington to a church over 800 miles from his current home and substantially reduced his compensation.

Gellington filed suit under Title VII of the 1964 Civil Rights Act, alleging that the transfer and pay reduction constituted an unlawful constructive discharge and retaliation for helping a co-worker assert her rights. The federal district court in Mobile dismissed the complaint, and the U.S. Court of Appeals for the 11th Circuit affirmed the dismissal.¹² Both courts relied on the three-decade old decision of the Fifth Circuit in *McClure v. Salvation Army*,¹³ which held that decisions involving the employment of ministers were not subject to gender discrimination suits under the civil rights act, even though the statute itself contained no such exemption.

¹²Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000).

¹³ 460 F.2d 553 (5th Cir. 1972).

It should not be surprising that courts would be loathe to permit the civil rights laws to undo centuries-old tradition of a male-only clergy in certain faiths. (Exactly why courts should be so loathe, when Congress included no such exemption in the statute, will be examined below.) The ministerial exception from civil rights laws which *McClure* creates, and many subsequent decisions reaffirm, however, is not limited to religious institutions that overtly discriminate on the basis of sex in the ordination and hiring of clergy. The *McClure* rule also immunizes religious institutions that assert no theological claim to engage in gender discrimination. Indeed, it even protects religious institutions that assert their full compliance with and support for anti-discrimination norms. Neither the Salvation Army, which paid Bobbie McClure less than her male counterparts, nor the CME Church, which transferred Lee Gellington, has official policies of gender discrimination, sexual harassment, or retaliation for complaining about civil rights offenses. Nevertheless, the courts in these and many other analogous decisions have dismissed civil rights complaints by clergy against religious institutions, on the theory that the Constitution forbids inquiry into employment decisions relating to clergy.

No other employers have constitutional immunity from civil rights suits akin to that recognized in *McClure* and its progeny. Are *McClure* and *Gellington* defensible illustrations of a special constitutional status for religious entities? If so, what is that status, and what are its scope and limitations as a source of immunity?

B. First Covenant, East Bay, and Historic Preservation of Religious Properties

1. The Case of the First Covenant Church – Seattle, Washington has enacted a Landmarks

Preservation Ordinance¹⁴ which authorizes the City’s Landmarks Designation Board to “ designate, preserve, and protect . . . objects which reflect significant elements of the City’s cultural, aesthetic, social, . . . architectural . . . historic or other heritage.” Pursuant to this ordinance, the Board designated First Covenant Church a landmark, and adopted restrictions on changes to the church’s exterior. The controls included a provision permitting the church to make alterations to the exterior of the building when required by changes in liturgy, but this provision required the church to negotiate with the Board about ways of accommodating both the liturgical change and the historic character of the property. The provision gave the final word on liturgy-driven changes to the church.

¹⁴ Seattle Municipal Code 25.12

In *First Covenant Church v. Seattle*,¹⁵ the Washington Supreme Court held that the religious liberty provision in the state’s constitution precluded landmarking of “houses of worship” owned by religious entities.¹⁶ The Court reasoned that such landmarking burdened the entity’s religious freedom in two ways. First, it caused substantial financial hardship by reducing the value of the First Covenant property. Second, it caused a regulatory burden by requiring First Covenant to “seek the approval of a government body before it alters the exterior of its house of worship, whether or not the alteration is for a religious reason.”¹⁷ Reasoning by analogy to several federal constitutional cases, the court ruled that any such burdens on religious institutions could only be justified if 1) “some compelling state interest justifies the infringement,” and 2) “the enactment is the least restrictive means to achieve the state’s ends.”¹⁸ Applying this rigorous standard, the Court concluded that “the City’s interest in preservation of aesthetic and historic structures is not compelling and it does not justify the infringement of First Covenant’s right to freely exercise religion.”¹⁹

A dissenting opinion²⁰ argued that financial hardship did not justify exemptions for religious institutions from generally applicable laws, and that the special provision permitting liturgically motivated changes was constitutionally acceptable because, despite the duty to negotiate, the provision guaranteed that the church would have final say about such changes. Accordingly, the dissent found no violation of the

¹⁵ 840 P.2d 174 (Wash. 1992).

¹⁶ An earlier judgment in the same case, resting on both the federal and state constitution, had been vacated and remanded for reconsideration by the U.S. Supreme Court in light of its decision in *Employment Division v. Smith*. 787 P.2d 1352 (1990), cert granted, judgment vacated and remanded, 499 U.S. 901 (1991).

¹⁷ 840 P.2d at 182.

¹⁸ *Id.*

¹⁹ *Id.* at 185.

state constitution in the designation of First Covenant as a historic property.

Is the *First Covenant* decision correct? Is each ground – financial diminution in value, and potential conflict over theologically determined changes in architecture – sufficient to treat religious institutions different from other nonprofit institutions in Seattle? More generally, should government be obliged to demonstrate in court that its laws are the least restrictive means of achieving compelling governmental interests each and every time such laws apply to the detriment, financial or otherwise, of religious institutions?

²⁰ Id. at 193.

2. The case of the California legislative exemption – The California legislature has authorized counties and cities to “provide special . . . regulations for the protection, enhancement, perpetuation, or use of places, sites, buildings, [or] structures . . . having a special . . . historical or aesthetic interest or value.”²¹

Another part of this scheme for landmarking and historic preservation, however, exempts “noncommercial property owned by any association or corporation that is religiously affiliated and not organized for private profit,” provided that the owner 1) objects to the application of the landmarking scheme to its property, and 2) “determines in a public forum that it will suffer substantial hardship, . . . likely to deprive the [owner] of economic return on its property, the reasonable use of its property, or the appropriate use of its property in the furtherance of its religious mission” if the landmarking application is approved.²² Thus, any religiously affiliated entity is free, by its own declaration, to exempt its noncommercial property from the scheme. The only constraint on this freedom is procedural; the religious entity itself must hold a public meeting at which the entity declares the requisite hardship.

The East Bay Asian Local Development Corporation, a secular nonprofit community development organization, and several other plaintiffs (including the City of San Francisco), challenged the exemption for religiously affiliated entities in the California state courts. The plaintiffs argued that the exemption scheme privileged religious over nonreligious enterprise in a way that violated both the state and federal constitution. By a 4-3 vote, the California Supreme Court upheld the exemption.²³ Taking an expansive view of the U.S. Supreme Court’s decisions concerning religion-specific accommodations, the Court majority reasoned

²¹ California Government Code, section 25373(b) (Deering 2001).

²² California Government Code, sections 25373(d), 37361(c) (Deering 2001)..

²³ East Bay Local Dev. Corp. v. California, 13 P. 3d 1122 (Cal. 2000), cert. denied, 69 U.S.L.Week 3700 (5/1/01).

that the exemption was reasonably necessary to avoid the possibility of state-imposed burdens on religious freedom, and that the limitation of the exemption to religiously-affiliated institutions did not amount to unconstitutional favoring of religion or discrimination against nonreligion. The majority also took the view that the California Constitution, upon which the plaintiffs had relied as well, was no more stringent than the federal constitution in its interdiction of legislation affording special treatment to religious institutions.

The three dissenting judges took a different and narrower view of the federal precedents, and a sharply different view of the meaning of various provisions of the California Constitution. Two separate dissenting opinions argued that the state and federal constitutions precluded special and favorable treatment for religious institutions unless that treatment was narrowly tailored to lifting or avoiding a government-imposed burden on the constitutional rights of those institutions.²⁴ The dissenters were of the view that the exemption scheme went far beyond what was necessary to protect constitutional rights of religious liberty. Under these circumstances, the state could exempt religious institutions only if they were part of a broad class of charitable, nonprofit associations. Because the exemption scheme did not extend to this broad group, of which religious institutions would be only a part, the dissenters concluded that the scheme violated state and federal constitutional requirements of neutrality between religion and nonreligion.

Even if *First Covenant*, which protected houses of worship from landmarking, is correct, can its logic be persuasively extended to all noncommercial property owned by religious institutions? Taken together, *East Bay* and *First Covenant* represent a powerful affirmation of the idea that religious institutions are legally distinctive, at least with respect to property ownership. Granted, the California exemption, broader of the two, is a product of legislative discretion, not judicial mandate.²⁵ Nevertheless,

²⁴ Id. at 1142-43 (Mosk, J., dissenting); id. at 1144-45 (Werdegar, J., dissenting).

²⁵ For further consideration of the problem of discretionary vs. mandatory political accommodation, see note xx

the decisions of both the Washington and California Supreme Courts highlight the question of the legal distinctiveness of religious institutions, at least with respect to regimes of control of the use of real property.

C. Charitable Choice and Faith-Based Organizations

Prior to the 1996 federal welfare reforms, religious providers of social services had been permitted to receive public funds to support their activities, but lawyers generally believed and counseled that the religious providers needed to set up a distinct legal entity to receive and administer the funds – an entity that engaged in no religious worship, proselytizing, or instruction – and the government-supported program needed to be operated without obvious religious imagery or references. In short, religious providers could participate in public programs only if they were first “scrubbed” of their religious characteristics.

infra.

The U.S. Supreme Court’s decision in 1988 in *Bowen v. Kendrick*,²⁶ upholding on its face the federal Adolescent Family Life Act, signaled a change in the legal landscape. *Bowen* upheld the Act’s requirement that grant proposals for community-based service to adolescents, on matters of sexuality and reproduction, include religious organizations as grantees. The Court’s opinion in *Bowen* recognized that many religious organizations would espouse views in these programs that would coincide with their religious views, and held that such coincidence would not disqualify these organizations from being grant recipients.²⁷ The Court also indicated, however, that the use by grantees of “materials that have an explicitly religious content or [that] are designed to inculcate the views of a particular religious faith” would raise serious Establishment Clause issues.²⁸

Against this background, the welfare reforms enacted by Congress in 1996²⁹ launched, at the federal level, the regime known as charitable choice. Reduced to its simplest terms, charitable choice authorizes religious entities, as well as other community groups, to participate as contractors in the administration of the new federal welfare program.³⁰ Their role includes the provision of employment training, readiness, and search services. But the right of religious organizations to participate in government programs is hardly novel. For religious entities, the legislation’s major innovation is its affirmation that they may retain their religious character, rather than operate under a legal duty to mask or dilute it.³¹ They are

²⁶ 487 U.S. 589 (1988).

²⁷ *Id.* at xxx.

²⁸ *Id.*

²⁹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. Law No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 USC, including 42 USC sec. 604a et seq (1996).

³⁰ *Id.* at secs . 604a(a), 604a(c).

³¹*Id.* at secs . 604a(a)(1); 604a(d); 604a(j) (1999).

not required to provide these services separate and apart from their religious premises; instead, services may be provided by church personnel directly out of the church itself. Religious providers may not use federal money for “sectarian worship, instruction, or proselytization”³² although they may use non-government money to engage in such activities in the same physical location as the government funded services. Religious coercion of, or discrimination against, beneficiaries, is of course prohibited.³³

President George W. Bush, in his first few weeks in office, took steps to broaden the notion of charitable choice. Drawing on the expansive Texas experience with charitable choice,³⁴ Bush’s executive orders³⁵ contemplate a wide range of service to people in need by faith-based and community organizations, financed in whole or part by the government. One key element in Bush’s initiative is its emphasis on results, without discrimination as to method of obtaining them.³⁶ Described more directly, the Bush philosophy appears to contemplate government-financed social services, such as drug counseling or prisoner rehabilitation, which use explicitly religious methods. In the past, proponents of charitable choice have

³² Id. at sec. 604a(j). Thus, faith-based providers may practice their religion openly when offering government-financed services. Programs involving recipient service vouchers, presented for redemption at faith-based organizations, do not carry with them the prohibition on worship, instruction, and proselytizing, on the theory that voucher programs involve the decision by private intermediaries rather than the government to select a religious provider.

³³ 42 U.S.C. sec. 604a(g).

³⁴ Charitable Choice’s Brenham Church’s Job-Training Program Sparks a High Profile Lawsuit, Dallas Morning News, Aug. 12, 2000, at 1G; Diane Watson, Strings Attached? Clergy Divided Over Whether Federal Funding Undermines Religious Freedom, Dallas Morning News, Feb. 4, 2000, at 1G; Scott S. Greenberger, Putting Faith in Their Futures – With Nod From Bush, State and Religion Join Forces for Jobs, Austin-American Statesman, Dec. 26, 1999, at A1.

³⁵ See Executive Order, Establishment of White House Office of Faith-Based and Community Initiatives, Jan. 29, 2001; Executive Order, Agency Responsibilities with Respect to Faith-Based and Community Initiatives, Jan. 29, 2001.

³⁶ Id. at section 1: “The paramount goal is compassionate results, and private and charitable community groups, including religious ones, should have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes, such as curbing crime, conquering addiction, strengthening families and neighborhoods, and overcoming poverty. *This delivery of social services must be results oriented and should value the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality*” (emphasis supplied).

pointed to the successes of the InnerChange Freedom Initiative, a program aimed at reducing recidivism among convicted felons, and Teen Challenge, an evangelical Christian program designed to treat teenage drug abuse.³⁷ Such programs represent a large step beyond the '96 welfare reform package, which tolerated religious trappings but did not itself finance explicitly religious means of achieving secularly desirable ends. Moreover, and quite consistently with the overarching philosophy of harnessing the spiritual energy of faith-based groups, religious organizations, in the Bush vision, are to be free to hire only coreligionists to implement their program.³⁸

Would the Bush philosophy, if fully implemented, undermine long-standing prohibitions on the relationship between the state and religious institutions? May the government finance faith-based methodologies of social and personal transformation? May the government subsidize programs which openly engage in religious discrimination in hiring? Planned Parenthood most assuredly has a philosophy of responsible sexuality, which the government may help to support with programs for adolescent counseling, and Planned Parenthood no doubt limits its hiring to those who share its secular views. Are

³⁷ Charles Glenn, *The Ambiguous Embrace: Government and Faith-Based Schools and Social Agencies* (Princeton 2000), at 62-73 (describing the successes of Teen Challenge); Christianity at center of Texas Faith-Based Aid, *The Houston Chronicle*, Feb. 24, 2001, at 1 (discussing the successes of InnerChange Freedom Initiative, a "New Testament-based prison redemption program, and the achievements of Teen Challenge); Ronald Sider, *Can Faith Help Solve Our Tough Social Problems*, *The Boston Globe*, Jan. 30, 2001, at p. A11 (arguing in favor of charitable choice, and citing as evidence a favorable report of Teen Challenge's success rate).

³⁸ The '96 Act explicitly permits this hiring preference, 42 USC sec. 604a(f), and the proposed Community Solutions Act of 2001, H.R. 7, 107th Cong., 1st sess, includes an identical provision. *Id.* sec. 1994A(e).

religious entities constitutionally distinctive for purposes of state support for their substantive ideologies, or their hiring preferences for those who share them?

Our three examples – the ministerial exception to nondiscrimination law, exceptions for religious institutions from landmarking law, and various forms of inclusion of faith-based groups in government-financed social services – all raise questions of the distinctive character of religious institutions as compared to their secular counterparts. In the first two, religious institutions seek distinctive treatment in the name of religious liberty. In the third, charitable choice, religious institutions seek nondistinctive treatment – that is, inclusion – in a scheme of public contracts or benefits. Thinking systematically about the question of distinctiveness seems essential to a coherent resolution of the conflicts these cases present.

