BYU Law Review

Volume 2015 | Issue 1 Article 3

February 2015

The Very Old New Separationism

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* I would like to thank Kiel Brennan-Marquez, John Fee, Lisa Grow Sun, RonNell Andersen Jones, David Moore, Benjamin Johnson, Saikrishna Prakash, Brett Scharffs, Mark Shawhan, Steven D. Smith, and John Welch for their helpful comments on earlier drafts of this paper. Special thanks go to Fred Gedicks, whose suggestions led to the paper's current form.

I. INTRODUCTION

Separation of church and state is supposed to be dead, or at least dying. It became the guiding principle of the Supreme Court's religion jurisprudence in the 1940s, increased in importance through the 1970s until it dominated the Court's religion jurisprudence, and then began a slow decline in the 1980s as the conservative Justices exploited its historical and conceptual weaknesses to tear it down. In its place, the Court has erected a neutrality regime that allows government both to regulate and to subsidize religion so long as it does so for secular reasons and remains religiously neutral.

Most discussion of separationism assumes the above narrative, and for good reason. It accurately captures the broad trends of the Supreme Court's religion jurisprudence and successfully explains them in both doctrinal and political terms. Yet there remain aspects of the Court's religion jurisprudence that fit this narrative awkwardly, if at all—aspects highlighted by the Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, which was both unanimous and thoroughly separationist.

Because scholars lack a consensus understanding of separationism as a concept, they have not fully appreciated the ways in which the separationism of the 1970s differed from the separationism that preceded it. They have also not noticed that the ways in which the Court's jurisprudence today, whether it uses the word "separation" or not, resembles the separationism that guided the Court's religion

jurisprudence in its earlier decades. It is a separationism at once new and very old.

The common thread running through this history is the Court's concern for the development of religious belief free from government involvement or interference. In Free Exercise jurisprudence, this concern has led to special protections for individual religious belief, religious speech, and organizations that teach religious principles. In Establishment Clause jurisprudence, it has led to a requirement that any government action benefitting religious people or organizations must have a non-religious purpose and must be religiously neutral, whether they are distributed to religious organizations directly or through the free choice of private parties. The abandonment of the 1970s' approach to separationism has not been a repudiation of separationism itself, but of a particular approach to separationism—one that was only ascendant for perhaps two decades, one based on dubious assumptions and leading to untenable outcomes.

This Article proceeds in four Parts. Part II elaborates on the traditional narrative of separationism's rise and fall before explaining this narrative's greatest flaw: its lack of any shared definition of separationism, which has obscured the separationist character of certain aspects of the Court's recent religion jurisprudence—in particular, the committed separationism of *Hosanna-Tabor*. Part III traces the contours of this new separationism in Free Exercise doctrine, tying it to the Court's early Free Exercise separationism and distinguishing both of them from the separationism of *Sherbert* and *Yoder*.

Parts IV and V investigate the Court's new separationism in one aspect of its Establishment Clause jurisprudence, namely, aid to religious organizations. Part IV argues that the end of the "pervasively sectarian" doctrine and of the Court's efforts to ban aid that can be put to religious purposes, often considered signs of separationism's decline, are in fact consistent with its early separationist jurisprudence and a departure only from problematic doctrines articulated in the 1970s. Part V makes the same argument with respect to the Court's willingness to allow indirect aid to religious organizations, or in other words, aid distributed by the free choice of private individuals. Part VI concludes.

II. THE FLAWED STORY OF SEPARATIONISM'S FALL

The conventional wisdom that the Supreme Court has repudiated separationism consists of two broadly shared understandings. First, the conventional wisdom understands the Supreme Court's religion jurisprudence from 1940 until 1980 as a continuous effort—if sometimes a timid and confused one—to build a wall that would separate government and religion as much as possible. Second, it sees the Court's religion jurisprudence since 1980 as abandoning this effort and dismantling the wall.

Variations on this basic narrative are expressed or assumed in the work of numerous legal scholars and other commentators. To some commentators, it is a happy story: separationism was incoherent to begin with,[1] or anti-egalitarian,[2] or anti-religious,[3] or just a pointless barrier to government subsidies of valuable private schools and charities.[4] To others, it is a tragedy: separationism protected religious liberty,[5] reduced religious strife, kept government out of the inner workings of religious organizations,[6] and advanced, however imperfectly, the ideal of government based on public reason in which all citizens can participate. But, happy or sad, the erection and dismantling of a wall of separation is the story most commentators assume when they discuss the subject, with only a few questioning whether recent doctrinal changes might actually be consistent with the separation of church and state,[7] or whether the Supreme Court remains committed to some aspects of separationism.[8]

1. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

2. MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE (2008).

3. RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE (1984).

4. Carl H. Esbeck, *A Constitutional Case for Governmental Co-operation with Faith-based Social Service Providers*, 46 EMORY L.J. 1 (1997).

5. Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. REV. 1111, 1112 (2002) ("Neutrality has emerged victorious from the doctrinal fray while separationism, which has been on the ropes for two decades, is apparently down for the count.").

6. William P. Marshall, *Remembering the Values of Separatism and State Funding of Religious Organizations (Charitable Choice): To Aid is Not Necessarily to Protect,* 18 J.L. & POL. 479 (2002).

7. *See* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 46, 48 (1997).

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

The following sections serve three purposes. First, Section II.A summarizes the conventional narrative in more detail. Then Section II.B argues that the conventional narrative overstates the extent to which the Supreme Court has abandoned separationism. In particular, it argues that *Hosanna-Tabor* was a perfect test case for the conventional wisdom that neutrality now dominates the Court's religion jurisprudence—a test case that separationism resoundingly won. Finally, Section II.C argues that the reason scholars have not universally appreciated the Supreme Court's continued separationist commitments is that scholars lack a universally shared understanding of what separationism is. This Article tries to ameliorate this problem by listing a few assumptions common to all understandings of separationism and calling attention to the key issue on which they differ: their definition of the church from which the state needs to be separated.

A. The Conventional Narrative

Although the phrase "separation between church and State" first appeared in a Supreme Court opinion in 1878,[9] histories of the Court's separationism usually begin in the 1940s with the incorporation of the Religion Clauses. In the Jehovah's Witnesses cases[10] and *United States v. Ballard*,[11] the Court began establishing a religious sphere protected from government influence—or, as the Court put it in *Cantwell v. Connecticut*, establishing a "shield [beneath which] many types of life, character, opinion and belief can develop unmolested and unobstructed."[12] In *Everson v. Board of Education*, the Court determined that the government must abstain from promoting religion as well as from interfering with it, and *Cantwell*'s shield became a wall.[13]

In the following decades, the Court continued to invoke the idea of separation and the wall metaphor to limit government interaction

9. Reynolds v. United States, 98 U.S. 145, 164 (1878).

10. *See generally* Patrick J. Flynn, "*Writing their Faith into the Laws of the Land": Jehovah's Witnesses and the Supreme Court's Battle for the Meaning of the Free Exercise Clause, 1939–1945*, 10 TEX. J. C.L. & C.R. 1 (2004).