There is a great divide in American culture, and in American legal thought, with respect to the proper way to approach the questions raised by these examples. On one side is a group we call the Religionists.³⁹ The Religionists are focused on the ways in which religion is a force for social good. They are committed to the notion that religious flourishing is socially beneficial, and that the law accordingly should promote a robust version of religious autonomy and religious inclusion in all aspects of public life. With respect to our three examples, the Religionists would find little difficulty in choosing sides. Relieving religious institutions from lawsuits and potential liability for discrimination is clearly in their interests, in terms

³⁹ Religionists do not agree about every detail, but their work has the general thrust described in text. Leading Religionist academic writing includes John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 *J. Contemp. Legal Issues* 275 (1996) (the law protects religious freedom because religion is good); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 *Emory L. J.* 43 (1997); Michael W. McConnell, *Accommodation of Religion*, 1985 *Sup. Ct. Rev.* 1, 39; Michael McConnell, *The Problem of Singling Out Religion*, 50 *DePaul L. Rev.* 1 (2000); Carl Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 *Emory L.J.* 1 (1997). Professor Giannella was a qualified Religionist. See Donald Giannella, *Religious Liberty Nonestablishment, and Doctrinal Development: Part I – The Religious Liberty Guarantee*, 80 *Harv. L. Rev.* 1381 (1967) (arguing for interest-balancing of state interests and free exercise concerns) and Donald Giannella, *Religious Liberty Nonestablishment, and Doctrinal Development: Part II – Nonestablishment*, 81 *Harv. L. Rev.* 513 (1968) (arguing for a view of nonestablishment which permitted religious organizations to share to some extent in public benefits).

of finances, administration, and public relations. Exemption from landmarking laws similarly relieves such institutions of administrative and financial burdens. So the Religionists would clearly say YES to decisions like *Gellington*, *First Covenant*, and *East Bay*. Charitable choice may be a bit more complex for Religionists; some of them realize that financial relations with government may prove administratively burdensome and potentially corrupting of spiritual mission. But most Religionists would think that religious institutions ought to decide for themselves whether the hazards of participation outweigh the benefits, rather than have courts paternalistically decide such matters for them in the name of the Constitution. So, here too, the Religionists would say YES.

On the other side of this divide in law and culture are a group we call the Secularists.⁴⁰ The Secularists are more focused on the dark side of religion – that is, the ways in which religious institutions and causes may produce divisiveness and social harm. In order to protect the state from the danger of religious capture and conflict, Secularists believe, the state’s activities must themselves be relentlessly secular. Viewing the issue from the other direction, Secularists believe that religious entities must survive entirely on private support, excepting only those public goods, such as police and fire protection, available to all as common right. Thus, Secularists are strenuously opposed to material assistance, in cash or kind, by the state to religious entities, whether those entities are specially benefitted or included in a larger group.

⁴⁰ Justice Stevens is relentlessly secularist. He routinely joins opinions which are receptive to Establishment Clause claims, see, e.g., *Mitchell v. Helms*, 530 U.S. 793, 867 (2000) (Souter, J., joined by Stevens & Ginsburg, JJ, dissenting), and those which reject Free Exercise Clause claims, see, e.g., *Emp. Div. v. Smith*, 494 U.S. 872 (1990) (opinion for the Court). Leading secularist commentary includes Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195 (1992) (the Constitution is designed to create and facilitate a secular democracy); Susanna Sherry, *Enlightening the Religion Clauses*, 7 *J. Contemp. Legal Issues* 473 (1996); Steven Gey, *Why Is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. Pitt. L. Rev. 75 (1990); William P. Marshall, *The Other Side of Religion*, 44 *Hastings L.J.* 843 (1993); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308 (1991); Marci Hamilton, *Religion and the Law in the Clinton Era: An Anti-Madisonian Legacy*, 63 *Law & Contemp. Probs.* 359 (2000); Marci Hamilton, *The Constitutional Rhetoric of Religion*, 20 *U. Ark. Little Rock L.J.* 619 (1998).

On the free exercise side, whatever rights of association and expression nonprofit groups may have, Secularists would reject the notion that religious institutions should have any more expansive privileges than their secular analogues.

Accordingly, the Secularists would see our three examples in a way diametrically opposed to the Religionists. The ministerial exception and the landmarking exception, to the extent they are religion-specific, would produce a clear NO from the Secularists. President Bush's version of charitable choice, which would finance programs of social service operated by religious entities and empower such entities to employ only their co-religionists in such programs, would offend the Secularist sense of the sorts of programs and policies the government may support. Here, too, the Secularist would say NO.

With respect to all three examples, both Religionists and Secularists are internally consistent in their view of the role of religious institutions in the society. They are not consistent, however, on the question we are addressing – are religious institutions legally distinctive? The Religionists believe that such institutions are distinctive when that characterization relieves them of regulatory obligations, but not when it seals them off from government benefits. And the Secularists are inconsistent in precisely the reverse way – they believe that government should be able to regulate religious institutions as it regulates others, but that such institutions should be distinctively disabled from receiving government support.

For consistent answers to our question, we need to find some more general account of the role of religious entities in our constitutional order. Deciding whether the 11th Circuit is correct in *Gellington*, or whether the narrow majority of the California Supreme Court has the better of the argument in *East Bay Asian Local Development Corporation*, or whether the President's view of the relationship between government and faith-based providers of social services is constitutionally sound, cannot be accomplished intelligently without a theory of the Religion Clauses and a consistent view of the appropriate place within

that theory of religious institutions. Such a theory must satisfy rigorous constraints of several kinds. First, it must in part be clause-bound – that is, it must account for distinctive norms of both nonestablishment and free exercise. Second, it must also in part be clause-transcendent – that is, such a theory must recognize those aspects of church-state concern that are sufficiently general and pervasive to attach to both clauses (or, to put it differently, to attach to neither, but to constitute instead an integral part of a general and persuasive account of the appropriate boundaries on church-government relations). Third, it must be exquisitely sensitive to both the commonalities and differences among religious entities, with respect to both structure and function.

We are focused on religious institutions, rather than matters of individual faith and religious conscience. Individual religious commitments represent aspects of human sentiment, commitment, and endeavor, but they are nevertheless wrapped in the larger cloth of the overall human condition, with its attendant material, emotional, and other concerns. Institutional arrangements, by contrast, tend to be focused rather exclusively in their purpose (though perhaps not in their execution) upon the principles and objectives of religious faith. Religious entities, moreover, typically and by explicit design possess qualities of longevity that transcend human life spans, and qualities of community or association that include many more lives, and consciences, than one.

Religious entities are no doubt distinct in their design, purpose, longevity, and commitments from religiously motivated individuals. But are religious entities distinct from other entities, organized and operated for secular purposes? Nonprofit associations, clubs, community associations, and corporations of many kinds possess qualities that make them seem analogous to religious institutions. The task of any overarching theory of the constitutional status of religious entities is to identify and elaborate the reasons, if any, that justify treatment of religious enterprises different from secular organizations and from individual

believers.

The task of building such a theory would be daunting enough were it being done from scratch. But there are substantial and dynamic bodies of law under both Religion Clauses that have developed and mutated over the past fifty years. This accumulated law, though it does not sort neatly into orderly categories and consistent principles, nevertheless frames a choice for theorists of the subject. Virtually all Religion Clause theories, and virtually all Religion Clause decisions by the courts, fall in whole or in part into one of two competing paradigms – Separation or Neutrality. As the labels suggest, Separationism strongly supports an approach to religious institutions that marks them as constitutionally distinctive, while Neutrality supports an approach that undermines any such claims to distinctiveness.⁴¹ Separationism, moreover, is a two-way street, suggesting special disabilities as well as special privileges.⁴² The *Gellington* decision, following the *McClure* line of cases concerning the ministerial exception from civil rights laws, and the *East Bay* decision both sound in separationist principles; the *East Bay* dissents draw upon the paradigm of neutrality. And the Bush Administration’s charitable choice initiative rests heavily on the neutrality approach – why, ask the

⁴¹ Religionist scholars sometimes try to portray separationism and neutrality as unified rather than in tension; religionist theory will defend establishment clause neutrality and free exercise separationism simultaneously, and assert that both positions rest on the single objective of minimizing the effect of government policy on religious choice. See, e.g., Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 *Emory L. J.* 43 (1997); Carl Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 *Emory L.J.* 1, 23-24, 26 (1997). This move, it seems to us, is a Religionist artifice; the Religion Clauses cannot be reduced to any such single principle, and the attempt to do so is simply a way for Religionists to argue that religious institutions can consume and possess their cake simultaneously. *Id.* at 27 (“It would be rhetorical, but still a fair comment, to say that in [Esbeck’s version of] neutrality theory religion gets the best of both worlds: religion is free of burdens borne by others but shares equally in the benefits.”)

⁴² Justice Souter is the most ardent Separationist on the current Court, see, e.g., *Mitchell v. Helms*, 530 U.S. 793, 867 et seq. (2000) (Souter, J., dissenting and arguing that the Establishment Clause prohibits the transfer to sectarian schools of material designed to aid in elementary or secondary education); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 559-561 (1993) (Souter, J., concurring and arguing for a doctrine of free exercise exemptions from general laws);. Before Justice Souter, Justices Brennan, Marshall, and Blackmun played that role. See, e.g., *Emp. Div. v. Smith*, 494 U.S. 872, 907-921 (1990)(Brennan, Marshall, & Blackmun, JJ, dissenting from opinion that effectively eliminated free exercise exemptions); *Mueller v. Allen*, 463 U.S. 388, 404-417 (1983) (Brennan, Marshall, & Blackmun, JJ, dissenting from opinion that permitted state income tax deduction for tuition and other costs of attending sectarian schools).

representatives of the President, should faith-based organizations be treated differently from other nonprofit organizations in their eligibility for grants and contracts as providers of service?

II. THE SEPARATIONIST VIEW

To a great many Americans, our constitutional tradition of religious liberty is reflected in Jefferson's pithy reference, in his letter to the Danbury Baptist Association, to "the wall of separation between church and state."⁴³ In the popular culture, Separationism is frequently associated with the Secularists, those who want to block official prayers in public schools and government aid to sectarian institutions. Indeed, on nonestablishment issues (though not free exercise issues), the Secularists and the Separationists are in agreement on the distinctive quality of religious institutions.

Separationism, however, is not a recent innovation by twentieth century Secularists. Nor is it originally a Secular position at all. Separationism has a long legacy as a theological view, associated with the Baptist (or Free Church) movement, highly influential in the America of the 18th century.⁴⁴ The richest image of separation is not Jefferson's wall; it is the metaphor of the garden (the church) and the wilderness (the surrounding society, including the state), made famous by Roger Williams.⁴⁵ As Separationists see the world, there are always urges from both directions to break down the barrier that separate the garden and the wilderness. Those who serve the state want to make use of the church's good office to seek ends, such as moral living, civility, and good order, in which the state is interested. Moreover, the state's officers frequently want to wrap themselves in the mantle of worship and respectability enjoyed by prominent religious institutions. From the other side of the divide, those who dwell in the garden frequently are tempted

⁴³ The reference appears in Jefferson's letter of January 1, 1802, to the Danbury Baptist Association. The exchange of letters between the Association and Jefferson is reprinted in Michael S. Ariens & Robert A. Destro, *Religious Liberty in a Pluralistic Society* 92-94 (Carolina Press 1996).

⁴⁴ See generally Philip Hamburger, *Separation of Church and State* (forthcoming, Harvard Univ. Press, 2001) (ms. on file with the authors).

⁴⁵ For more elaborate explication of Roger Williams' views in the context of 20th century church-state law, see Mark deWolfe Howe, *The Garden and the Wilderness* (1965); Timothy Hall, *Separating Church and State: Roger Williams and Religious Liberty* (1998).

to use the state's temporal power to reinforce the church's spiritual ends.

Separationism wears two cloaks – theological and political. Theological separationists believe that the church-state wall must be maintained for the good of the church; the church must be protected from the corruption without, and from the corruption that will grow within if the church reaches outward into the wilderness. Political separationists, like Jefferson and Madison before them, believe that the state and the civil order must be kept free of the factional disputes and oppression associated with religious campaigns for use and control of state machinery. Whether one views the problem from the perspective of the garden or the wilderness, however, what is incontrovertible to the Separationist is that religious institutions are indeed distinctive. No other institutions can be as vulnerable to the state, or as dangerous to the state, as institutions of faith.

Moreover, Separationists tend to believe strongly in bright lines and legal prophylaxis. The only way to be sure that religious institutions and the state maintain a mutually safe distance from one another is to delineate sharp boundaries between them, and resist the temptation to manipulate those boundaries for policy reasons. Accordingly, Separationists tend to resist flexible standards and to favor rules that incorporate bright lines to mark the zones of forbidden interaction between religious entities and government. Better to overseparate, in this view, than to underseparate in the course of pursuing considerations of temporal policy.

A. The Legal Principles of Separationism

As seen by Separationists, there are three great principles of constitutional law that buttress the constitutional project of Separationism. Civil government may not 1) itself be a religious institution, 2) subsidize the religious work of institutions of faith, or 3) interfere in religious matters. We consider each in turn.

1. *Government is not a religious institution.* The core of the Separationists’ message is a claim of institutional differentiation. Secular matters belong to civil authorities and sacred matters belong to religious authorities. Thus, religious entities may not exercise powers of temporal government – especially coercive force – and the state is forbidden to delegate such powers to religious institutions.⁴⁶ Conversely, the state may assume neither the marks nor the functions of a religious institution. The prohibition on Religious Tests, found in Article VI of the Constitution, signals that the new state is not a “communion of the saints.” Religious status concerns a matter outside the jurisdiction and competence of civil government.

At least in principle, the Separationists’ jurisdictional limit bars the state from religious proselytizing, indoctrination, or worship. To put it more simply, the government may not speak in a religious voice. The Religionists would be first to point out, however, that this Separationist principle was never completely embraced in the early republic. Almost every President has engaged in religious expression at his Inauguration, and has declared days of public thanksgiving (in theistic language).⁴⁷ The First Congress approved the hiring of legislative chaplains.⁴⁸ In our time, sectarian speech by government tends to take the form of exclusionary invocations of the sacred – celebrations of phenomena considered divine and miraculous by particular faith groups, like creches,⁴⁹ crosses,⁵⁰ the Ten Commandments,⁵¹ and menorahs.⁵²

⁴⁶ *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982) (state may not delegate authority to veto liquor license to neighboring religious institution); *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994) (state may not selectively confer authority as public school district on community characterized by religious dominance and insularity).

⁴⁷ The history of official Presidential statements invoking religious sentiment is summarized in Justice Scalia’s dissenting opinion in *Lee v. Weisman*, 505 U.S. 577, 631-636 (1992). Jefferson, however, refused to issue Thanksgiving Proclamations during his tenure as President. See Letter from Thomas Jefferson to Rev. S. Miller, Jan. 23, 1808, in *5 The Founders’ Constitution*, at 98-99

⁴⁸ In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court approvingly discusses the decision by the First Congress to hire chaplains.

⁴⁹ *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Allegheny County v. ACLU*, 492 U.S. 573 (1989).

⁵⁰ Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991); Separation of Church & State Committee v. City of Eugene, 93 F.3d 617 (9th Cir. 1996); Murray v. City of Austin, 947 F.2d 147 (5th Cir. 1991).

⁵¹ Stone v. Graham, 449 U.S. 39 (1989); Books v. City of Elkhart, 235 F.3d 392 (7th Cir. 2000) (city may not sponsor display of the Ten Commandments), cert. denied, 149 L.E.2d 1036 (2001)..

⁵² Allegheny County v. ACLU, 492 U.S. 573 (1989); ACLU v. Schundler, 168 F.3d 92 (3d Cir. 1999); Elewaski v. Syracuse, 123 F.3d 51 (1998)..

As religious heterogeneity has replaced the de facto “Protestant establishment” in the United States,⁵³ the Separationist limit on government religious activity has taken on increasing constitutional significance.⁵⁴ The Supreme Court has not expressed the constitutional prohibition on sectarian messages by government in jurisdictional terms, however. When the context for such utterances is public schools, prohibiting coercion of impressionable schoolchildren is the key rationale for barring the expression.⁵⁵ When the context involves adults in a noncoercive setting, the Court’s primary focus shifts to the alienation of religious minorities. This worry is reflected in the rationale offered by Justice O’Connor, concurring in *Lynch v. Donnelly*:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.⁵⁶

⁵³ For a thorough account of the legal significance of the rise and decline of the Protestant establishment, see John Jeffries & James Ryan, *A Political History of the Establishment Clause*, Univ. of Virginia School of Law, Public Law and Legal Theory Research Paper Series, Working Paper No. 01-1, May 2001, available at http://papers.ssrn.com/paper.taf?abstract_id=267786.

⁵⁴ For an account of the accelerating rise of constitutional concern over government religious speech, see Ira C. Lupu, *Government Money and Government Messages: Mitchell v. Helms, Santa Fe, and the Arc of the Establishment Clause*, 42 *William & Mary L. Rev.* 771 (2001).

⁵⁵ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Santa Fe Ind. Sch. Dist v. Doe*, 120 S. Ct. 2266 (2000).

⁵⁶ 465 U.S. at 688 (O’Connor, J., concurring) (citation omitted).

From the Separationist's perspective, Justice O'Connor's concern with government religious speech is perfectly appropriate, but she mistakes a symptom of the problem (citizens' feelings of alienation or superiority, depending on the content of the religious speech) for the true constitutional infirmity. When government speaks, it frequently alienates some of its members: anti-smoking campaigns marginalize smokers and vilify tobacco producers; celebrations of family and children may offend the unmarried and childless. Why should religious offense or pride have a different constitutional status than these other deeply felt responses to government speech?⁵⁷ The constitutional infirmity of government religious speech cannot lie in the hearers' subjective response to the speech, but must be found in the nature of the speech itself. The sentiment of religious exclusion is a symptom of jurisdictional disease. Religious expression by secular government represents its effort to become what it is constitutionally forbidden to be – a religious community.

2. *Civil government may not subsidize matters of faith.* The no-subsidy principle of separation has deep, historical roots; in particular, it is the centerpiece of the Madisonian commitment to insulation of the government from religious conflict and protection of faith institutions from government control and coercion. Madison's famous "Memorial and Remonstrance"⁵⁸ had as its central and immediate purpose the defeat of a proposed tax assessment in the State of Virginia which would have supported the salaries of Christian ministers and the costs of construction of Christian churches. Although the logic of Madison's argument was deeply individualistic rather than institutional, its constitutional and legal focus was

⁵⁷ See, e.g., William P. Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 Cal. L. Rev. 495 (1986); Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 Mich. L. Rev. 266 (1987)

⁵⁸ Madison's Memorial & Remonstrance, 2 Writings of James Madison 183 (G. Hunt ed. 1901), is set out as an appendix to Justice Rutledge's dissenting opinion in *Everson v. Bd. of Educ.*, 330 U.S. 1, 66-76 (1947).

institutional separation

of faith communities from civil government.

Since Madison's time, the scope of what government supports has grown enormously. Relief of the poor and education of the young, for example, are activities outside the scope of 18th century American government yet well within the concerns of government in our own time. This growth has given rise to conflicts about the scope and purpose of American Separationism. Strict Separationists argue that government may not support religious institutions even when such institutions are engaged in activities that produce apparent secular benefits. Moreover, the strict Separationist does not want the state even to approach the boundaries of forbidden territory. Accordingly, to the Separationist it is not permissible for the state to aid secular activities of religious institutions, even if the religious activities of such institutions remain privately funded. The dangers of cross-subsidy of religion because it cannot be separated from activity of secular value, and the dangers of state intrusion on religion arising out of close monitoring of aid, are evils which the Separationist seeks to minimize.

American Separationism reached its high water mark in the early 1970's, when the Supreme Court laid down rules that essentially precluded any direct government assistance to the educational program of religiously affiliated elementary and secondary schools.⁵⁹ These rules are broadly prophylactic in character. Their underlying premise, heavily influenced by the Court's perception of the degree of religious indoctrination occurring in Catholic schools, is that government support of sectarian education

⁵⁹Lemon v. Kurtzman, 403 U.S. 602 (1971). See also Levitt v. Committee for Public Education, 413 U.S. 472 (1973); Meek v. Pittenger, 421 U.S. 349 (1975), *overruled*, Mitchell v. Helms, 120 S.Ct. 2530 (2000); Wolman v. Walter, 433 U.S. 229 (1977), *overruled*, Mitchell v. Helms 120 S.Ct. 2530 (2000); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

among the young is tantamount to government subsidy of religious teaching and inculcation of faith.⁶⁰

Accordingly, the Court majority at that time perceived taxpayer support for sectarian elementary and secondary schools as equivalent to support of the faith-based mission itself rather than as a separable enterprise of support for the secular aspects of publicly accredited sectarian schools. These decisions thus treated educational institutions quite differently, depending upon their character as sectarian or secular; government could aid the latter but not the former. To put the matter in the terms we are addressing, under this line of cases, government was constitutionally required to treat sectarian institutions as constitutionally distinctive.

Over the past fifteen years, the prophylactic character of strict Separationism has been under siege. The Supreme Court has become increasingly willing to tolerate programs which aid the secular functions of sectarian institutions, so long as there are adequate safeguards in place to ensure that government funds are not diverted to religious uses.⁶¹ Nevertheless, the Separationist premise that religious institutions are distinctive for purposes of aid programs remains as a significant constitutional principle.

3. *Civil government may not regulate matters of faith.*

a. *The prohibition on substantive intervention.* The principle of government nonintervention into

⁶⁰ These rules, judicially codified in the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), required that all aid programs have secular purposes and primary secular effects, and prohibited any form of monitoring of such programs that would result in “excessive entanglement” between state and religious institution. The first of these three requirements was easy for states to meet; the latter two, in tandem, made it virtually impossible for states to directly aid the academic program of sectarian elementary and secondary schools. Many Justices saw indoctrination and education in these schools as completely intertwined, and therefore believed that state aid to their academic programs would inevitably advance religion, and the monitoring required to avoid that result would excessively entangle religious entity and state. Justice White described the conundrum of advancement-entanglement as a Catch-22. *Lemon*, 403 U.S. at 668.

⁶¹ See *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000). *Mitchell* establishes that government efforts to finance private, sectarian education with in-kind (rather than cash) assistance limited to secular uses will be constitutionally acceptable so long as sectarian schools are neither favored nor disfavored in the distribution. *Mitchell* reveals, however, that a majority of the Court still believes that safeguards against religious diversion of the funds are constitutionally required.

matters of faith is the most venerable constitutional protection for religious entities. The U.S. Supreme Court first expressed this principle in an 1871 case, *Watson v. Jones*,⁶² which involved a dispute between two factions within the Presbyterian Church. A Presbyterian congregation in Louisville, Kentucky (like many other congregations) had split during the Civil War. Both factions claimed that their position reflected the true Presbyterian doctrine and polity, and the Kentucky Supreme Court held in favor of the faction that supported the Confederacy, finding that the General Assembly and other church bodies had violated the national church constitution by asserting a strong anti-slavery position. On federal common law grounds, the U.S. Supreme Court held that civil courts could not render determinations of whether church bodies had violated church precepts. Such matters, said the *Watson* court, must remain within the exclusive control of the authorities in which the church had reposed them – hierarchies or congregations, as authorized by the relevant church polity.

The deference principle of *Watson v. Jones* has been constitutionalized⁶³ and extended by the Supreme Court to cases involving church personnel and organization as well as title to property.⁶⁴ The principle requires that, in the case of intrafaith disputes, courts must defer to religious authority.⁶⁵

It should not be difficult to see why any attempt at resolution of disputed theological questions would improperly make courts the arbiter of the commitments of a faith community. Such a role is

⁶² 80 U.S. (13 Wall.) 679 (1871)

⁶³ See, e.g., *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

⁶⁴ *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

⁶⁵ In the mid-1970's, the Supreme Court qualified this doctrine by ruling that civil courts could decide such disputes if, but only if, they could do so by relying on religion-neutral principles of law (e.g., from the law of property, contract, or trust). *Jones v. Wolf*, 443 U.S. 595 (1979). We discuss the impact of this decision in Part III, *infra*.

juridically inappropriate on two grounds. The first, and weaker ground, is lack of judicial expertise on matters of religion – courts could easily misapprehend or mistranslate religious understandings. This concern, however, does not distinguish the judicial role in intrachurch disputes from the role judges might play in other, internal disputes of private associations in which the resolution turns essentially on matters of intergenerational contract – that is, the organization’s internal understanding over time of its commitments, and the mode of evolution of those commitments.

The second ground for judicial refusal to decide intrafaith controversies concerning property, structure, or personnel is more persuasive. Resolution by state agents, judges or otherwise, of intrafaith disputes on matters of theological significance transgresses the state’s temporal jurisdiction. When judging such controversies, the state inevitably asserts competence in and authority over sacred matters, thus violating the core Separationist commitment to institutional differentiation. To theological Separationists, it is simply beyond the competence of the state to decide for a religious community what its sacred doctrine requires.⁶⁶

b. *The prohibition on procedural entanglements.* The Separationists have another vital concern, which focuses on process -- that is, upon the nature and extent of interaction between government agents and religious entities. This concern, usually labeled the nonentanglement principle, is most strongly

⁶⁶ This principle of separationism is, like many others, plagued with concerns of definition and boundary. What should courts do if the shape and structure of the church polity is itself in dispute, leading to competing claims from congregations and hierarchical officers about who has authority to speak for the church (and therefore is entitled to deference from the courts)? See Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843, 18xx-xx (1998) (citing cases involving the mixed congregational and hierarchical church polity of the Presbyterians). Which disputes are sufficiently internal to the faith community that external, public interest in their peaceful resolution is insufficient to overcome the religiously internal and private interest in resolution by religious authorities only? We might all agree that secular courts cannot properly exercise substantive jurisdiction over property disputes between competing church factions over questions involving the “true” meaning of articles of faith, but that agreement might break down quickly if the question is whether the employment discrimination statutes may regulate the church-pastor relationship. This latter question tests the concept of “internality” of the dispute; are fights between religious entities and their members (as pastors inevitably will be) matters of wholly internal concern, or do such disputes implicate sufficiently weighty external and public concerns of policy to justify state intervention?

associated with the cases from the 1970's involving aid to sectarian schools. In those cases, the Court repeatedly held that programs of aid could not be allowed to advance sectarian missions, and that the degree of supervision necessary to avoid such advancement would inevitably lead to what the Court described as “excessive entanglement.” Thus, in *Lemon v. Kurtzman*,⁶⁷ involving salary supplements for teachers in “secular” subjects like mathematics and modern foreign languages, the Supreme Court held that any effort at ensuring that teachers in pervasively sectarian schools would not advance their faith mission, even in such subjects, would involve state agents in intrusive and forbidden policing of the religious enterprise.

The anti-entanglement concern, however, has significance independent of the evolving law of nonestablishment on matters of material assistance to religious institutions. Indeed, if one needs proof that Religion Clause doctrine is clause-transcendent, one need look no further than the role of nonentanglement in cases involving the labor relations of religious entities, with respect to which administrative and judicial processes at times threaten the possibility of autonomous decisionmaking. The lower courts have relied heavily on the notion in the cases working out the ministerial exception to the federal prohibitions on sex and age discrimination in employment.⁶⁸ Inquiry into the possibility of pretextual reasons for employment decisions, which in fact may be based in whole or part on undisclosed, impermissible considerations, has

⁶⁷ 403 U.S. 602 (1971).

⁶⁸ In addition to *Gellington* and *McClure*, see, e.g., *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985). The most prominent recent reaffirmation of the ministerial exception is *EEOC v. Catholic University of America*, 83 F.3d 455 (DC Cir. 1996).

frequently been foreclosed by concerns that the process of inquiry will intrude too deeply on the shaping of the core, theological message of religious entities.

The Supreme Court has never engaged the ministerial exception cases directly,⁶⁹ but it has lent the weight of its own judgment to the identical concern, in a regulatory context, in *Catholic Bishop of Chicago v. National Labor Relations Board*.⁷⁰ *Catholic Bishop* involved an attempt by the NLRB to assert jurisdiction over the labor relations between schools affiliated with the Catholic Church and lay teachers in those schools. By a 5-4 majority, the Court concluded that the assertion of such jurisdiction raised substantial questions under the First Amendment, and accordingly held that the National Labor Relations Act would not be construed to cover such entities unless Congress had clearly manifested its intention to do so. Scrutinizing the statute and its history with this question in mind, the Court ruled that the Act did not reflect a sufficiently clear “intention of Congress that teachers in church-operated schools should be covered. . . .”⁷¹ The majority’s reasoning drew directly from its no-aid decisions and their concern that state policy not create the sort of interaction between state agents and church officials that would produce

⁶⁹ The closest the Court has come to engaging the merits of the ministerial exception is its decision in *Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission*, 106 S. Ct. 2718 (1986), in which the Court vacated an injunction against a civil rights investigation by a state agency into allegations of sex discrimination against a sectarian school which would not permit mothers of school-age children to continue in their jobs as teachers. The Sixth Circuit had enjoined the investigation on the basis of nonentanglement concerns, 766 F.2d 932 (6th Cir. 1985), but the Supreme Court, relying on doctrines of federal abstention in matters involving state administrative processes, vacated the injunction, suggesting that the school could raise its constitutional defenses in the state proceeding. To the argument that the state proceeding itself violated the school’s constitutional rights, the Court unanimously replied that “the Commission violates no constitutional rights by merely investigating the . . . discharge . . . if only to ascertain whether the ascribed religion-based reason was in fact the reason for the discharge. 106 S. Ct. at 2724. Whether the result in *Dayton Christian Schools* would have been the same had the dismissed employee been a member of the clergy rather than a teacher is an important and unanswered question.

⁷⁰ 440 U.S. 490 (1979). For analysis and discussion of *Catholic Bishop*, see Douglas Laycock, *Toward A General Theory of the Establishment Clause: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981).

⁷¹ 440 U.S. at 504. Accordingly, the Court did not reach the First Amendment questions that a finding of statutory coverage would have required it to entertain.

governmental interference with decisions about the communication of faith.

Intriguingly and correctly, the Court did not specify which “Religion Clause” might be offended by assertion of Board jurisdiction over church-operated schools; nonentanglement concerns, reflected in the “internal dispute” cases like *Watson v. Jones*, the no-aid cases like *Lemon v. Kurtzman*, or the regulatory intrusion cases like *Catholic Bishop*, are the most obviously clause-transcendent element of Religion Clause doctrine. Moreover, the *Catholic Bishop* majority distinguished the case of *Associated Press v. NLRB*,⁷² in which the Court had not required a clear statement of statutory coverage to hold the press subject to labor board jurisdiction, and had rejected a First Amendment claim, based on freedom of the press, against the exercise of such jurisdiction. The disjunction between the *Associated Press* decision and the *Catholic Bishop* ruling strongly suggests that religious institutions are unique among those entities with objectives linked to the First Amendment.⁷³

As to the particular focus of its potential constitutional immunity, *Catholic Bishop* strongly evokes an image of a zone of inviolate institutional concern:

The Court of Appeals’ opinion refers to charges of unfair labor practices filed against religious schools. . . . The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but *also the very process of inquiry leading to findings and conclusions*.⁷⁴

⁷² 301 U.S. 103 (1937).

⁷³ For other decisions rejecting the equivalent of process immunities for entities advancing nonreligious purposes within the ambit of the First Amendment, see *Hebert v. Lando*, 441 U.S. 153 (1979) (press may not resist discovery into editorial processes in defamation suit); *Univ. of Pennsylvania v. EEOC*, 493 U.S. 182 (1990) (university may not, on asserted first amendment ground of academic freedom, resist discovery into letters of evaluation of scholarship of tenure candidate).