11. United States. v. Ballard, 322 U.S. 78 (1944).

12. Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

13. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

with religion under both Religion Clauses.[14] Yet (the narrative goes) the Court's separationism was fickle and inconsistent even in its golden age. In *Everson* itself, the Court declared in emphatic tones that it "could not approve the slightest breach" in the wall of separation, while refusing in the same paragraph to strike down a subsidy for parochial students' bus fares[15]—leading Justice Jackson to remark that the Court, "whispering 'I will ne'er consent,'—consented."[16] In the Court's first Establishment Clause case after *Everson*, it forbade schools from allowing private religious instruction on campus during school time,[17] only to permit a nearly identical program four years later.[18]

Nevertheless, the Court's separationism grew stricter with time, and in the 1960s and 1970s, it articulated general statements of the requirements of the Religion Clauses that were strictly separationist. In 1963's *Sherbert v. Verner* and 1972's *Wisconsin v. Yoder*, the Court declared that laws may not burden religious exercise unless doing so is justified by a "compelling state interest."[19] In 1971, the Court in *Lemon v. Kurtzman* held that no government action is permissible unless its primary purpose is secular, its primary effect neither advances nor inhibits religion, and the action avoids excessive entanglement between government and religion.[20] In the following decade, the Court used this three-prong test to strictly limit

14. *E.g.*, Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church of N. Am., 344 U.S. 94, 109 (1952) (Free Exercise); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (Establishment).

15. *Everson*, 330 U.S. at 18.

16. *Id.* at 19 (Jackson, J., dissenting) (internal quotation marks omitted); *see also* ROGER K. NEWMAN, HUGO BLACK 363 (1994) ("[Justice Black's majority opinion in *Everson*] drew criticism from all quarters. Black's rhetoric and dicta contrasted too sharply with his conclusion and holding to satisfy anyone.").

17. *McCollum*, 333 U.S. at 203.

18. Zorach v. Clauson, 343 U.S. 306 (1952) (majority distinguishing *McCollum* based on whether the religious instruction took place on school property); *id.* at 315 (Black, J., dissenting) (dissenters arguing that the majority's decision was inconsistent with *McCollum*). For a history of the two decisions, see James E. Zucker, Note, *Better a Catholic than a Communist: Reexamining* McCollum v. Board of Education *and* Zorach v. Clauson, 93 VA. L. REV. 2069 (2007) (arguing that the shift from *McCollum* to *Zorach* can largely be explained by a growing fear of atheism and communism).

19. Sherbert v. Verner, 374 U.S. 398, 403 (1963) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

20. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

government aid to religious schools[21] and to strike down Ten Commandments displays in public schools.[22]

By 1980, separationism seemed ascendant, and it had become identified with the set of issues most people still associate with it today: keeping religious exercises out of public schools, limiting subsidies to religious private schools, restricting government religious speech, and so forth. In Free Exercise jurisprudence, separationist principles supported doctrines that provided—in principle, at least—robust protection for religious conscience and for churches' self-governance. The Court seemed committed to the idea that government and religion should influence each other as little as possible.

But already the cracks were appearing, and they grew quickly. Beginning in the early 1980s, the Court stepped back from its broad separationist commitments on several controversial fronts:

> • *Increased aid to religious organizations.* In 1973's *Committee for Public Education v. Nyquist*, the Court determined that if aid to a religious organization could be put to religious purposes, it was impermissible.[23] But it quickly became clear that the Court would not enforce its rule. Within ten years, the Court had approved a direct cash subsidy to religious schools,[24] narrowed its standing doctrine to prevent some government support for religious institutions from ever being challenged in court,[25] and upheld tax deductions for religious school tuition—despite having struck down tax credits for religious school tuition in *Nyquist*.[26] In 1995 the Court held that government subsidies to religious groups are actually constitutionally mandatory in some circumstances,[27] and in 2002 it all but overturned

21. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772–73 (1973) (citing *Lemon*, 403 U.S. at 612–13)).

22. Stone v. Graham, 449 U.S. 39, 40 (1980) (citing *Lemon*, 403 U.S. at 612–13).

23. *Nyquist*, 413 U.S. 756; *see also* Meek v. Pittenger, 421 U.S. 349 (1975).

24. Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).

25. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

26. Mueller v. Allen, 463 U.S. 388, 390–91 (1983); *Nyquist*, 413 U.S. 756.

27. Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995).

Nyquist, allowing states to subsidize religious school tuition through religion-neutral voucher programs.[28]

• *The erosion of the* Lemon *test*. Though *Lemon* was a religious school subsidy case, it presented itself as a general statement of the requirements of the Establishment Clause.[29] Nevertheless, the Court never treated it as such, and its importance has declined as the Court has repeatedly chosen not to apply it, choosing instead to decide cases based on "history and tradition,"[30] the Free Speech Clause,[31] or Justice O'Connor's endorsement test.[32] Eventually *Lemon*'s influence grew so small that one majority opinion attempted to jettison its crucial injunction against church-state entanglements,[33] and another dismissed its three-prong test as "no more than helpful signposts."[34]

• *The collapse of the compelling interest test*. Separationism in the Court's Free Exercise jurisprudence met a similar fate, as the Court never applied *Sherbert*'s compelling interest test as broadly as it seemed to demand. The Court continued to use it to require states to give employment compensation to people who rejected work for religious reasons,[35] but with the exception of *Yoder*, the Court never used the compelling interest test to require religious exemptions in any other context.[36] In some contexts, the Court concluded that the

28. Zelman v. Simmons-Harris, 536 U.S. 639, 661–62 (2002) ("[W]e now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.").

29. Lemon v. Kurtzman, 403 U.S. 602, 602 (1971).

30. Marsh v. Chambers, 463 U.S. 783, 786 (1983).

31. *Rosenberger*, 515 U.S. at 837; Widmar v. Vincent, 454 U.S. 263, 276 (1981).

32. The endorsement test first appeared in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). It was later cited in a number of majority or plurality opinions, for example *Board of Education v. Mergens ex rel. Mergens*, 496 U.S. 226 (1990), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

33. Agostini v. Felton, 521 U.S. 203, 233 (1997) (noting that "[n]ot all entanglements, of course, have the effect of advancing or inhibiting religion"). *But see Santa Fe*, 530 U.S. at 314 (after *Agostini*, still referring to *Lemon* as a "three factor" test).

34. Van Orden v. Perry, 545 U.S. 677, 686 (2005) (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).

35. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 146 (1987).

36. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877–83 (claiming that "[w]e have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation" and supporting this claim with a list of the Court's Free Exercise precedents). Michael McConnell sharply (and accurately) criticizes

> burden on religious exercise was justified by a compelling state interest,[37] while in others it concluded that *Sherbert* and *Yoder* did not apply.[38] Eventually the Court concluded that *Sherbert* only applied to laws that are not "neutral and generally applicable,"[39] leaving most burdens on religious exercise subject to no more than rational basis review.

This decline of separationism has been explained in a number of ways. To some, it is the work of the religious right:[40] the school prayer decisions have always been unpopular with voters,[41] so the Republican Party took advantage of their unpopularity[42] and appointed judges who would work to overturn those decisions. To others, it is a reflection of problems inherent in separationism itself, the two most common complaints being that the Court's

Smith's use of precedent, but the examples he uses to counter the Court's claim fall into three categories: unemployment cases like *Sherbert v. Verner*, 374 U.S. 398 (1963), *Hobbie*, 480 U.S. 136, and *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989); cases in which the Free Exercise claim failed, like *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990), and *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989); and finally *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the only non-unemployment case in which a claim under *Sherbert*'s compelling interest test persuaded the Court. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120 (1990).

37. The Court's compelling interests included the following: *Gillette v. United States*, 401 U.S. 437, 462 (1971) ("interest in procuring . . . manpower" for the military); *United States v. Lee*, 455 U.S. 252, 258–59 (1982) (interest in administering Social Security); *Hernandez*, 490 U.S. at 699–700 (quoting *Lee*, 455 U.S. at 260) (interest in "a sound tax system").

38. The Court concluded that the compelling interest test should not apply to the following: *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986) (military dress regulations); *Bowen v. Roy*, 476 U.S. 693, 711–12 (1986) (mandatory issuance of social security numbers); *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 441–42 (1988) (the government's decision concerning where to build roads and harvest timber on public land).

39. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); *see also Smith*, 494 U.S. at 879.

40. *See, e.g.*, DAVID SEHAT, THE MYTH OF AMERICAN RELIGIOUS FREEDOM 255–82 (2011) (documenting the rise and effects of the conservative "moral majority"); Lupu, *supra* note 8, at 237 (associating the decline of separationism with "the Reagan-Bush years" and the conservative "program of putting an end to 'judicial activism'") (quoting William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 2–6 (1992)).

41. David W. Moore, *Public Favors Voluntary Prayer for Public Schools*, GALLUP (Aug. 26, 2005), http://www.gallup.com/poll/18136/public-favors-voluntary-prayer-public-schools.aspx.

42. Every Republican platform since 1972 has included support for prayer in schools. The complete text of Republican Party platforms since 1856 is available on the website of The American Presidency Project at the University of California (Santa Barbara), http://www.presidency.ucsb.edu/platforms.php.

separationism was based on incorrect historical claims,[43] and that separationism is incoherent and incapable of leading to a workable religion jurisprudence.[44] And finally, some scholars see the Court abandoning separationism for an ideal of religious neutrality—an ideal more consistent with contemporary constitutional law's dominant focus on equality.[45]

But whatever the cause, the conventional narrative of scholars and commentators is that separationism has declined, that it is suffering a "lingering death,"[46] that the "wall of separation" is crumbling, and so on. And as the foregoing narrative makes clear, there are, unquestionably, reasons for this conventional wisdom. There can be no question that the Court restricted interactions between religion and government more in 1975 than it does today, just as there can be no question that the Court's use of the word "separation" and of Jefferson's "wall" metaphor have declined in recent decades.[47]

But a few scholars have noticed problems with the conventional narrative. Douglas Laycock has argued that the Court's relaxed Establishment Clause doctrine is consistent with separationism properly understood, while Ira Lupu, who once wrote of separationism's "lingering death," has since acknowledged that separationism shows signs of lingering life.[48]

As these scholars have observed, there remain aspects of the Court's religion jurisprudence that do not fit comfortably into the conventional story. The conventional story has difficulty explaining why, even in separationism's heyday, the Court overruled as many Establishment Clause challenges as it sustained—except perhaps to say that the Court was never completely committed to the wall even while it was building it.[49] The story has more difficulty explaining

43. SEHAT, *supra* note 40, at 235; Steven K. Green, *A "Spacious Conception": Separationism as an Idea*, 85 OR. L. REV. 443, 450 (2006).

44. *See, e.g.*, EISGRUBER & SAGER, *supra* note 1, at 23.

45. *See, e.g.*, *id.* at 24–25; Green, *supra* note 5, at 1111–12 ("Neutrality has emerged victorious from the doctrinal fray while separationism, which has been on the ropes for two decades, is apparently down for the count.").

46. Lupu, *supra* note 8, at 230.

47. The last Supreme Court opinion that approvingly cited the "wall" metaphor was *Van Orden v. Perry*, 545 U.S. 677, 708–09 (2005) (Stevens, J., dissenting).

48. Ira C. Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 B.C. L. REV. 1139 (2002).

49. SEHAT, *supra* note 40.

why certain aspects of separationism have survived while others have not. School prayer is still unconstitutional after half a century of widespread public opposition to the school prayer cases.[50] It is still unconstitutional for courts to question the reasonableness of a person's religious beliefs even though courts may ask whether a person's other beliefs are reasonable.[51] And still, three decades after separationism supposedly started dying, churches have a degree of constitutionally protected autonomy that non-religious organizations lack—autonomy recently affirmed by all nine Justices in *Hosanna-Tabor*.

B. Problems with the Narrative: Separationism in Hosanna-Tabor

1. A conflict between separationism and neutrality

In *Hosanna-Tabor*, the parties tested the conventional wisdom that separationism has been replaced by neutrality, and separationism proved quite loudly that it was not dead yet.