⁷⁴ 440 U.S. at 502 (emphasis supplied). A footnote at this point in the opinion reads: “This kind of inquiry and its sensitivity are illustrated in the examination of Monsignor O’Donnell, the Rector of Quigley North, by the Board’s Hearing Officer, which is reproduced in the appendix to this opinion.” *Id.* at 502, n.10. In the Appendix is a portion of a transcript, in which the hearing Officer questions the Monsignor concerning the frequency of required liturgies during

Three features of the doctrine of nonentanglement deserve highlighting here. First, the Court has always used the modifier “excessive” in deploying it; the concern is thus a subtle one of degree, as well as a matter of kind. Second, not all regulatory intrusions into the business of religious entities, including their labor relations, raise significant First Amendment issues. In *Tony and Susan Alamo Foundation v. Secretary of Labor*,⁷⁵ for example, a unanimous Supreme Court upheld application of the Fair Labor Standards Act to a religious foundation whose employment force had agreed to work for less than minimum wage.⁷⁶ In contrast to *Catholic Bishop*, in which the challenged regulation could have covered the instructional content in a sectarian school, the Fair Labor Standards Act is concerned only with wages paid and hours worked. Third, the doctrine appears to apply *only* to institutions; the courts have explicitly authorized courts and agencies to probe the sincerity with which individual beliefs are held, even if the inquiry intrudes on deep concerns of conscience and theological commitment.⁷⁷ If anything in the positive law of the Constitution confirms the distinctive character of religious institutions, the doctrine of nonentanglement is it.

B. The Three Examples Seen Through Separationist Eyes

As fortified by aspects of the law described above, the Separationist sees religious institutions as legally distinctive in many contexts. Moreover, the Separationist is eager to protect this specialized character of religious entities, and to protect the state against the unique threat they pose, with broad rules

school hours.

⁷⁵ 471 U.S. 290 (1985).

⁷⁶ A federal district court recently approved the seizure of a Baptist Temple in Indiana for nonpayment of six million dollars in taxes, penalties, and interest for failure to withhold employee income taxes, Social Security taxes, and Medicare taxes. See “Indiana church seized for back taxes,” <http://www.cnn.com/2001/LAW/02/13/irs.church.seized/index.htm> (Feb. 13, 2001)

designed to prevent erosion of the Separationist's particular concern. It is through these twin lenses of distinctiveness and prophylaxis that the Separationist would view the three examples:

1. The ministerial exception. With respect to the core case of explicit gender exclusion from the clergy, the Separationist would have no doubts. The message of faith is what makes religious entities distinctive, and the clergy are the official messengers for such entities. The identity of the clergy, as much as what they may say, constitutes an aspect of that message. So if a particular faith group explicitly excludes women, or men, or members of particular national, ethnic, or racial groups from its clergy, the group is making a statement about who may properly intermedate for its members with the Divine. These choices, however unacceptable they may be if made by a secular employer, the state must respect.

⁷⁷ See *United States v. Ballard*, 322 U.S. 78 (1944).

Cases like *Gellington* and *McClure*, in which the religious entity does *not* have an official policy of exclusion of civil rights complainants, or women, from the clergy, are only a bit more difficult for the Separationist. Allowing such claims to proceed against religious institutions generates multiple risks of intrusion upon the enterprise of message-shaping. First, the usual structure of claims of disparate treatment, if allowed to proceed, is that the employee asserts forbidden discrimination, the employer then asserts a legitimate reason for the job action, and the employee responds with an assertion that the proffered reason is a pretext.⁷⁸ Judicial inquiry into the possibility of pretext involves interrogation of those in religious authority about the bases, theological and otherwise, of their decision. In such circumstances, the risk of mistake in determining whether the employer is acting pretextually is greater than usual. And a finding of pretextual firing generates judicial power to order, among other things, clergy reinstatement as a remedy.

For the Separationist, the degree of intrusion into affairs of faith attendant upon a case like *Gellington* triggers both a concern for institutional autonomy in choosing messengers of faith, and the prophylactic protection such choices require. *Gellington* involves the principle barring substantive intrusion into internal affairs of religious entities, and the nonentanglement principle as well. To *Gellington*, the Separationist says YES.

2. The landmarking exception. Religious entities need sacred space as well as sacred messages. Accordingly, a case like *First Covenant* seems plainly correct to the Separationist. Seattle's

⁷⁸ See, e.g., *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (setting out elements of claims and defenses in disparate treatment cases).

decision to landmark the property on which First Covenant's house of worship is located would have forced church officials to seek and obtain permission every time they desired to alter the property's exterior. Liturgy and church aesthetics are never far removed from one another. And Seattle's special provision giving the church the last word on liturgy-driven changes, but requiring that such changes be negotiated in order to maximize preservation interests as well as theological ones, involves government officials in conversations which the Separationist finds deeply inappropriate. To the Washington Supreme Court's ruling in *First Covenant*, the Separationist says YES.

The California legislative exemption, available with respect to all noncommercial property of religious institutions, at first glance seems a bit more troublesome. It is not limited to houses of worship, and it is the result of a legislative, rather than judicial, decision to give religious entities distinctive privileges. But the strict Separationist, though sensitive to affirmative benefits given to religious entities only, is ordinarily pleased when the government deregulates such entities, leaving them outside the grasp of state power. This is exactly what the California exemption does. Moreover, its requirement that the institution seeking exemption make a public declaration of the reasons, unreviewable by any government body, is for the Separationist a positive contrast with the Seattle provision requiring negotiation with the state over exterior changes, motivated by liturgical considerations. Finally, the sweep of the California exemption appeals to the Separationist's concern over intrusive regulatory mistakes. Noncommercial property includes houses of worship, but it also will include rectories, religious schools, homeless shelters, and other property with religious significance. Here again, the Separationist believes it's better to err on the side of underregulation than overregulation of religious entities. To the decision of the California Supreme Court in *East Bay*, the Separationist says YES.

3. Charitable Choice.

For the Separationist, the form of Charitable Choice associated with then-Governor Bush in Texas, and that he and some of his advisors have contemplated for the United States, is deeply violative of fundamental principles. The idea that programs of religious transformation and conversion will be paid for by government is a stark case of the wilderness invading the garden. To the Separationist, the government is presumptively forbidden from using explicitly religious means to accomplish secular ends,⁷⁹ no matter how important the ends may be. To those plans of the President that include public financing of such means, the Separationist says NO.

What about the version of Charitable Choice brought into being by the 1996 Welfare Reform Act? Recall that the '96 Act permits religious entities to retain their identity even while serving as government contractors, and to offer religious service, privately funded, alongside publicly funded secular services. Moreover, the '96 Act explicitly forbids religious coercion of beneficiaries, and prohibits use of federal financial support for "religious indoctrination, worship or instruction."

⁷⁹ See, e.g., *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 265-66 (1963) (Brennan, J. concurring) (" . . . government may not employ religious means to serve secular interests . . . at least without the clearest demonstration that nonreligious means will not suffice.")

For the Separationist, these prohibitions are insufficient. The Separationist will have a number of worries about the '96 arrangements. First, auditing of programs will invite the possibility that government agents will question the religious or secular quality of particular expenditures. This sort of presence risks entanglement of the precise sort which justified deregulation of employment practices and land uses in examples 1 and 2. Moreover, the Separationist cannot abide government money being transferred to a faith-soaked forum, even if the government money is paying only for secular aspects of the enterprise. From the perspective of beneficiaries rather than accountants, such programs are state-subsidized projects of faith. As such, they risk corruption of that faith, under pressure from auditors, judges, or political critics. Even if the faith remains pure, the state's close involvement with it threatens the Separationist concern that faith be given a wide berth by the state, lest the boundaries on state power over ultimate concerns be forgotten or eroded. Whether it be considered a matter of prophylaxis, as some would view it, or a matter of direct violation of Separationist principles, as others would see it, the Separationist would say NO to the Charitable Choice arrangements of the '96 Welfare Reform Act.⁸⁰

III. THE NEUTRALIST VIEW

⁸⁰ For an excellent illustration of the Separationist approach to charitable choice, see Steven K. Green, *The Ambiguity of Neutrality*, 86 *Cornell L. Rev.* 692 (2001) (reviewing Charles L. Glenn, *The Ambiguous Embrace: Government*

At the time of the Framing, the distinctive character of religious institutions would have seemed incontrovertible to educated Americans. Aware of Europe's experience and familiar with their own public debates about the role of the church, they could probably not imagine that any analogous, secular institutions could play a role comparable to that occupied by institutions of faith. Although much of the regulation with which we are now familiar would have been generally difficult for that generation to understand, it would have been harder still for them to accept that regulation such as land use controls or civil rights law could be applied to religious communities.⁸¹

When, beginning in the 1940's, the Supreme Court began to address Religion Clause issues, the Court looked to the Founding Generation and embraced a Separationist vision.⁸² About twenty-five years ago, that vision peaked. In the middle-1970's, the no-aid Separationism exemplified by *Lemon v. Kurtzman*⁸³ was in full flower, and free exercise Separationism reached its high water mark, represented by the Supreme Court's decisions in *Sherbert v. Verner*⁸⁴ and *Wisconsin v. Yoder*.⁸⁵

The competing paradigm of neutrality, however, has long been lurking as a sub-theme in Religion

and Faith-Based Schools and Social Agencies).

⁸¹ There is a legitimate debate about whether the Founding Generation believed in judicially created exemptions under the free exercise clause. Compare Philip Hamburger, A Constitutional Right of Religious Exemption -- An Historical Perspective, 60 *Geo. Wash. L. Rev.* 915 (1992) (arguing that the Founding generation rejected a doctrine of judicial exemptions) with Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 *Harv. L. Rev.* 1410 (1990) (arguing that the Founding generation accepted such a doctrine). But there is much less reason to doubt that the Founding generation would have accepted legislative exemptions from general regulation for religious institutions.

⁸² In *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), all of the Justices focused on the historic fight to separate church and state in Virginia as the key episode in the search for the meaning of the Establishment Clause.

⁸³ 403 U.S. 672 (1971).

⁸⁴ 374 U.S. 398 (1963).

⁸⁵ 406 U.S. 205 (1972).

Clause law. The paradigm finds its origins in cases in the early 1940's protecting religious speech⁸⁶ and religiously motivated refusals to speak.⁸⁷ The Neutralist believes that religious entities and causes are to be treated exactly like their secular counterparts, no worse but no better.⁸⁸ And there is surely an appeal to an argument that protests special pleading by or against religious entities and finds its intellectual center of gravity in appeals to norms of equality. Quite rightly, Neutralists assert that government is simply not interested in the rituals, liturgies, or other distinctive qualities of religious entities; rather, the government's concern is limited to the nondistinctive qualities of those entities. To place the point in the context of our three examples, government may care about religious institutions in their status as employers, land users, and providers of social services, and be otherwise indifferent to such institutions with respect to the content of their sacred concerns, rituals, and activities.

A. The Movement Towards Neutrality in Culture and Law

Powerful themes, emergent in the law and culture in the last twenty-five years or more, have pushed in the direction of neutrality. First, neutrality is a healthy corrective to anti-Catholic elements lurking in

⁸⁶ See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁸⁷ See *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (students in public schools with religious objection to flag salute may not be compelled to engage in the practice), *overruling* *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

⁸⁸ As Professor Laycock and Professor Esbeck have argued, neutrality may have multiple meanings, including, as they put it, "minimization of government's influence over personal choices concerning religious belief and practice." Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 *Emory L. J.* 43, 69 (1997), *quoting* Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with faith-Based Social Service Providers*, 46 *Emory L. J.* 1, 25 (1997). See also Douglas Laycock, *Formal, Substantive, and Desegregated Neutrality Toward Religion*, 39 *DePaul L. Rev.* 993 (1990). This approach to neutrality, which leads to a policy of nondiscrimination with respect to government benefits for religious entities and a policy of exemption or deregulation with respect to government intrusions on religious entities, is the one favored by the Religionists, because it will systematically favor religion and religious institutions. The Neutralist we describe in text is one who views neutrality as meaning nondiscrimination between religious institutions and their secular counterparts, without regard to whether such evenhandedness helps or hinders religion. The leading works from the Neutralist camp we invoke in text include Philip Kurland, *Of Church, State, and the Supreme Court*, 29 *U. Chi. L. Rev.* 1 (1961), Mark Tushnet, "Of Church and State and the Supreme Court": Kurland Revisited, 1989 *Sup. Ct. Rev.* 373; and Eugene Volokh, *Equal Treatment is Not Establishment*, 13 *Notre Dame J. of Law, Ethics, & Public Policy* 341 (1999).

Separationism. *Lemon*⁸⁹ and its progeny, virtually all of which involved state aid to parochial schools in the heavily Catholic Northeast, were tinged by anti-Catholic sentiment.⁹⁰ No-aid principles, in practice, meant but one thing – no state assistance to Catholic elementary and secondary schools. Most happily, such sentiment is, for a variety of reasons, no longer intellectually respectable in the United States. Indeed, in the four-Justice plurality opinion in the most recent Supreme Court decision concerning material government assistance to private schools, the anti-Catholic provenance of *Lemon* was explicitly highlighted and repudiated.⁹¹

Second, government has expanded tremendously since the New Deal. In the night watchman state that typified the role of government at the time of the Framers, and through most of American history, separationism meant religion was to be left free and unregulated. But as more and more of the commonwealth became controlled and distributed through mechanisms of state largesse, separationism came to be seen as a form of exclusion or discrimination. This has been particularly acute in relation to the role of religion in debate over public issues such as abortion, gay rights, and the death penalty,⁹² but it extends as well to simple questions of access of religious voices to state controlled and allocated fora for expression.⁹³

⁸⁹ 403 U.S. 602 (1971).

⁹⁰ For an account of the role of anti-Catholicism in the Supreme Court's no-aid decisions, beginning with *Everson*, and the historical reasons for the collapse of such sentiment, see Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 *Notre Dame J. of Law, Ethics, & Public Policy* 375, 385-88 (1999); see generally Jeffries & Ryan, note xx supra.

⁹¹ *Mitchell v. Helms*, 120 S. Ct. 2530 (2000).

⁹² For discussion of questions of the appropriate role of religious voice in political argument, see Kent Greenawalt, *Religious Convictions and Political Choice* (Oxford 1988); Michael J. Perry, *Religion in Politics: Constitutional and Moral Perspectives* (Oxford 1997); Abner Greene, *The Political Balance of the Religion Clauses*, 102 *Yale L.J.* 1611 (1993).

⁹³ See text at note xx infra for further discussion of the decisions concerning equal access of private religious

Third, and most broadly, the move away from separationism and toward neutrality has been accelerated by a profound change in the sociological, psychological, and intellectual role of religion in American life. At the time of the Framing, religion for many Americans was a source of comprehensive understanding about Divine Providence and the order of the universe. The rise of science, technology, psychoanalysis and other profoundly secularizing influences, however, has altered perceptions about the role of religion. For many Americans, religion is now affective, psychological, and interior. Instead of being about the way things originated, are, and will continue always to be, religion for many is about the way one feels and copes with the vicissitudes of contemporary life. As such, religion is but one of many comparable experiences.

Once religion takes on this subjective, interior character, religious institutions take on a different social role. As the Neutralist would put it, religious institutions are now no more important or distinctive than analogous, secular enterprises. If religion is, like therapy, a source of mental comfort and well-being, why should religious institutions be treated any differently from mental health facilities? If religion is, like art, a source of spiritual beauty and transcendence, why should religious institutions bear any different relationship to the state than museums?

speech to public fora.