The case was a lawsuit brought by a teacher against her church school employer, alleging that she had been fired in violation of the Americans with Disabilities Act. The school responded that she was an ordained minister and that her suit was barred by the ministerial exception, a doctrine developed by the circuit courts that prevented the application of anti-discrimination laws to churches' choice of ministers.[52] This defense was rejected by the Sixth Circuit, which

50. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000). A Gallop poll in 2005 found that "76% of Americans favor[ed] a constitutional amendment . . . allow[ing] voluntary prayer in public schools." Moore, *supra* note 41; *see also* Michael Lipka, *South Carolina Valedictorian Reignites Debate on Prayer in School*, PEW RES. CENTER (June 13, 2013), http://www.pewresearch.org/fact-tank/2013/06/13/south-carolina-valedictorian-reignites-debate-on-prayer-in-school/ ("A 2012 Pew Research Center poll found that 65% of Americans believe liberals have gone too far trying to keep religion out of schools and government. A smaller, but significant share (48%) think conservative Christians have gone too far to try to impose religious values on the country.").

51. United States v. Ballard, 322 U.S. 78 (1944).

52. *See* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985); Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999); EEOC v. Roman Catholic Diocese, 213 F.3d 795 (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000); Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299 (4th Cir. 2004); Elvig v.

determined that, despite her title, she was not a minister for the purposes of the exception.[53]

It was after the Supreme Court granted certiorari that the case became a stark conflict between separationism and neutrality. Surprisingly, the government's brief focused not on defending the Sixth Circuit's narrow definition of "minister," but rather on attacking the ministerial exception itself.[54] Less surprisingly, its arguments against the ministerial exception were all classic neutrality arguments, all similar to arguments that had persuaded the Court to abandon separationist doctrines in earlier cases.

The guiding principle of the government's theory of the case was that religious people and organizations should be treated the same as similarly situated non-religious people and organizations. Therefore, churches are simply expressive associations, and in principle their right to choose their ministers is no different from a union's right to choose its leadership.[55] "[A] *secular* private school would have no expressive-association right to discharge a teacher in retaliation for her assertion of rights under the antidiscrimination statutes,"[56] the government argued, so why should a religious private school be treated differently?

Certainly not because of any Free Exercise right. Under *Employment Division v. Smith*, neutral and generally applicable laws may constitutionally interfere with religious practices so long as they pass the rational basis test, and the employment discrimination laws at issue in *Hosanna-Tabor* are neutral and generally applicable.[57] The church's only Free Exercise rights at stake were what *Smith* called "hybrid" rights[58] that "merged" into its freedom of association

Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Werft v. Desert Sw. Annual Conference of United Methodist Church, 377 F.3d 1099 (9th Cir. 2004); Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006); Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008); Skrzypczak v. Roman Catholic Diocese, 611 F.3d 1238 (10th Cir. 2010); Cannata v. Catholic Diocese, 700 F.3d 169 (5th Cir. 2012).

53. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694 (2012).

54. Brief for the Federal Respondent at 28–32, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) (No. 10-553) 2011 WL 3319555.

55. Transcript of Oral Argument at 27–28, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553).

56. Brief for Cheryl Perich at 18, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553) 2011 WL 3380507.

57. Brief for Federal Respondent, *supra* note 54, at 21–29.

58. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881–82 (1990).

right.[59] These rights ensured that churches and other expressive associations would be able to choose leaders who espoused their expressive message, but the rights would not permit discrimination unrelated to an association's message.[60] The rights certainly would not treat the choice of ministers as a matter from which the government must remain scrupulously separate.

The government acknowledged that the Establishment Clause prohibits government from "tak[ing] sides in a religious dispute"[61]—a principle that the Court had used in earlier cases to protect churches' autonomy from government interference.[62] But the government distinguished this principle by appealing again to neutrality. Citing the Supreme Court's 1979 decision in *Jones v. Wolf*, the government argued that the employment discrimination claims against churches could be resolved based on "neutral principles of law" and that the Establishment Clause therefore permitted them to go forward.[63] On every point, the respondents made the sort of neutrality-based arguments that had persuaded the Court to narrow its separationist doctrines in the past.

And on every point, the neutrality-based arguments failed spectacularly. At oral argument, when the government attempted to explain how churches' right to choose their ministers was essentially the same right as labor unions' right to choose their leaders, Justice Scalia exploded:

> JUSTICE SCALIA: That's extraordinary.
>
> MS. KRUGER: I —
>
> JUSTICE SCALIA: That is extraordinary.
>
> MS. KRUGER: Well, I —
>
> . . .

59. Transcript of Oral Argument, *supra* note 55, at 38.

60. Brief for Cheryl Perich, *supra* note 56, at 22.

61. *Id*. at 20.

62. *See, e.g.*, Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696 (1976).

63. *Cf.* Jones v. Wolf, 443 U.S. 595, 602 (1979) (ruling that "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.").

> JUSTICE SCALIA: There's nothing in the Constitution that explicitly prohibits the government from mucking around in a labor organization. . . . [B]ut there, black on white in the text of the Constitution are special protections for religion. And you say that makes no difference?[64]

Justice Scalia was not the only Justice to be bothered by the argument. Justice Kagan called it "amazing" that the government would take the position it did,[65] and the Court's unanimous opinion declared, "We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."[66]

The Court rejected the government's neutrality-based interpretations of both Religion Clauses, concluding that letting the suit go forward would violate each Religion Clause independently. When the government tried to defend its interpretation of the Free Exercise Clause using *Smith*, its position was rejected by Justice Scalia, who wrote *Smith*: "*Smith* didn't involve employment by a church. It had nothing to do with who — who the church could employ. I don't — I don't see how that has any relevance to this."[67] And the Court's opinion again agreed with him: "*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself."[68] This distinction may be untenable—the Native American Church's sacramental use of peyote at issue in *Smith* was unquestionably an "internal church decision that affect[ed] the faith and mission of the church itself"—but whether it is coherent or not, the outward/inward distinction is a classic separationist move, distinguishing between a sphere in which government can act freely and a religious sphere with which the government may not interfere.

On the other hand, the government's interpretation of the Establishment Clause was simply ignored. The Court's opinion cited the church autonomy cases that had forbidden the government to take sides in religious disputes, concluding that these cases supported

64. Transcript of Oral Argument, *supra* note 55, at 28–29.

65. *Id*. at 37.

66. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012).

67. Transcript of Oral Argument, *supra* note 55, at 38.

68. *Hosanna-Tabor*, 132 S. Ct. at 706–07.

a ministerial exception.[69] It did not mention *Jones v. Wolf*, the neutrality-centered case that the government had relied on that allowed courts to resolve internal church disputes so long as they could do so using "neutral principles of law."[70] At every point, the government's arguments for neutrality were rejected in favor of separationism.

2. A thoroughly separationist opinion

The *Hosanna-Tabor* Court reached strikingly separationist conclusions, but perhaps more striking was the resemblance between its reasoning and the reasoning of famous separationist precedents.

This similarity is most obviously visible in the Court's use of religion clause history, which shares the following features with the extensive historical accounts in *Everson* and *Engel*:

- A description of some institutional entanglement between church and state, presumed to be oppressive, that was common in Europe during or before the colonial period.[71]
- The claim that this oppressive entanglement was so strongly opposed by the American colonists that it was among the reasons why they left Europe for the New World.[72]
- An extensive focus on James Madison's views of church-state relations.[73]
- The assumption that because Madison and some of his contemporaries opposed a particular church-state entanglement, that entanglement is banned by the religion clauses.[74]

69. *Id.* at 704–06. (citing Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952) and Serbian E. Orthodox Dioceses for U.S. & Can. v. Milivojevich, 426 U.S. 696 (1976)).

70. 443 U.S. 595, 604 (1979).

71. *Hosanna-Tabor*, 132 S. Ct. at 702; *see also* Everson v. Bd. of Educ., 330 U.S. 1, 10–11 (1947); Engel v. Vitale, 370 U.S. 421, 425 (1962).

72. *Hosanna-Tabor*, 132 S. Ct. at 702–03; *see also Everson*, 330 U.S. at 10; *Engel*, 370 U.S. at 427.

73. *Hosanna-Tabor*, 132 S. Ct. at 703–04; *Everson*, 330 U.S. at 12; *Engel*, 370 U.S. at 428.

74. *Hosanna-Tabor*, 132 S. Ct. at 703 (quoting Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1446 (2011) (quoting Flast v. Cohen, 392 U.S. 83, 103 (1968)) (calling Madison "the leading architect of the religion clauses of the First Amendment").

Hosanna-Tabor's separationist historical narrative does differ somewhat from its predecessors. It examines several states rather than focusing exclusively on Virginia,[75] it relies less on the writings of Thomas Jefferson, and it uses post-ratification history as evidence of the meaning of the Amendment, an approach usually associated with the Court's less separationist decisions like *Marsh v. Chambers*.[76] But the basic thrust of the historical argument remains the same: a church-state entanglement should be invalidated because it resembles an English practice that Madison and other early Americans abhorred.

Ultimately, the Court responded to the government's simple theory of the case—namely, that churches should be treated the same as secular expressive associations—with a simple theory of its own, which can be summarized in a very simple, very separationist syllogism:

> *Major premise:* The religion clauses prohibit governments from interfering in church affairs by appointing ministers.[77]
>
> *Minor premise:* Holding a church liable for dismissing a minister would effectively appoint a minister.[78]
>
> *Conclusion:* The Religion Clauses prohibit the government from holding a church liable for dismissing a minister, even if the dismissal violates anti-discrimination laws.

The Court's whole argument was an attempt to define a proper sphere for the church and to keep the state separate from it. At no point did the Court attempt to justify its reasoning in terms of neutrality or equality; in fact, the two words barely appear in the opinion[79]—even though the case concerned anti-discrimination laws, a context where one would expect principles of equality to be paramount.

In summary, the government's decision to attack the ministerial exception with neutrality arguments made *Hosanna-Tabor* an almost

75. *Id*. at 702–03.

76. *Id*. at 703–04; Marsh v. Chambers, 463 U.S. 783, 788–90 (1983).

77. *Hosanna-Tabor*, 132 S. Ct.at 703.

78. *Id*. at 709 ("Perich continues to seek frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney's fees. An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination.").

79. *Id*. at 706–07.

perfect test case for the conventional wisdom that separationism has been replaced by neutrality. And yet the Court forcefully rejected every neutrality argument the government made and chose instead to reach a thoroughly separationist conclusion on thoroughly separationist grounds, making no effort whatsoever to justify its decision in terms of neutrality. It is just one case, but *Hosanna-Tabor* is nevertheless compelling evidence that the Court remains committed to some form of separationism.

If the Court does remain committed to separationism, however, it raises a few questions. Why has separationism's continued vitality gone generally (though not universally) unappreciated? And how is it that the Court can have remained separationist despite having substantially changed its religion jurisprudence and largely abandoned the word "separation"?

C. Problems with the Narrative: The Difficulty of Defining Separationism

1. Separationism's many meanings

The chief reason that scholars' understanding of the rise and fall of separationism is vague and imprecise is that scholars' understanding of separationism itself has been mostly vague and imprecise. Douglas Laycock acknowledged this problem recently, declaring that "the phrase ['separation of church and state'] has no agreed core of meaning that will enable anyone to communicate. . . . [W]e now know that from the phrase alone, without an analysis of context, we have no idea what people mean by it."[80]

If Laycock means that separationism "has no agreed core of meaning" among today's courts and legal scholars, I think he exaggerates slightly.[81] Clearly, separation of church and state means that the government may not establish an official church,[82] and further, nearly everyone associates separationism with a handful of

80. Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1700–01 (2003).

81. If, on the other hand, he means that there is no common meaning of separationism that has been shared across the several centuries in which the term has been used, then he may not be exaggerating at all.

82. EISGRUBER & SAGER, *supra* note 1, at 23 ("The wall metaphor . . . captures a basic institutional difference between the United States and countries such as Great Britain and Iran that recognize an official national church or faith.").

important Supreme Court precedents: *Engel v. Vitale*,[83] *Abington School District v. Schempp*,[84] and so forth. But this core is small, and its hazy penumbras are vast.

This haziness clears when one examines a list of religion clause controversies and asks which position on each controversy is separationist. Are tax exemptions for churches consistent with separationism? Scholars disagree.[85] Does separationism favor or oppose religious exemptions from neutral laws? Again, scholars disagree.[86] Many scholars argue that if a state subsidizes private school education through tuition vouchers, separationism permits it to subsidize only non-religious schools,[87] but according to one eminent scholar, separationism actually *requires* states to subsidize religious schools on equal terms with non-religious ones.[88] Scholars do not even agree on whether separationism is predominantly a principle of Establishment Clause jurisprudence, or whether it matters in Free Exercise cases as well.[89]

Further, when explaining what constitutional purpose separationism is supposed to serve, scholars give radically different

83. Engel v. Vitale, 370 U.S. 421 (1962).

84. Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

85. *Compare* Lupu, *supra* note 8, at 235 (claiming that *Walz* is consistent with separationism), *with* SEHAT, *supra* note 40, at 259–60 (arguing that *Walz* is inconsistent with separationism).

86. *Compare* Lupu, *supra* note 8, at 236–37 (arguing that Free Exercise exemptions are consistent with separationism), *with* Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 688–89 (1980).