Perhaps anticipating the legal changes that fit such a cultural mood, Professor Philip Kurland published a highly influential article in 1961, in which he argued that “the [Religion] clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classifications in terms of religion either to confer a benefit or to impose a burden.”⁹⁴ Kurland’s view, which quite plainly would eliminate any possibility of constitutionally distinctive treatment for religious entities, has a number of apparent virtues. First, any approach to the subject that precludes special treatment for religion has the advantage of balance; it limits special benefits just as it blocks special disabilities. Second, the Kurland approach seems useful in resolving what some have seen as tension between the Religion Clauses. If nonestablishment norms preclude benefits for religion, and free exercise principles require them, the clauses are at war. Kurland’s version of neutrality transforms this conflict into an easy peace.⁹⁵

The law of the Religion Clauses indeed has been changing in ways that map onto these cultural changes – that is, the law has been tending towards the position of neutrality, or nondistinctiveness. Although the Kurland position has never caught on in its entirety, it has shaped a variety of Religion Clause doctrines that emerged in its wake. For example, in *Walz v. Tax Commission*,⁹⁶ the 1970 decision which upheld, against Establishment Clause attack, a state tax exemption for property owned by religious organizations and used exclusively for religious worship, the Supreme Court emphasized the overall neutrality between religious and secular, charitable uses of property exempted by the scheme.

⁹⁴ Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1 (1961).

⁹⁵ In addition, adherence to the Kurland approach may tend to eliminate the problem of defining religion for constitutional purposes; if religion cannot be singled out for favored or disfavored treatment, decisionmakers will be inclined to submerge it in larger categories of behavior or organization, defined in terms independent of faith.

⁹⁶ 397 U.S. 664 (1970).

In addition, the Supreme Court in 1979 expanded the possibilities for civil court involvement in intra-church property disputes. The earlier decisions, discussed in connection with Separationism in Part II, above, had required civil courts in such cases to defer to decisionmaking bodies as appropriately constituted by religious polities – hierarchical religious authority in those entities so structured, and congregations in those arranged more democratically. In *Jones v. Wolf*,⁹⁷ the Court approved of a new technique for resolving such disputes. When the dispute may be resolved by application of religion-neutral principles of trust, contract, property, or nonprofit association law, civil courts are now free to apply such principles and need not defer to religious bodies. To be sure, *Jones v. Wolf* did not put a complete end to religion-specific treatment of internal associational disputes. Deference to religious authorities, in cases in which questions of internal group doctrine are at stake, is still both a permissible option and an arguably unique mode of disposition. *Jones*, however, did expand legal horizons for the resolution of such disputes in a way which appreciably reduced the likelihood of such distinctive treatment.

⁹⁷ 443 U.S. 595 (1979).

The most prominent moves in the direction of neutrality in the Supreme Court have come on several fronts, all recognizable as part of the backlash against Separationism. First, the Court has become far more receptive to government aid programs that support those aspects of the work of religious entities which have secular value. Such programs, which have included advice to teenagers on matters of sexuality,⁹⁸ the provision of public employees to offer remedial assistance in reading and mathematics to children in sectarian schools,⁹⁹ and, most recently, provision of educational materials for secular use in sectarian elementary and secondary schools,¹⁰⁰ have been sustained by narrow majorities, albeit with a continued emphasis on the secular quality of what is being provided and the secular value, wherever housed, of the program being aided. In all these decisions, the Court emphasized the broad, religion-neutral quality of the category of aid beneficiaries.

Second, in a series of decisions involving claims of equal access of religious claimants and groups to publicly available resources, the Supreme Court has repeatedly embraced the anti-separationist, pro-neutrality claim that religious claimants are constitutionally entitled to the same public benefits – for example, access to public spaces for meetings – as those provided to their secular counterparts.¹⁰¹ Time after time, the government has unsuccessfully defended these cases with the Separationist argument that private religious speech must be excluded from publicly supported speech fora; in each case, the Court has rejected this argument, which relies on Separationism as a shield, in favor of considerations of free speech and

⁹⁸ *Bowen v. Kendrick*, 487 U.S. 589 (1988).

⁹⁹ *Agostini v. Felton*, 521 U.S. 203 (1997)

¹⁰⁰ *Mitchell v. Helms*, 530 U.S. 793 (2000).

¹⁰¹ *Good News Club v. Milford Central School*, 2001 U.S. LEXIS 4312); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

equality derived from the Neutralist position. For purposes of access of private speech to public property, religious viewpoints and causes are to be treated like all others, no worse and no better.

The most dramatic move in the direction of religion clause neutrality, however, arose in the context of a claim based purely on the free exercise clause. After a 30-year stretch in which a doctrine of free exercise exemptions had appeared to take at least some shallow root,¹⁰² the Supreme Court in the early 1990's proclaimed neutrality as the prevailing general principle of free exercise of religion. In *Employment Division v. Smith*,¹⁰³ decided in 1990, the Court broadly rejected the concept that religiously motivated action might be entitled to distinctive and more favorable treatment than comparable acts motivated by nonreligious concerns. In rejecting the claim by several members of the Native American Church that their sacramental peyote use should not be considered misconduct for purposes of disqualification for unemployment compensation, the Supreme Court emphatically declared the principle that neutrality, rather than religious privilege, had become the guiding force in free exercise adjudication.

¹⁰² The paradigm of religion clause neutrality arguably had its origins in *Reynolds v. United States*, 98 U.S. 145 (1878). George Reynolds, a chief aide to Brigham Young, was prosecuted by the United States under a law making bigamy a crime in the Territories of the United States. Reynolds' constitutional defense, which rested on the free exercise clause, arose from his sense of religious obligation; he was, he claimed, under a religious duty to take more than one wife. The Court rejected his argument in terms that still influence the shape of neutrality theory. The free exercise clause, the Court reasoned, protects religious beliefs but not religiously motivated actions. If the clause privileged actions so motivated, but not their secular analogues, then religiously devout people would remain outside the boundaries of secular law. The only way to avoid a collapse into chaos, the Court argued, was to treat religious motivations for breaking the law as no different than secular motivations. Thus, whether Reynolds had a secular or a religious motivation for taking plural wives was of no constitutional significance; the law was neutral between secular or religious reasons for acting, and neither sort of reason would excuse the crime.

Reynolds would clearly be the germinal case for free exercise neutrality but for the obvious religious gerrymander it represented. Singular marriage was clearly an institution with religious origins, and the exclusive preference for singular marriage effectively protected one religious tradition to the exclusion of others, both new and old. *Reynolds* would control the law of religion-based exemptions for individual believers for the next 75 years, when *Sherbert v. Verner*, 374 U.S. 398 (1963) began to cast doubt upon it. *Employment Div. v. Smith*, discussed in text immediately below, restored the neutrality regime of *Reynolds*.

¹⁰³ 494 U.S. 872 (1990).

This stance was reinforced several years later in the Santerian animal sacrifice decision,¹⁰⁴ in which the Court unanimously struck down ordinances enacted by the City of Hialeah, Florida, designed to impede the religious practice of animal sacrifice by an Afro-Cuban religious group. The Hialeah decision emphasized the discriminatory intent of the ordinances, which, taken together, appeared to outlaw Santerian animal sacrifice yet allowed most other killing of animals. The majority opinion in the Hialeah case, however, reaffirmed the neutrality theme of *Employment Division v. Smith*; had the City of Hialeah outlawed all or most animal killings within its borders – a politically unthinkable prospect – the religious motivation of the Santerian sacrifices would not have protected them under the Constitution.

There has been no shortage of criticism of *Smith*¹⁰⁵ and its rule of free exercise neutrality; most of the attack has rested on the powerful proposition that *Smith*, as explained in *Hialeah*, drains the free exercise clause of independent meaning and renders it entirely redundant of equal protection concerns. This view has surely caught on in many respects among lawmakers as well as academics; witness the explosion in religious liberty legislation since 1990,¹⁰⁶ when *Smith* was decided.

¹⁰⁴ Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

¹⁰⁵ See, e.g., Jesse H. Choper, The Rise and decline of the Constitutional Protection of Religious Liberty, 70 Neb. L. Rev. 651 (1991); Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1; Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1145-46 (1990). A number of critics of *Smith* argue that it was wrongly decided, but remain drawn to the neutrality position on questions of state aid to religious organizations. Douglas Laycock, The Underlying Unity of Separation and Neutrality, 46 Emory L. J. 43 (1997); Michael W. McConnell, Religious Freedom at the Crossroads, 59 U. Chi. L. Rev. 115 (1992); Michael W. McConnell, The Problem of Singling Out Religion, 50 DePaul L. Rev. 1 (2000). Religionists understandably are drawn to this latter bifurcation of neutrality; establishment clause neutrality permits significant state aid to religious entities, while free exercise neutrality may impede judicially crafted privileges in their favor.

¹⁰⁶ In 1993, the Congress enacted the Religious Freedom Restoration Act, 42 U.S.C. sec. 2000bb (Supp. V 1993), designed to overturn *Smith*; in 1997, the Supreme Court invalidated the Act as applied to the states in *City of Boerne v. Archbishop Flores*, 521 U.S. 507 (1997). A number of states have enacted their own religious freedom acts, see, e.g., Illinois Religious Freedom Act, 775 Ill. Comp. Stat. 35/1-99 (West Supp. 1999); Okla. Religious Freedom Act, 51 Okl. St. Ann. 251; and Congress has recently enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. sec 2000cc (2000).

A few prominent scholars have vigorously defended *Smith*,¹⁰⁷ primarily on the ground that religion cannot be preferred to other causes, ideologies, and deeply held commitments, although none of *Smith*'s defenders have been willing to take religion clause neutrality all the way to its ultimate and logical conclusion on the nonestablishment side, permitting government to aid religion and secular causes with equal force and identical means. Much of the defense of *Smith*, that is, comes from the Secularists, who also favor neutrality in one direction only.

To summarize and clarify: like Separationism, Neutrality is two-edged. Religionists are partial to free exercise separationism and establishment clause neutrality, both of which materially help religious institutions; the Secularists are inclined to reverse the relationship, and prefer results which consistently hinder such institutions. On the bench, the most consistent Neutrality comes from Justices Scalia and Thomas, along with Chief Justice Rehnquist, all of whom believe that judges should neither specially protect religion under the free exercise clause nor disable government from neutrally assisting religion in the pursuit of secular goals.¹⁰⁸

¹⁰⁷ See William P. Marshall, In Defense of *Smith* and Free Exercise Revisionism, 58 *U. Chi. L. Rev.* 308 (1991); Ellis West, The Case Against a Right to Religion-Based Exemption, 4 *Notre Dame J. Law, Ethics, & Pub. Pol.* 591 (1990). Professor Eisgruber and Sager have written a number of influential articles defending *Smith*, see, e.g., Christopher Eisgruber & Lawrence Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 *U. Chi. L. Rev.* 1245 (1994), but they are unwilling to defend a consistent establishment clause neutrality; they believe, for example, that religious speech by government agents may be prohibited where secular speech would be permissible. See, e.g., id. at 1286. Professor Marshall's establishment clause views are similar; see, e.g., William P. Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 *S. Cal. L. Rev.* 495, 531-37 (1986) (approving the endorsement test). Marshall, Sager, and Eisgruber thus must be counted as Secularists in the terminology we have employed.

¹⁰⁸ Justices Rehnquist, Thomas, and Scalia are neutralist on the question of judicial exemption from general laws, see *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), and on the question of inclusion of religious groups in general programs of aid for secular purposes, see *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), but have indicated willingness to defer to legislative determinations that religious groups get religion-specific accommodations, see *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, xxx-xxx (1994) (Scalia, J., joined by Thomas, J., and Rehnquist, CJ, dissenting); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (Scalia, J. joined by Kennedy, J., and Rehnquist CJ, dissenting). For them, neutrality is constitutionally sufficient, but not constitutionally required; they do not forbid political departures from neutrality, sometimes called accommodations. For competing views on the permissibility of such discretionary political accommodation, compare Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 *U. Pa. L. Rev.* 555 (1991) with Michael W. McConnell, *Accommodation of Religion: An*

B. THE NEUTRALIST VIEW OF THE THREE EXAMPLES –

1. The ministerial exception. The Neutralist looks at the ministerial exception as resting in its core on constitutional justifications which are in no way religion-specific. It is of course true that those in the role of clergy frequently perform tasks at the heart of faith – lead others in prayer, preside over sacramental occasions such as weddings and funerals, and give explicitly spiritual comfort to those in need. These functions are expressive of the group’s philosophy on matters most basic to it. The Neutralist would deny, however, that the clergy has a constitutionally distinctive role. The freedom of any association or organized social group to choose its message, constitutionally protected with respect to choosing its leaders¹⁰⁹ as well as its messages per se,¹¹⁰ supports the group’s right to exclude from positions of prominence anyone whose selection would communicate a message contrary to the group’s prevailing beliefs. Moreover, the right of privacy or intimate association, akin to that involved in choosing a psychotherapist, may also insulate the clergy selection process from state intervention.¹¹¹

Although the latter Neutralist argument seems a bit strained, given the institutional intermediation between parishioner and priest, it is not without some force. And combined with the first argument, extending as it does to secular groups and religious ones alike, the core case for the ministerial exception on religion-neutral grounds is quite powerful. So, when the National Organization for Women insists that its Executive Director be a female, or the Lambda Defense Fund chooses to exclude heterosexuals from

Update and a Response to the Critics, 60 *Geo. Wash. L. Rev.* 685 (1992). The best attempt to reconcile the competing views on accommodations is to be found in Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 *William & Mary L. Rev.* 1007 (2000).

¹⁰⁹ *Boy Scouts v. Dale*, 120 S. Ct. 2446 (2000).

¹¹⁰ *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 115 S.Ct 2338 (1995).

¹¹¹ Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 *U. Chi. L. Rev.* 1245, 1276 (1994).

the position of chief counsel, or the Roman Catholic Church, or the spokesmen for Orthodox Judaism, proclaim as a matter of theological principle that their priesthoods and rabbinate are open only to men, the Neutralist thinks that the Constitution requires the government to respect such a considered exclusion. For the Neutralist who disapproves of such discrimination despite the legal right to so behave, it may at least be comforting to realize that religious leaders must accept the social costs of sexist theologies, including the disaffection of feminists and general social disapprobation.¹¹²

This analysis and conclusion, however, does not solve the problem in cases like *Gellington*, and virtually all others in which the exception has been raised, because they are not about explicit policies of exclusion of certain categories, ordinarily forbidden by the civil rights laws as grounds for denial of employment opportunity. Gellington's employer did not exclude women from the ministry, and it did not have policies condoning sexual harassment of ministers by their supervisors. Rather, it did not want to be coerced into publicly defending its reasons, whatever they may have been, licit or otherwise, for transferring Gellington and reducing his compensation. The Christian Methodist Episcopal Church wanted the benefit of the ministerial exception, without having to bear the social costs of its conduct toward the Reverend Gellington and his friend, the Reverend Little.

¹¹² The Boy Scouts of America suffered materially and immediately from the publicity given its anti-gay stand in connection with *Boy Scouts of America v. Dale*. See Kate Zernike, Public, Private Support for Scouts Drops Since Anti-Gay Policy Upheld, *Chicago Tribune*, Aug. 29, 2000, at A6.

In such circumstances, the ministerial exception cannot be justified by the religion-neutral Constitution alone. In the absence of an explicit message which competes with a particularized application of law, freedom of association does not ordinarily extend to general immunity of this sort, from civil rights law or otherwise. Here, the Neutralist and the Separationist part company. The Neutralist would find the ministerial exception exhausted by the core case. With respect to the sort of process immunity seemingly associated with the nonentanglement principle of which Separationists are so fond, the Neutralist will be quick to remind us that other institutions doing work protected by the First Amendment – universities, and the mass media, for two prominent examples – have unsuccessfully sought process immunity broader than their substantive immunity.¹¹³ Institutions NEVER want outsiders poking around their most sensitive personnel matters, and clergy are no different in this regard than professors, newscasters, or CEO's of major companies.