87. *E.g.*, Marshall, *supra* note 6, at 484 (giving the reasons of "religious integrity, church-state entanglement, government evaluation of religion, and sectarian divisiveness" as reasons against vouchers); Melissa Rogers, *Traditions of Church-State Separation: Some Ways They Have Protected Religion and Advanced Religious Freedom and How They Are Threatened Today*, 18 J.L. & POL. 277, 316 (2002) ("[W]hile careful governmental regulation and oversight is necessary and appropriate in these contexts, it will seriously degrade religion's independence.").

88. Laycock, *supra* note 7, at 68–73 (explaining Laycock's theory of "substantive neutrality," which he sees as consistent with separationism and which requires religious entities to be subsidized on equal terms with non-religious ones).

89. Many scholars speak of separationism only in the Establishment Clause context. *See, e.g.*, Brett G. Scharffs, *Protecting Religious Freedom: Two Counterintuitive Dialectics in U.S. Free Exercise Jurisprudence*, *in* FREEDOM OF RELIGION UNDER BILLS OF RIGHTS 285, 304–05 (Paul Babie & Neville Rochow, eds., 2012) (discussing separationism in the Establishment Clause context but not the Free Exercise context). Others see separationism as a general statement of proper church-state relations, one that supports particular Free Exercise outcomes as well. *See, e.g.*, EISGRUBER & SAGER, *supra* note 1, at 22–50 (explaining separationism's implications, including for Free Exercise issues like religious exemptions).

answers: religious liberty,[90] equality,[91] preserving "the hegemony of secular ideology in the public square,"[92] or some combination of these. William Marshall lists no fewer than four values that separationism serves.[93] John Witte lists five.[94]

2. Separationism's shared core of meaning

Given all of this confusion, it is tempting to dismiss separationism as a meaningless concept and stop using the term entirely. But this temptation should be resisted. It is clear that the phrase "separation of church and state" does not communicate a single, complete, coherent theory of the Religion Clauses, but it does make several implicit claims about the proper relationship between religion and government—claims that, although increasingly controversial, are broadly shared by authors who consider themselves separationist.

At its heart, "separation of church and state" is a spatial metaphor. The core meaning of the verb "to separate" is to put distance between two objects, "to keep apart or divide, as by an intervening barrier or space."[95] Applying a physical, spatial relationship like separation to abstract concepts like "church" and "state" entails making assumptions about how the physical concept maps onto the abstract domain in question, and these assumptions are the core claims shared by practically all separationist theories.

What are these assumptions? Beginning with the obvious, separationist theories assume that there is something called "church" and something called "state." Further, they assume that "church" and "state" are things that can in principle be recognized and

90. Green, *supra* note 5, at 1121 (arguing that the recent reinterpretation of separationism to serve neutrality is contrary to the historical meaning of the Religion Clauses).

91. *See* NUSSBAUM, *supra* note 2, at 229 ("With . . . the main lines of Establishment Clause jurisprudence in the latter half of the twentieth century . . . I shall suggest that a good guide is the idea of equality."); *see also id.* at 11 ("[T]here was a brief era when the separation idea acquired a momentum of its own and things became unbalanced."); *id.* at 224–72 (explaining the Court's Establishment Clause jurisprudence in terms of equality, beginning with the school prayer cases).

92. Lupu, *supra* note 8, at 249.

93. Marshall, *supra* note 6, at 484–90.

94. John Witte, Jr., *That Serpentine Wall of Separation*, 101 MICH. L. REV. 1869, 1889–91 (2003).

95. *Separate Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/separate?s=t (last visited Aug. 2, 2013).

distinguished from each other, even if the task may be difficult in practice. Though these insights may seem obvious, they actually constitute separationism's first non-trivial claim. The idea that religious ideas, practices, and institutions can be distinguished from non-religious ones has increasingly come under attack in both social scientific and legal literatures.[96] Separationists might respond to this critique in a variety of ways, but if they wish to separate church and state, they cannot abandon the idea that there is in fact a church.

A second non-trivial claim implied by the separation metaphor is that the church not only can be distinguished from the rest of society, but that it ought to be. In other words, if there are other entities in society that do not need to be separated from the state, the church should be treated differently from them. This claim has also come increasingly under attack in recent years, as scholars have disputed whether religion merits any sort of "special treatment."[97] To any theory plausibly claiming to be separationist, the answer must be "yes."

Moving our focus from the words "church" and "state" to the word "separation" yields a third important separationist claim. As pointed out above, separation is a relationship between two objects in space, and it is always reciprocal: it is impossible for an object to be separate from something that is not separate from it. In other words, to separate X from Y is always to separate Y from X. This suggests that separationist theories are similarly reciprocal, advocating both that the state should be protected from church interference and that the church should be protected from state interference.[98] Unlike separationism's first two claims, this claim has always been controversial, with advocates of greater religious influence on government complaining (for example) of a "naked

96. WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 138–39 (2005) (arguing that it is impossible for courts to define "religion" fairly and consistently and that the effort to do so will inevitably disadvantage people with nontraditional or idiosyncratic religious beliefs); Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 807 (2009) (using the difficulty of defining religion as an argument for abandoning separationism).

97. *See, e.g.*, Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 572 (2006).

98. *Cf.* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that *both* religion and government can best work to achieve their lofty aims if *each* is left free from the other within its respective sphere.") (emphasis added).

public square."[99] Recently, this claim has found new attackers: critics of religion who want a thoroughly secular state to regulate religious belief and practice.[100]

To summarize, the separationist metaphor expresses three popular but by no means universally accepted claims:

> 1. First, that there is something called "church" and something called "state," and that church and state can be distinguished from each other and from the rest of society.
>
> 2. Second, that the church ought to be treated differently from other entities that do not need to be separated from the state.
>
> 3. Third, that church and state should each be protected from the other, rather than only one of them being protected.

These three claims are the core of separationism's meaning and are shared by all understandings of separationism of which I am aware. As such, these claims provide a convenient measuring stick for determining whether a scholar's theory or a justice's opinion is separationist. If all three of these claims play an important role in an argument, then the argument is structurally separationist, even if, for whatever reason, the argument's author chooses to avoid the word "separation."

3. The mischief of suppressed assumptions

Identifying these core separationist claims is valuable for another reason: it calls attention to the key point on which separationist theories differ, and thus explains both why there has been such rampant confusion regarding separationism and why the confusion has sometimes gone unnoticed. This key point of difference is the definition and nature of the church.

> 1. If, following the first core claim, the church exists and can be distinguished from the state and the rest of society, what is the church and how do we distinguish it?

99. NEUHAUS, *supra* note 3.

100. *See, e.g.*, SAM HARRIS, THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON (2004).

2. If, following the second and third core claims, the church should be treated differently from other entities in society, what is it about the church that merits this special treatment?

Justice Frankfurter alluded to these questions in his *McCollum* concurrence: "[A]greement, in the abstract, that the First Amendment was designed to erect a wall of separation between church and State, does not preclude a clash of views as to what the wall separates."[101] Yet the mischief that unstated assumptions about the "church" have wrought upon separationist reasoning has not generally been appreciated. There has been some debate between those who understand "church" to mean actual churches[102] and those who think separationism should separate government from religion more broadly.[103] But this church-as-institutions versus church-as-religion-generally debate radically understates the difficulty. "Religion" is a famously amorphous concept, one some scholars have advocated abandoning entirely,[104] and it is unlikely that the various advocates of separating government from religion all have the same idea of "religion" in mind.

To give one of many possible examples, from the nineteenth century through the 1960s, many Protestant separationists supported prayer and Bible study in public schools on the grounds that such practices were not actually religious.[105] To them, "religion" was synonymous with sectarianism—that is, it consisted primarily of the beliefs and practices that divide denominations from each other.[106] Because everyone was assumed to accept prayer and Bible study, these practices were considered part of "general Christianity" or the "Judeo-Christian tradition" rather than part of religion, and they were therefore permitted in schools as a form of moral education. Today's courts and scholars are probably unanimous that

101. *McCollum*, 333 U.S. at 213 (Frankfurter, J., concurring) (internal quotation marks omitted).

102. *See, e.g.*, Derek H. Davis, Editorial, *Separation, Integration, and Accommodation: Religion and State in America in a Nutshell*, 43 J. CHURCH & ST. 5, 9–10 (2001).

103. *See, e.g.*, *McCollum*, 333 U.S. at 212 ("The First Amendment rests upon the premise that *both* religion and government can best work to achieve their lofty aims if *each* is left free from the other within its respective sphere.")(emphasis added)).

104. *E.g.* SULLIVAN, *supra* note 96, at 138–39.

105. STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE (2012).

106. This definition was not neutral, of course—that it allowed Protestants but not Catholics to use public schools for religious education was one of its chief attractions.

prayer and Bible study are religious practices, but that does not mean that courts and scholars have any shared understanding of why prayer and Bible study are religious, or how to distinguish between religious and non-religious beliefs, symbols, practices, and so forth. Drawing such a distinction is often extremely difficult, and cases that turn on the distinction between religion and non-religion still reach the Court regularly.[107]

As a result of this confusion, two people might agree that church and state ought to be separated, and agree that by "church" they mean all of religion, and yet lack a common understanding of "religion" and disagree on the correct outcome of every religion clause controversy in the last seventy years—possibly without even noticing their disagreement. On the other hand, they might disagree in principle about separationism and yet interpret the religion clauses in very similar ways, possibly without noticing their agreement. And as I will argue below, the conventional story of separationism's decline makes both of these mistakes.

As I will argue in Parts III through V, the conventional story assumes too much similarity between the Court's early separationism and its strict separationism of the 1970s, possibly because the Court in both eras used separationist rhetoric in its opinions. Further, it fails to acknowledge the similarities between the Court's early separationism and its current approach to the Religion Clauses, possibly because the Court no longer uses separationist rhetoric as often as it once did. Nevertheless, that the Court avoids separationist rhetoric does not mean that it eschews separationist reasoning. Part III makes this case with respect to the Court's Free Exercise jurisprudence, and Parts IV and V make the same case in the more complicated context of the Establishment Clause.

107. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984) (challenging a nativity scene in a city holiday display); Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (deciding the constitutionality of a crèche in county courthouse); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (challenging school district policy requiring recitation of Pledge of Allegiance); Van Orden v. Perry, 545 U.S. 677 (2005) (challenging monument inscribed with Ten Commandments on state capitol grounds); McCreary Cnty. v. ACLU, 545 U.S. 844 (2005) (deciding constitutionality of Ten Commandments posted in a county courthouse).

III. THE NEW FREE EXERCISE SEPARATIONISM: PROTECTING RELIGIOUS BELIEF

According to the conventional narrative, Free Exercise separationism aimed to leave every aspect of Americans' religious lives as free as possible from government influence, to "minimiz[e] . . . the government's influence over personal choices concerning religious beliefs *and practices*."[108] This principle guided the Court's most important separationist Free Exercise decisions, *Sherbert* and *Yoder*, which established that government may not burden religious practices unless doing so is the only way to achieve a compelling state interest.[109] Protecting religious practice with the compelling interest test is often presented as an inevitable implication of the separationist idea,[110] a consummation towards which the Court's early separationist decisions were clearly working.

I disagree. The compelling interest test of *Sherbert* and *Yoder* was indeed a flowering of separationist ideas planted in the Court's earlier decisions, but it was not the only flower that might have grown from those seeds. In reasoning from the idea of separation to the compelling interest test as *Yoder* applied it, the Court had to make a crucial and debatable assumption: that the "church" from which the "state" should be separated includes all religious practices rather than only some religious practices, or only religious institutions, or only religious belief.

This Part argues that the Court's early decisions did not make this key assumption, and instead focused its separationism specifically on religious belief and on the practices and institutions through which individuals develop their religious beliefs. This Part then describes the problems that arose from the Court's broad understanding of the "church" in the 1960s and 1970s. Finally, this Part argues that the Court's decisions in *Smith* and *Church of the Lukumi Babalu Aye v. City of Hialeah*, which are generally understood as abandoning Free Exercise separationism for neutrality, actually had a more subtle effect of dividing Free Exercise

108. Laycock, *supra* note 7, at 69 (emphasis added) (Esbeck, supra note 4, at 25.

109. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

110. *E.g.*, Laycock, *supra* note 7, at 69 ("Minimizing government influence is consistent with the central meaning of separation—it maximally separates government power and influence from religious belief and practice.").

jurisprudence into two separate doctrinal realms: one governed by separationism, concerning itself with religious belief and the institutions and practices that shape belief; and the other governed by neutrality and protecting other aspects of religion from government discrimination.

A. From Cantwell *to* Sherbert*: The Narrow Church of Belief*

Between 1937 and 1960, the Court laid the foundations of modern Free Exercise jurisprudence, deciding over two dozen claims by religious claimants under the Free Exercise and Free Speech Clauses.[111] Separationism was not the only idea on the Court's mind in these cases, but the justices were nevertheless functionally separationist, delineating a religious sphere within which religion could exist free of government interference. And the principle that guided this delineation was that of individuals' freedom of religious belief (discussed in III.A.1 below).