To the broad version of the ministerial exception, of the sort invoked in *Gellington*, the Neutralist says NO.

2. The historic preservation exception – What does the Neutralist have to say about the California scheme under which religious entities may render their noncommercial property exempt from local historic preservation schemes by making a public declaration, unreviewable by state authority, that

¹¹³ See *Herbert v. Lando*, 441 U.S. 153 (1979) (rejecting television producer's claim to editorial privilege against discovery questions pertaining to application of the actual malice standard in defamation cases); *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990) (rejecting University's claim of broad academic freedom privilege against discovery of academic evaluations in nondiscrimination suit arising out of the denial of tenure).

imposition of landmark status upon them would cause substantial hardship? Other, nonprofit secular organizations have no comparable way of exiting these arrangements. Furthermore, what does the Neutralist think about the Washington Supreme Court decision, immunizing “houses of worship” from Seattle’s landmarking law?

Historic preservation schemes frequently do impose significant burdens on religious entities. Settlers and pioneers often built houses of worship before they constructed commercial or other buildings, so the oldest buildings in many communities will be those devoted to religious uses. In general, landmarking laws may significantly raise the cost of modifications of structures devoted to religious use. In California, moreover, religious institutions may face substantial problems from landmarking law independent of any desire on their own part to modify their buildings. California’s earthquake damage prevention laws, which may require very expensive retrofit projects in order for structures to be in compliance and open for public use,¹¹⁴ may well create financial incentives for many older churches to tear down their old buildings and rebuild entirely rather than to do what is necessary to bring existing structures into compliance. So landmarking laws, which prevent this wholesale reconstruction, may in some circumstances impose large and unavoidable costs on many religious entities.

¹¹⁴ See Pete Carey, San Jose Calif. Area Historic Buildings Need Constant Maintenance, San Jose Mercury News, March 2, 2001. For the general requirements of seismic retrofit under California law, see Cal. Code Regs, tit. 24, part 10. Alternative regulations, codified in *id.*, part 8, permit local authorities to modify these requirements for historic buildings, but do not authorize complete exemption from them. Los Angeles requires seismic retrofit for all qualified buildings, including historic properties. See Los Angeles Municipal Code, secs. 91.8805, 91.8807, 91.9105, 91.9107, and 91.8119, available at <http://www.spl.org/selectsites/municode.html>.

These are good arguments for thinking twice about imposing landmarking restrictions on religious entities. But are they good arguments for exempting all noncommercial property of all religious organizations, and no other noncommercial properties, from laws of this character? The arguments for doing so are substantially over- and under-inclusive. Wealthier religious communities can afford to comply with earthquake safety laws, or to otherwise modify their buildings in compliance with the requirements of historic preservation. With respect to the less affluent religious communities, is there any reason to prefer them to otherwise equally situated secular, nonprofit groups and associations? Noncommercial property, whether owned by secular or religious entities, will by definition not generate revenue to offset costs of compliance with requirements of historic preservation.

Is there anything in the character and functioning of religious entities that makes all of their noncommercial property unique in its character, and therefore not subject to the argument that secular owners of noncommercial property deserve equal treatment? The Neutralist would say no. Historic preservation laws, as they fall on nonprofit associations, create two kinds of problems. The first is that of substantial financial hardship – a group wants to expand, or alter, or rehabilitate, or even tear down and rebuild entirely its structure, and the obligation to preserve its historic character makes it impossible or prohibitively expensive. But this sort of difficulty cannot possibly be unique to religion, or even more acute for particular religious uses than non-religious uses of land. Most importantly, it can be solved with a religion-neutral administrative scheme, pursuant to which local authorities may give relief to landowners who suffer substantial hardship from application of the landmarking scheme. So long as hardship criteria, and the processes by which they are applied, are the same for all nonprofit uses, religious institutions have no legitimate complaint about costs of compliance. In general, Neutralists would argue, when the problem generated by a legal regime is one that money can solve, the case for religion-specific treatment is always

weak.

The second problem for religious institutions that might be generated by landmarking laws is more constitutionally complex, and is highlighted by the Washington Supreme Court's opinion in the *First Covenant* case. Suppose a religious entity modifies its worship, and wants to change its exterior and interior to reflect its new theological commitments and extirpate the old? Or suppose a group of one faith buys a historic house of worship long owned by another faith, and marked by the symbols of the prior owner?¹¹⁵ Should there not be a religion-specific exemption for modifications so inspired?

Here too the Neutralist says no. These problems are but an instantiation of a religion-neutral problem of compelled speech,¹¹⁶ such that any nonprofit, belief-oriented group should be free to avoid being trapped in a structure which communicates by its design features a message which the group has disavowed. So whether the problem arises from the purchase of a church by a Jewish congregation, or a synagogue by a Christian group, or a purchase by the NAACP of the former headquarters of the Daughters of the Confederacy, its property being adorned by racist murals depicting the slave trade, the answer should be the same. Historic preservation should not extend to forcing a group to carry on its property a message inimical to its own.

So, whether the issue is the validity of the California legislative exemption for all noncommercial property owned by religious entities, or the request for a judicial exemption to the Seattle ordinance for houses of worship, the committed Neutralist twice says NO.

¹¹⁵ We do not consider in this paper whether a purchaser in these circumstances would be estopped from complaining about pre-existing features of the landmarked property.

¹¹⁶ *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977). Religion-neutral arguments from expressive freedom are also important in zoning matters affecting religious institutions. See Robert Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 *George Washington L. Rev.* 861 (2000) (arguing that religious institutions should have at least as much protection as adult theaters from hostile acts

by zoning authorities).

3. Charitable Choice – For the Neutralist, the problem of Charitable Choice is the easiest of all. The funding programs are constitutionally gratuitous; that is, government need not fund any such programs of privately run social service. So the Neutralist’s only worry is evenhandedness; if the government is to fund such programs, it must give equal respect and consideration to faith-based and secular-based programs alike.

Indeed, the explicit premise of President George W. Bush’s program of “faith-based and community initiatives”¹¹⁷ is one of neutrality – i.e., that such exclusion of religious entities from opportunities for government support discriminates against the faith-based groups. The President’s order emphasizes the need for all groups to compete on a “level playing field”.¹¹⁰ More explicitly still, the order declares that the “delivery of social services must be results oriented and should value the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality.”¹¹¹ These references are best understood as a direct reaction to the principles of Separationism; indeed, John DiIulio, the first head of the new White House Office, publicly elaborated on these orders soon after their promulgation by insisting that the methodology of service delivery of faith-based organizations be treated on an equal footing with the means used in other, secular approaches to social services.¹¹²

So long as requirements of evenhandedness are satisfied, and no invidious discrimination among

¹¹⁷ See Executive Order, Establishment of White House Office of Faith-Based and Community Initiatives, Jan. 29, 2001; Executive Order, Agency Responsibilities with Respect to Faith-Based and Community Initiatives, Jan. 29, 2001.

¹¹⁰ See Executive Order, Establishment of White House Office of Faith-Based and Community Initiatives, Section 1, Jan. 29, 2001.

¹¹¹ Id.

¹¹² See Transcript, From Promise to Policy: A Discussion of the White House Office of Faith-Based and Community Initiatives, Pew Forum on Religion and Public Life, Tuesday, Jan. 30, 2001, available at <http://pewforum.org/events/0130/> (opening remarks of John DiIulio).

groups sneaks back into the program in its administration,¹¹³ the Neutralist's only concern is efficacy. Whether the government is trying to keep teenagers away from being sexually active or from using alcohol or drugs, or trying to control recidivism among violent criminal offenders, or attempting to improve the lot of abused women or children, the Neutralist cares about results, not about the particular role of religion in bringing them about. The Neutralist is indifferent to whether the federally assisted private group's method focuses on physical well-being, mental health, or spiritual transformation and recovery. This is why the Neutralist would applaud President Bush's Executive Order, requiring steps be taken to level the playing field between faith-based providers and others, and focusing on outcomes in exactly this way. Moreover, the Neutralist is quite willing to tolerate religious discrimination in hiring by government-assisted faith-based groups, partly because it may add to their efficacy, and partly because the power to so discriminate rests comfortably on the Neutralist premise that religious groups, like their secular counterparts, should be free to hire only those who are ideologically in tune with their mission.¹¹⁴

Accordingly, whether the issue is the charitable choice provisions of the 1996 welfare reform law, pursuant to which religious groups may maintain their religious identity even as they serve as government contractors, or President Bush's more radical version of charitable choice, pursuant to which efforts at religious transformation may themselves be the objects of government funding, the Neutralist says YES.

¹¹³ For discussion of the problem of discriminatory administration of charitable choice programs, see the Testimony of Professor Ira C. Lupu Before the Subcommittee on the Constitution, House Judiciary Committee, The Constitutional Role of Faith-Based Organizations in Competition for Federal Social Service Funds (hereafter cited as Lupu Testimony), at 11-13, available at <http://www.house.gov/judiciary/lupu-060701.htm>.

¹¹⁴ For recent defense of this proposition, see Jeffrey Rosen, Religious Rights, *The New Republic*, 2/26/01, at xxx, available at www.tnr.com/022601/rosen022601.htm. Of course, religious organizations could hire those with the same social values as committed co-religionists, without limiting the hiring to those of the same religious creed. Whether this approach would undercut group cohesion in service delivery is an open question. See Lupu testimony, n. 113 supra, at 17 & n.36.

IV. OUR VIEW OF THE DISTINCTIVE PLACE OF RELIGIOUS ENTITIES

If the reader has been keeping score up to this point, she will know that a court composed of a Religionist, a Secularist, a Separationist, and a Neutralist would be evenly split, 2-2, on each of our examples. This even split, of course, offers us the chance to cast the tie-breaking vote in every case. This division, however, has a cultural and legal significance far more important than the rhetorical opportunity it provides to us. The legal distinctiveness of religion and religious institutions continues to divide our society, and contemporary legal decisions and theories offer little hope for getting beyond the impasse reflected in our split votes. In this last section, we hope to sketch out a principled attempt to get beyond the legal and cultural impasse.

We will explicate the details of our approach in our discussion of the three examples. Preliminarily, however, we can chart the broad outlines of where we are heading. First, the only sensible starting point involves a presumption of neutrality. In most ways with which the law is concerned, religious institutions are simply not different from their counterparts. Think, for example, of issues involving commercial dealings, or tort liability for motor vehicle accidents caused by those acting as agents of such institutions, and it will be apparent that religious institutions generally should not be subject to a different regime of contract or tort than their secular neighbors. Moreover, as a normative matter, a presumption of neutrality best fits our overall constitutional, political and moral ethos. Whatever unique place religious institutions may have held in the culture of the framing generation, the rise of secularism, the changing role of religion as described above by the Neutralist, and the proliferation of secular causes and organizations all combine to make the claims of distinctive treatment a kind of special pleading towards which skepticism is appropriate.¹¹⁵

¹¹⁵ For a powerful account of these phenomena, see Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. Ark. Little Rock L.J. 555 (1998).

This attitude seems correct, moreover, regardless of whether the claims of distinctiveness be the friendly claims of Religionists or the hostile claims of Secularists. The presumption of neutrality is rebuttable, but the basis for rebuttal must be strong and context-specific. We reject the general claim, such as that made by Professor Laycock,¹¹⁶ that religious institutions are presumptively autonomous. He would place the burden of persuasion of nondistinctiveness on the state; that is, the state would have to demonstrate very good reasons to regulate religious institutions as it regulates their secular counterparts. We would reverse the burden of persuasion. Whether it is a religious institution that makes a free exercise claim, or an opponent of benefits to a religious institution who makes a nonestablishment claim, the burden should fall on the claimant to demonstrate the religious distinctiveness of the activity in question.

It should not be forgotten that the presumption of neutrality will frequently help religious institutions in asserting constitutional rights. As the discussion above has highlighted, the First Amendment prohibits singling out religious institutions for disfavored treatment.¹¹⁵ And, as the Neutralist argued in Part III, a robust set of rights of association and expression are available to many forms of private association, including religious entities. If religious institutions simply get the same land use protections as adult theaters,¹¹⁶ and the same rights to select leaders as the Boy Scouts,¹¹⁷ they will have a significant degree of protection against regulation which might impair their message.

Nevertheless, however dominant the Neutralist message may be, it does not represent the last and

¹¹⁶ Douglas Laycock, *Toward A General Theory of the Establishment Clause: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981)

¹¹⁵ *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

¹¹⁶ For discussion of the ways in which cases about land use by adult theaters may help religious institutions, see Robert Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 George Washington L. Rev. 861 (2000).

¹¹⁷ *Boy Scouts of America v. Dale*, ___ U.S. ___, 120 S.Ct. 2446 (2000).

only word about the distinctiveness of religious institutions. Though some of Separationism has eroded, its deep roots remain entrenched in the law. We believe that these features reflect necessary elements of a coherent constitutional approach to religious institutions, rather than the last vestiges of a fading theory. In June of 2000, the Supreme Court reinforced key elements of Separationism in the *Santa Fe* decision,¹¹⁸ which prohibited public officials from sponsoring a program of prayer by students over the public address system at high school football games. Even in *Mitchell v. Helms*,¹¹⁹ which approved of transfers of educational equipment to sectarian schools and overruled several Separationist decisions in the process, the crucial concurring opinion insisted that such transfers would be constitutionally acceptable only if they included enforceable safeguards against diversion of public subsidies to religious use.¹²⁰

Nor has neutrality entirely taken over the field of free exercise, despite the strong move in that

¹¹⁸ *Santa Fe Ind. Sch. Dist v. Doe*, __ U.S. __, 120 S. Ct. 2266 (2000).

¹¹⁹ 530 U.S. 793 (2000).

¹²⁰ *Id.* at 857-860 (Breyer and O'Connor, JJ., concurring) (“to establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes.”) This, of course, is a point about distinctiveness; proof of use of aid for other, ideological but secular purposes, might violate the governing statute or regulations but would not violate the Constitution. When grouped with the three dissenters in *Mitchell* (Justices Ginsburg, Souter, and Stevens), the concurring Justices complete a majority of five who believe that the constitution precludes the use of government assistance for religious purposes, whether or not the government intends to foster such purposes.

direction initiated by *Employment Division v. Smith*. Although the dominant principle in that field is the neutrality rule of *Smith*, under which religiously motivated conduct may be forbidden so long as comparable conduct with secular motivation is similarly forbidden, the *Smith* opinion itself identified circumstances in which religiously motivated conduct would be entitled to special constitutional protection. Most post-*Smith* attention has been paid to two of these circumstances: cases of “hybrid rights,”¹²¹ in which rights of religious liberty are conjoined with other constitutional rights; and cases that involve significant administrative discretion (e.g., where unemployment agency administrators are empowered to decide what count as “good reasons” for being unavailable for work).¹²² But the Supreme Court’s opinion in *Smith* identified additional, still-vital, aspects of religious liberty that bear directly on our inquiry:

“The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. . . . The government may not compel affirmation of religious belief . . . punish the expression of religious doctrines it believes to be false . . . impose special disabilities on the basis of religious views or religious status . . . or lend its power to one or the other side in controversies over religious authority or dogma. . . .”¹²³

¹²¹ 494 U.S. at 881-883.

¹²² *Id.* at 884.

¹²³ *Id.* at 877.

Most of this enumeration is highly significant, though quite Neutralist, in reaffirming the elements of religious liberty that coincide with the general freedom to espouse controversial beliefs,¹²⁴ freedom from compulsory affirmation of any kind,¹²⁵ and freedom of association.¹²⁶ The *Smith* Court's other reference to religion-specific doctrines of free exercise, however, is suggestive of something rather different indeed. In reaffirming the constitutional prohibition on judicial involvement in controversies over religious authority or dogma, the Court exempted from the neutrality principle a class of cases in which religious entities are particularly interested and involved. If courts may "lend their authority to one or the other side . . ." in controversies over other forms of dogma – economic, political, or what-have-you – there is something decidedly nonneutral in the judicial refusal to take sides on religious matters in dispute. For example, courts

¹²⁴ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹²⁵ *West Va. Bd. Of Educ. v. Barnette*, 319 U.S. 624 (1943).

¹²⁶ The prohibition on state imposition of "special disabilities on the basis of religious status" finds particularized expression in the Constitution's first, pre-Bill of Rights religion clause – the provision in Art. VI, par. 3 that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." As adopted, this provision has a separationist cast, singling out religious association, as well as belief, for a constitutionally protected status.

Consider, for example, the opposition to John Ashcroft as President George W. Bush's Attorney General. A number of grounds of the opposition might have stuck – Ashcroft had defamed an African-American candidate for the federal bench, had perhaps unreasonably opposed an openly gay candidate for an ambassadorship, and had arguably been unduly hostile to school desegregation remedies ordered by courts in Missouri. One ground that constitutionally could *not* stick, however, was his membership in a Pentecostal church. Ashcroft's sect may well have been far from the American mainstream, religious or otherwise. See Kevin Johnson & Toni Locy, *Pentecostal Faith Underlies Ashcroft's Conservatism*, USA Today, Jan. 16, 2001, at p. 8A (Ashcroft's faith forbids dancing, drinking, and gambling). Over time, of course, freedom of association has been expanded beyond its religious origins to include other forms of association. See, e.g., *United States v. Robel*, 389 U.S. 258 (1967) (government may not exclude all members of the Communist Party from employment in defense facilities).

may enforce contracts and trusts that require judgment of disputed questions of secular ideology -- for example, whether a university has acted consistently with a gift donated for the support of a scholar who is an expert in the thought of John Maynard Keynes. Understanding why matters of religious dispute are outside of the jurisdiction of civil courts is essential to any account of the distinctive role of religious entities.¹²⁷

Moreover, the continued vitality of Separationism is most pronounced in cases involving religious institutions rather than religiously motivated individuals. For the past fifteen years, the Supreme Court has been continuously distinguishing between institutions and individuals for purposes of analyzing problems of forbidden aid. In *Witters v. Washington Department of Services for the Blind*,¹²⁸ decided in 1986, a unanimous Supreme Court held constitutional a payment of state funds for vocational rehabilitation to a blind recipient who used the funds to pay tuition at a Christian college to prepare himself for a career as a “pastor, missionary, or youth director.” In *Zobrest v. Catalina Foothills School District*,¹²⁹ a divided Court upheld the governmental provision of an interpreter to a hearing-impaired young man who attended a highly sectarian secondary school; the interpreter translated communications heard in religion class and morning Mass at the school, as well as classes in secular subjects. And in *Rosenberger v. University of Virginia*,¹³⁰

¹²⁷ The co-existence of the principle of deference to religious bodies with the solution of “neutral principles” is confusing and surely open to criticism, see, e.g., Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843 (1998); Arlin M. Adams & William R. Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. Pa. L. Rev. 1291 (1980); but this legal state of affairs very much reinforces what we see as the predominant characteristic of the regime governing religious entities. Some, uniquely religious aspects of their affairs, require legally distinctive treatment; other elements of their business, because they are readily translatable into terms identical to those applicable to secular entities, can be treated under the identical legal arrangements applicable in the secular world.

¹²⁸ 474 U.S. 481 (1986).

¹²⁹ 509 U.S. 1 (1993).

¹³⁰ 515 U.S. 819 (1995).

a 5-4 majority held that the Establishment Clause provided no defense to the University's attempt to exclude religious journals from the set of student publications for which student fees were used to pay printing costs. In all three of these decisions, the Court emphasized program neutrality, and concluded that the government was not responsible for private decisions to expend the publicly provided resources for religious purposes. But the religious expenditure is clearly foreseeable in all three cases, and it is difficult to believe that the Court would have ruled the same way if the distribution of public resources had been made to religious institutions,¹³¹ even in the context of a religion-neutral program, rather than individuals. The requirement of "no diversion of state aid to religious use," prominent in the recent decisions involving institutions, simply disappears when aid flows to individuals. Long-standing Madisonian notions of the required disconnection between religious entities and the state thus become irrelevant when the beneficiaries are individuals rather than organizations with declared religious purposes and continuing, artificial lives.

In addition, the principle of "nonentanglement," discussed in Part II above, is decidedly one of institutional rather than individual focus. Free exercise claims by individuals are subject to inquiry into the sincerity with which the religious beliefs are held,¹³² but the same sort of inquiry into institutional commitments is presumptively forbidden by the prohibition on excessive entanglements between the state and religious entities.¹³³

So "Separationism" has thus far survived the prognosis of "lingering death" that one of us some

¹³¹ Justice Kennedy alluded to this distinction in *Rosenberger*, *id.* at 826.

¹³² *United States v. Ballard*, 322 U.S. 78 (1944) (in prosecution for mail fraud, juries may not decide truth of religious representations but may decide whether defendants sincerely held such beliefs); see also *U.S. v. Seeger*, 380 U.S. 163, 184-85 (1964).

¹³³ The government may, however, inquire into whether the organization is a bona fide religion. See, e.g., *Church of the Chosen People v. United States*, 548 F. Supp. 1247 (D. Minn. 1982)(organization does not qualify as religion for tax purposes).

years ago assigned to it,¹³⁴ and shows signs of continued vitality, especially in cases involving religious institutions. But to say this is only to begin an inquiry, not to conclude it. What sort of activity falls within this separationist ambit, and why? Is the project of defining this zone itself one in which the bias toward familiar religious experience is inescapable? Are the boundaries of forbidden regulation perfectly coincidental with the boundaries of forbidden subsidy? Might it be the case that protection against regulation, which guards religion against government coercion on matters of faith, requires a zone of prophylaxis, while limitation on subsidy, which demarcates the legitimate secular bounds of government action (and protects religion against more subtle forms of corrosion) does not? Or is the case for prophylaxis stronger the other way around, on the theory that religious entities will be vigilant in defending against government coercion, but that government subsidies lead to complacency or willing surrender in the face of government expansion beyond its limited jurisdiction?

As we have seen in Parts II and III above, the Separationist tends to err on the side of prophylaxis and overprotection, and the Neutralist inclines away from any zone of special protection at all. Neither is comfortable in drawing subtle lines between those occasional cases and contexts in which there is persuasive warrant for special treatment of religious institutions, and those in which no such warrant exists. In the last portion of this essay, we will try to do exactly that, recognizing humbly all the dangers of bias, misjudgment, and mistake.

The argument for distinctiveness cannot be made from the subjective perceptions of the governed concerning what constitutes the inviolable core of their faith. As Justice Scalia writes in *Smith*, issues of

¹³⁴ Ira C. Lupu, The Lingering Death of Separationism, 62 *Geo. Wash. L. Rev.* 230 (1994)

what lies, or does not lie, at the centrality of faith for particular believers is beyond judicial competence.¹³⁵

From that direction, judges must either accept all claims, with chaotic results, or (as *Smith* does) opt for rejecting all claims. And the problem of centrality is yet worse in nonestablishment claims, in which recipient religious institutions face corrupting incentives to deny, rather than affirm, that some element of faith is central to their theology, and only complaining outsiders remain to assert that the government is impermissibly aiding that which it may not.

Quite paradoxically, a constitutionally sufficient answer to the question of religious distinctiveness cannot begin with a theology or the sociology of religion. It must begin, instead, with a political concept of religion – one implicit in the founders’ “novus ordo seclorum.”¹³⁵ Hopes for this new order rested, in important part, on its limited horizon. The order would belong to “the ages”; its powers would be restricted to the temporal welfare of its citizens. Though its citizens might (indeed likely would) have religious commitments, the state itself would have no religious confession to make. By thus circumscribing the government’s jurisdiction, this new order would avoid both conflict among religious factions for political authority and the inevitable despotism of the religious faction that won out. Seen in political terms, “religion” represents that which the new order disclaims: jurisdiction over ultimate truths, a comprehensive claim to undivided loyalty, a command to worship. Separationism, then, depends on an articulation of this political concept of sacredness, and on some attempt to identify what particular aspects of the behavior of religious institutions are bound up with the sacred.

Understood this way, Separationism – a sense of boundary between state and some aspects of

¹³⁵ 494 U.S. at 886-887.

institutional behavior – functions much like the constitutional right of privacy. As articulated and defended by Professor Rubenfeld,¹³⁶ the right of privacy is necessary as a check on totalitarianism. Totalitarian regimes typically try to control intimate aspects of their subjects' lives. Control of the intellectual, political, and sexual as well as the economic details of the lives of political subjects creates enormous leverage for the state in the struggle for control of their spirits – their souls, if you will. If the right of privacy, at least in part, insulates the realm of the spirit from state control, the constitutional distinctiveness of religious institutions – those which nurture the spirit directly – rests on comparable foundations.

This notion of jurisdictional limits on the state remains vague, and we hope to begin to work it out in the context of our three exemplary problems – ministerial exception, landmarking exception, and charitable choice. Because we think it will help to clarify the argument, we take them up in reverse order.

¹³⁶ Jed Rubenfeld, *The Right to Privacy*, 102 Harv. L. Rev. 737 (1989).

CHARITABLE CHOICE

As we write this, the 1996 version of Charitable Choice is playing out under current law, but the expansion of Charitable Choice, proposed by President Bush and others, is a moving target.¹³⁷ So we will have to proceed on some assumptions, and educated speculation, with respect to what may be proposed by the current administration.

The 1996 Charitable Choice program involves religious institutions as contractors with government. These institutions substitute for government bureaucracy in conducting job training, job search, and job-readiness programs, among other things.¹³⁸ The '96 law explicitly authorizes contracting religious institutions to maintain their religious identity,¹³⁹ but explicitly prohibits the use of government money for “sectarian, worship, instruction, and proselytization.”¹⁴⁰ Beneficiaries may not be coerced into accepting service from a religious entity,¹⁴¹ and are guaranteed a secular provider if they so desire.¹⁴²

So long as participating religious entities comply with the Act’s restrictions, we think that the ‘96 Act approximates the boundaries of the Constitution. We use the word “approximates” advisedly. The

¹³⁷ For discussion of the fierce debate within and without the Bush Administration over the possible contours of an expansion of Charitable Choice, see Jessica Reaves, *Why Bush’s Faith-Based Initiative May Be Headed for Purgatory*, TIME, March 13, 2001; Franklin Foer & Ryan Lizza, *Holy War*, The New Republic, April 2, 2001, at 1417. The Administration has thus far initiated no new legislation on the subject. Congressman J.C. Watts has introduced the Community Solutions Act of 2001, H.R. 7, 107th Cong., 1st sess., which proposes an expansion of charitable choice, on much the same terms of religious autonomy and limits as the ‘96 Act, to other federal programs. For analysis of H.R. 7 and comparison of its provisions with those in the ‘96 welfare reform law, see Carl Esbeck, Senior Counsel to the Deputy Attorney General, *Testimony Before the Subcommittee on the Constitution*, House Committee on the Judiciary, on Sec. 1994A (Charitable Choice) of H.R. 7, *The Community Solutions Act*, June 7, 2001, available at <http://www.house.gov/judiciary/2.htm>.

¹³⁸ See Center for Public Justice & Center for Law and Religious Freedom, *Christian Legal Society, A Guide to Charitable Choice* (1997), at 5.

¹³⁹ 42 USC sec. 604a(d) (1999).

¹⁴⁰ *Id.* at sec. 604a(j).

¹⁴¹ *Id.* at sec. 604a(i).

'96 Act's restrictions are in important respects less comprehensive than the Constitution requires. First and foremost, the Constitution prohibits more than "sectarian proselytizing, worship or instruction" with government funds; it forbids all religious uses of such funds. The 12-step program made famous by Alcoholics Anonymous, for example, cannot be subsidized by government money (nor problem drinkers coerced into participating in it), because it is deeply religious despite being nonsectarian.¹⁴³ In addition, the '96 Act, and other charitable choice proposals, ideally should go further in guaranteeing secular options for beneficiaries, and in guaranteeing nondiscrimination among sectarian providers which are competing for government contracts.¹⁴⁴

¹⁴² Id. at sec. 604a(e)(1).

¹⁴³ For a recent and illustrative example of a court limiting government support for Alcoholics Anonymous, see *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397 (2nd Cir. 2001). See also *Warner v. Orange County Dept. of Probation*, 115 F.3d 1068 (2d Cir. 1997), *reaff'd* after remand, 173 F.3d 120 (2nd Cir), cert. denied, 528 U.S. 1003 (1999) (county may not condition probation on participation in Alcoholics Anonymous, because of AA's religious content).

¹⁴⁴ It is easy to see how faiths that are widely adhered to and/or well-respected in a particular state or local community might have advantages in the competition for federal social service funds; inversely, faiths that are less widely followed in the U.S., either because they depart from our predominant Judeo-Christian tradition, or for some other reason become the target of bias or suspicion, may labor under comparable disadvantages. Some religious leaders have already

expressed fears that Charitable Choice programs will lead to government financing of religious movements of which such leaders in some fashion disapprove. See Leslie Lenkowsky, *Funding the Faithful, Why Bush is Right*, Commentary, Vol. 111, No. 6 (June 2001) 19, 20. A survey done for the Pew Forum on Religion and Public Life reported recently that “Most Americans would not extend [the right to participate in government-financed social services] to . . . Muslim Americans, Buddhist Americans, Nation of Islam and the Church of Scientology. Many also have reservations about [including] the Church of Jesus Christ of Latter-Day Saints . . .” See *Faith-Funding Backed, But Church-State Doubts*, [wysiwyg://12/http://pewforum.org/events/0410/report/execsum.php3](http://pewforum.org/events/0410/report/execsum.php3).

The Separationist's concerns about the milieu in which government-funded services will be provided fail to justify disqualification of religious providers from equal participation in government programs. At least under the '96 Act, the religious characteristics of providers are incidental to the purpose of government funding. Such characteristics are constitutionally indistinguishable from those of other, non-religious providers. The law forbids diversion of funds to religious uses, and the accounting and auditing required to police a rule of no diversion can ordinarily be accomplished without the sort of intrusive inquiry enjoined by the non-entanglement rule. Most importantly, in this respect, the substance of the programs covered by the '96 Act is primarily focused upon work responsibilities. Although the question of work may be tied up with religious attitudes about self-reliance, the obvious material advantages of work opportunities suggests that work programs need not depend upon any sort of religious commitment or conversion. While it is of course possible that programs under the '96 Act could be conducted in ways that include significant religious content, thereby implicating nonestablishment concerns most sharply, the design of the '96 Act on its face¹⁴⁵ is one that we believe does not transgress the appropriate boundaries of the state. Thus, while

¹⁴⁵ The leading precedent in the field of government partnership with religious entities for social services is *Bowen v. Kendrick*, 487 U.S. 589 (1988). *Bowen*, which upheld the inclusion of religious grantees in the Adolescent family Life Act, distinguished between facial attacks on such a program and attacks on the program as implemented by particular grantees. *Bowen* upheld the Act as applied, because it had sufficient safeguards against diversion of government money to religious use, and left open the possibility (to be explored on remand) that grantees might be impermissibly using "materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith." *Id.* at xxx.

we recognize that the '96 Act arrangements may be abused in ways which violate the statute and the constitution, we offer a wary YES to the Charitable Choice arrangements in the '96 Act.¹⁴⁶

¹⁴⁶ Several recent articles on the subject are more skeptical of the constitutionality and wisdom of Charitable Choice, see Susanna Dokupil, *A Sunny Dome With Caves of Ice: The Illusion of Charitable Choice*, 5 *Tex. Rev. Law & Pol.* 149 (2000); Jonathan Friedman, *Charitable Choice and the Establishment Clause*, 5 *Geo. J. on Fighting Poverty* 103 (1997).

By contrast, the expanded version of charitable choice associated with the administration of then-Governor Bush in Texas has a different flavor. It expands the partnership with faith-based groups beyond welfare and work to include programs aimed at substance abuse, juvenile delinquency, and adult crime recidivism.¹⁴⁷ Although these sorts of programs of course may be limited to secular methodologies, the driving force behind the Bush administration's efforts has been the inclusion of all methodologies, faith-based and otherwise, in the effort to combat social and personal pathologies.¹⁴⁸ And programs aimed at such pathologies typically are designed to be transformative in the deepest sense¹⁴⁹ – that is, to change the fundamental beliefs and practices of participants in order to turn them away from destructive behavior and give them the strength to resist such behavior in the future.

So viewed, this sort of expansion of charitable choice harnesses religious transformation and commitment to the state's ends in combating destructive conduct. The constitutional problem with doing so is not coercion of beneficiaries; the governing statutes typically and expressly prohibit such coercion. Nor, despite a commonly held view to the contrary, is the problem one of coercing taxpayers to finance religious transformation; taxpayers are often forced to subsidize government enterprise with which they disagree. Nor, finally, is the problem one of corruption of faith which may accompany a religious entity's attempt to comply with program restrictions; the potentially corrupting effects of government money, on

¹⁴⁷ Congressman J.C. Watts recently introduced H.R. 7, the proposed Community Solutions Act of 2001, which would (among other things) expand the federal program of charitable choice to include programs addressed to juvenile delinquency and juvenile justice, crime control, housing, senior citizens, child care, community development, domestic violence, hunger relief, and non-school-hours programs for students.

¹⁴⁸ The Executive Orders signed by President Bush in his first days in office make explicit the concern for equal treatment by government of all service methodologies, religious or otherwise. Executive Order, Establishment of White House Office of Faith-Based and Community Initiatives, Section 1 (Jan. 29, 2001): “. . . This delivery of social services must be results oriented and should value the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality.”

¹⁴⁹ See Charles L. Glenn, *The Ambiguous Embrace: Government and Faith-Based Schools and Social Agencies*

secular or religious beneficiaries, is the potential beneficiary's worry, not the government's.¹⁵⁰

In our view, the state may not make use of the instrument of religious transformation as a method for pursuing government's ends. The limits on the state's competence attaches to both means and ends, and the project of awakening or deepening spiritual faith is beyond that competence. Faith makes comprehensive, ultimate claims, and our anti-totalitarian political commitments preclude the state from supporting means which involve claims upon the whole of lives in that way. It may well be, of course, that religious transformation is the best possible way to achieve a variety of goals in which the state is interested, much as it may be that the infliction of cruel and unusual punishment may be the best way to deter crime. In both instances, however, our constitutional understandings about limits on the state's choice of means

62-73 (Princeton 2000) (describing religious transformations achieved by Teen Challenge).

¹⁵⁰ Potential corruption of faith institutions is of course an undesirable policy result, even if it is not at the center of constitutional concern. See Stuart Taylor, *The Risk is Not Establishing Religion, But Degrading It*, *National Journal*, 2/3/01, at 320-21. The article by Ms. Dokupil, *supra* note xx, suggests similar themes.

counsels against a particular choice, regardless of its efficacy. To the forms of charitable choice that involve direct government subsidy for efforts at religious transformation, we say NO.¹⁵¹

THE LANDMARKING EXCEPTION

¹⁵¹ It is possible that some programs operated under the '96 Act transgress the boundaries articulated in text. To those programs, as operated, we would also say NO. And it also possible that programs now contemplated for expansion of charitable choice into areas of substance abuse and crime control could be designed in ways that preclude any government support for religious transformation. To such programs we would say YES, and insist that there be a strict accounting to ensure that government money is not supporting the insupportable. For example, government would be free to pay for food and shelter in a residential program aimed at substance abuse, but not to pay for the labor of counseling, when that counseling is aimed at stimulating religious belief and experience. Here we part company with the Separationists, who would ban all such programs because of the risk (rather than the proof) of diversion of government money to religious uses, and with the Neutralists, who would permit all such programs regardless of diversion of money to religious uses. An intriguing variation on our themes is presented in *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397(2d Cir. 2001), in which the U.S. Court of Appeals held that state funds could not be expended to pay salaries of private alcohol abuse counselors if they directly participated in the inculcation of religious beliefs. So long as the staff of faith-based organizations do not so inculcate, we believe that government may finance their salaries and that government may (but need not) permit religious selectivity in their hiring. For a thorough analysis of the problem of religious discrimination in employment by faith-based organizations receiving federal financial assistance, see Memorandum for William P. Marshall, Deputy Counsel to the President, from Randolph D. Moss, Assistant Attorney General, Re: Application of the Coreligionists Exemption in Title VII of the Civil Right Act of 1964, 42 U.S.C. sec. 2000e-1, to Religious Organizations That Would Directly Receive Substance Abuse and Mental Health Services Administration Funds Pursuant to Section 704 of H.R. 4923, the "Community Renewal and New Markets Act of 2000," October 12, 2000 (copy on file with the authors).

The terms upon which we have relied in analyzing charitable choice can be extended to our other examples. With respect to the California statutory exception from landmarking laws for all noncommercial property owned by religious entities, we think the case for legally distinctive treatment for all such property simply cannot be sustained. Some Separationists may be drawn to such a broad exception, on the ground that the state may not burden sacred uses of property,¹⁵² and that courts are not competent to draw lines between sacred and nonsacred uses. We do not believe, however, that the Separationist’s prophylaxis is warranted in this context. Any claim to the distinctiveness of all non-commercial property owned by religious institutions – e.g., school buildings, administrative buildings, dormitories, health care facilities – surely demands more justification than a concern about under-protection if courts are forced to distinguish between sacred and non-sacred uses. If the fight is between the “all distinct” view of the Separationist, and the “never distinct” view of the Neutralist, the Neutralist will likely carry the day.¹⁵³ This is especially true in the context of land use regulations, which impose obvious and often significant burdens on neighbors and others outside the religious community.¹⁵⁴ Because of its significant and unjustified overbreadth, we say NO to the California exception upheld in *East Bay*.

The Washington Supreme Court decision in *First Covenant* of course presents a closer case, because it is limited in its protection to houses of worship. The Court focused on two sorts of burdens imposed by the landmarking of the church – financial hardship, caused by diminution in value of the church

¹⁵² Nor may the state subsidize sacred uses. See *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

¹⁵³ The leading Neutralist decision in the landmarking context is *Rector, Wardens, & Members of Vestry of St. Batholmew’s Church v. New York*, 914 F.2d 348 (2d Cir. 1990), cert. denied, 499 U.S. 905 (1991) (applying neutrality principle of *Smith* to a landmarking ordinance). For commentary on the general problem, see Angela Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 *Vill. L. Rev.* 401 (1991); Pak, *Free Exercise, Free Expression, and Landmarks Preservation*, 91 *Colum. L. Rev.* 1813 (1991).

¹⁵⁴ See generally Jonathan Lipson, *On Balance: Religious Liberty and Third Party Harms*, 84 *Minn. L. Rev.* 589 (2000).

property, and the danger of government interference with architectural changes motivated by liturgical revisions. Financial hardship, however, is a circumstance that cannot be understood as religion-specific, and therefore cannot justify a religion-specific exception, whether carved out by courts or legislatures.

Here, the key question for us is whether the religion-neutral doctrine of compelled speech exhausts the constitutional protection of religious entities from being forced to carry religious messages which they no longer support. Perhaps a distinction between exterior and interior changes to houses of worship would be a sensible one. Although we recognize that religious institutions will often have very strong claims to determine the architectural message expressed by their structures, we nevertheless believe that a religion-neutral doctrine of compelled speech is adequate to the task of handling exterior changes. With respect to interior spaces, however, the Separationist's claim for prophylactic protections has greater weight. First, changes to the interior of a house of worship are so likely to be driven by theological (and therefore expressive) considerations that a presumption of unconstitutionally compelled speech might attach to the landmarking of religious interiors. Second, when directed to interior spaces, the searching administrative inquiry into proposed changes required by most historic landmark ordinances sharply implicates the Separationist's concern with procedural entanglement. For an example drawn from real life, consider the spectacle of a government review board determining where the altar should be placed in a Roman Catholic church.¹⁵⁵ By contrast, nonreligious properties may be subject to interior landmarking, with only the general doctrine of compelled speech to fall back on for constitutional objection.

Accordingly, to *First Covenant* we say NO, but we are open to the possibility of a narrow, religion-specific doctrine of exemption for landmarking of interior space in buildings used for religious

¹⁵⁵ See *Society of Jesus v. Boston Landmarks Comm'n*, 409 Mass. 38, 564 N.E. 2d 571 (1990).

purposes.

THE MINISTERIAL EXCEPTION

As Parts I-III of this paper have discussed, the ministerial exception from the civil rights laws applies to two quite different kinds of claims – those by religious institutions, like the Roman Catholic Church or Orthodox Jewish congregations,, which openly and explicitly discriminate against women in choosing their clergy, and those, like the Salvation Army or the Christian Methodist Episcopal Church, whose policies repudiate such discrimination but are nevertheless accused of it in the context of a particular personnel decision. With respect to the former, all but the committed Secularist defends the constitutional right of religious associations to select their spokespersons without state interference. The Religionist is of course exceedingly sympathetic to autonomy claims of this type. The Separationist might put this right on religion-specific grounds, but does not have to do so, because the Neutralist has offered a powerful, religion-neutral justification, sounding in associational freedom, for the autonomy of ideological organizations to be free of the civil rights laws in selecting their leaders. Here, only the Secularist parts company,¹⁵⁶ and even the most committed Secularist will be hard put to explain why secular nonprofit organizations should have such freedom and religious entities should not. So Secularists will have to deny the rights of associational freedom of all such organizations, religious or otherwise, in order to resist the claim of religious entities to be free to exclude men (or women) from positions of organizational leadership.

In this context, we see no need to confront the question of religion-specific treatment. Because we find no warrant for placing any such distinctive burden on religious institutions, and because we think

¹⁵⁶ See generally Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 *Corn. L. Rev.* 1049 (1996); JoAnne Brant, “Our Shield belongs to the Lord”: Religious Employees and a Constitutional Right to Discriminate, 21 *Hastings Con. L. Q.* 275 (1994). One of the authors of this work has in the past taken a very critical view of the ministerial exception, see Ira C. Lupu, *Free Exercise Exemptions and Religious Institutions: The Case of Employment Discrimination*, 67 *B.U. L. Rev.* 391 (1987), but has since become more sympathetic to the arguments of associational freedom and institutional uniqueness that support it.

freedom of expressive association protects this right of explicit exclusion from organizational leadership, we say YES to the ministerial exception for religious entities that explicitly discriminate on the basis of sex in their hiring of clergy.

It is with respect to cases like *McClure* and *Gellington*, in which the claim of constitutional immunity comes from religious entities which have no policy of sex discrimination in the employment of clergy, that we are put to the test. Should we side with the Neutralists, who reject a religion-specific exception for such cases, or with the Separationists, who defend it? There is a good deal more to be said about this than we have room for in this piece, but our inclinations are to recognize such an exception for a highly limited class of employees.¹⁵⁷ Those who act as clergy, or who teach others to act as clergy, are the lifeblood of the institution's message. To permit administrative and judicial inquiry, including all the opportunities for party discovery, into the possibility of pretextual reasons for a particular employment action puts the state in dangerous proximity to control over the content of the institution's message, including aspects of that message that are clearly outside the boundaries of the state's competence. The hazards of such a process sharply implicate the extant Separationist principle prohibiting state intervention into, and determination of, substantive issues of faith, as well as the Separationist concern that the process of interaction between state and religious entity not require the latter to justify its theological commitments or be tempted to bend them to satisfy its interrogators.

The dangers of entanglement seem to us particularly acute when the state's agents are attempting to discern the "true" reason why religious officials have taken a particular action, with the attendant risk of

¹⁵⁷ The courts have expanded the exception to a broader category of employees than we think the exception's rationale can bear. See, e.g., *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981) (Seminary's faculty and administrative staff that equates with or supervise faculty are considered ministers for purposes of the exception). We would restrict the exception to a group more explicitly assigned the responsibility to articulate and develop the group's message.

mistake concerning the officials' motivations. Such dangers appear to be comparatively less in the situation, likely to arise in the context of Charitable Choice, in which the state's auditors are trying to figure out the true object of expenditures with government funds. Accounting issues are far more objective, and are not likely to depend upon the subjective judgment of the state's representative about the extent to which religious officers are shading the truth or insincerely manipulating their theology in an attempt to avoid liability.

Moreover, when pretext claims are successful, courts are empowered to remedy the disparate treatment with orders of reinstatement.¹⁵⁸ Judicially ordered reinstatement of clergy, including reinstatement to a particular position involving a congregation of the faithful, allows the state to influence the content of the entity's religious message over the objection of those who are authorized to speak for the religious community. When this religion-specific remedial concern is coupled with the entangling qualities of the process of inquiry, the case for exception in Gellington-type circumstances seems to us to tip in favor of YES.

CONCLUSION

Do religious entities occupy a distinctive place in our constitutional order? As we have analyzed the problem, the answer is a limited yes. Our affirmative to the question is surely narrower than that to be expected from the Religionist, who will always be looking for distinctive grounds for deregulation of such entities, or the Secularist, who will always be in search of grounds to disable religious entities from sharing

¹⁵⁸ The explicit absence of a reinstatement demand influenced the 9th Circuit in rejecting a ministerial exception defense in a sexual harassment case brought by a former Jesuit novice against a Jesuit order. *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999), *rehearing and rehearing en banc denied*, 211 F.3d 1331 (9th Cir. 2000).

equally in the commonwealth. Our answer is only a bit – though we think an important bit – broader than that of the Neutralist, who will systematically deny the possibility of distinctive treatment in the law for religious institutions, and considerably narrower than that of the Separationist, who will affirm such distinctive treatment wherever plausible.¹⁵⁹

The role of the contemporary state is broad indeed, but it remains circumscribed by its penultimacy. Life's ultimate questions are to be left in private hands, and when those hands are institutional, the state must back off and respect the internal life and self-governance of such institutions. Most importantly, our approach is consistent with the duality of roles of religious institutions in contemporary America. When those institutions perform functions indistinguishable from other segments of the nonprofit world, they should be treated by the law as their secular counterparts are treated. When, however, religious institutions act in uniquely religious ways, making connections with the world beyond the temporal and material concerns that are the proper concern of the state, the legally distinctive qualities of such institutions begin to emerge. It is only by exploring the intrinsic limits on state power to affect these ultimate concerns, rather than by mining the desires, activities, or teachings of religious organizations, that the distinctive place of religious entities in our constitutional order can be located. The Religionist, the Secularist, the Separationist, and the Neutralist may all have broader, cleaner paths through this thicket than we do, but we believe that our approach is most faithful to the intricacies and competing concerns woven into the American constitutional

¹⁵⁹ If we were obliged to label ourselves, we would probably choose something like limited or qualified Separationists. But, as everyone knows, it's more fun to label than to be labeled, so we do not adopt either of these monikers.

design.