But, the Court recognized that, for individuals' choice of religious beliefs to be truly free, they must also be free to hear new ideas, to speak their minds (III.A.2), and to associate with like-minded people (III.A.3). These insights have long been the core of First Amendment jurisprudence generally, and their application to Religion Clause controversies has been particularly strict, often providing greater protection for the formation and spread of religious beliefs than for non-religious ideas.

However, the freedom to form one's religious beliefs does not depend on the freedom to act on those beliefs. It is therefore unsurprising that the Court's separationism in this era provided little protection for what are now often called claims of religious conscience—that is, claims that a person should not have to obey a particular law because doing so would be contrary to her religious beliefs. The Court's early unwillingness to validate such claims is discussed in Subsection III.A.4.

1. Protecting belief itself

Few Supreme Court cases in any era have dealt with actual prohibitions on belief, likely because of the difficulty of prohibiting

111. For a list, see Appendix Three of JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 305 (3d ed. 2011) (listing all "Supreme Court decisions relating to religious liberty" up to 2010).

belief itself rather than expressions of it. But the Supreme Court's early separationism made it clear that the freedom to choose one's religious beliefs is absolute—even more protected than the freedom to choose one's beliefs in other contexts.

This preferential treatment appears in the Court's 1944 decision *United States v. Ballard*, in which the leaders of a small religious movement were indicted for fraud on the theory that they had obtained money from their followers by making dishonest claims to divine visitations and miraculous healing powers.[112] The Court permitted the indictment, but—contrary to standard practice in fraud cases—forbade juries from passing judgment on whether the defendants' claims were true or false:

> Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.[113]

In addition to protecting believers from inquiries into the truthfulness or falsity of their religious beliefs, the Court later protected believers from having to deny their religious belief by making oaths contrary to it. Because it was difficult to determine whether such oaths are constitutionally protected statements of belief, rather than actions that could be freely regulated, protection on this point was not entirely consistent: in 1945 the Court allowed Illinois to deny bar membership to applicants who would not swear to serve in the militia during wartime.[114] But the very next year, the Court struck down the requirement that candidates for naturalized citizenship swear to fight for the United States,[115] and the Court's approach to oaths contrary to a claimant's religion has generally

112. United States v. Ballard, 322 U.S. 78 (1944).

113. *Id*. at 86 (citations omitted).

114. *In re* Summers, 325 U.S. 561, 570–73 (1945) ("It is impossible for us to conclude that the insistence of Illinois that an officer who is charged with the administration of justice must take an oath to support the Constitution of Illinois and Illinois' interpretation of that oath to require a willingness to perform military service violates the principles of religious freedom which the Fourteenth Amendment secures against state action . . . .").

115. Girouard v. United States, 328 U.S. 61 (1946).

followed its famous words in *West Virginia Board of Education v. Barnette*:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[116]

This idea—that government may not establish a religious orthodoxy but must rather allow individuals to form their own religious opinions—was indeed the "fixed star" of the Court's early separationism.

2. The right to preach

Just as democracy depends on free public debate,[117] individuals' freedom of religious belief cannot be meaningfully exercised if other individuals cannot preach or otherwise spread their own beliefs. This freedom to preach and proselytize was the subject of a large majority of the Court's religion decisions in the early separationist era, decisions that formed the basis of modern Free Speech law.[118]

It is unnecessary to go into detail about these decisions. It suffices to say that in order to protect the free development of religious belief, the Court established constitutional protections for believers to proselytize from door to door,[119] solicit funds for religious purposes,[120] distribute religious literature,[121] display

116. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *see also* Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (striking down Maryland's requirement that state officers declare a belief in God because "neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion") (internal quotation marks omitted).

117. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (3d ed. 2004).

118. By my count, the Court decided an astonishing twenty-two cases concerning proselytism or other public preaching between 1938 and 1953—about 1.5 cases per year—from *Lovell v. City of Griffin*, 303 U.S. 444 (1938), to *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

119. Martin v. City of Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943).

120. Cantwell v. Connecticut, 310 U.S. 296 (1940).

121. Jones v. City of Opelika, 319 U.S. 103 (1943); *Lovell*, 303 U.S. 444.

supposedly sacrilegious films,[122] and hold religious parades and public assemblies.[123]

Many of these protections were grounded in the Free Speech and Press Clauses, rather than the Free Exercise Clause, but with respect to the cases' religious claimants, the purpose and effect of the decisions was clearly separationist. Legislatures could not use censorship to protect favored religious beliefs from criticism,[124] they could not give executive officials discretion that effectively allowed them to block the teaching of disfavored religious views,[125] and they could not tax the delivering of sermons and distribution of religious literature except to recoup the public expenses occasioned by the religious speech.[126]

In the language of *Cantwell*, the "essential characteristic" of these new constitutional rights is "that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed."[127] Effectively, these decisions made religious speech part of the "church" from which government needed to be kept scrupulously separate.

3. Church autonomy

Finally, the Court's early decisions concerning separation of church and state protected actual churches as well as individuals' beliefs and religious speech. Faced with a New York law that transferred authority over New York's Russian Orthodox congregations away from the Patriarch of Moscow, the Court determined that to intervene in church affairs in such a manner "violate[d] our rule of separation between church and state."[128] Churches should have "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy . . . must now be

122. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

123. Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Cox v. New Hampshire, 312 U.S. 569 (1941).

124. *Joseph Burstyn, Inc.*, 343 U.S. 495.

125. Largent v. Texas, 318 U.S. 418, 418 (1943); *Cantwell*, 310 U.S. at 308.

126. Murdock v. Pennsylvania, 319 U.S. 105 (1943) (invalidating a tax); Follett v. Town of McCormick, 321 U.S. 573 (1944) (invalidating a tax); Poulos v. New Hampshire, 345 U.S. 395 (1953) (permitting license fees that pay for city expenses incurred because of the constitutionally protected activity).

127. *Cantwell*, 310 U.S. at 310.

128. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 110 (1952).

said to have federal constitutional protection as a part of the free exercise of religion against state interference."[129] As in *United States v. Ballard*, the Free Exercise Clause gave religious claimants preferential treatment over non-religious ones.[130]

4. Minimal protection for religious practice

As the foregoing discussion shows, the Court—by espousing doctrines protecting individuals' rights to believe, preach, and assemble, as well as churches' right to choose their representatives—marked off a robust church sphere including most of the key practices and institutions through which individuals form their religious beliefs.[131] But outside this sphere, the Court showed little interest in accommodating religious practice, acknowledging in *Cantwell* that "the Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[132]

This contrast can be seen most clearly in the flag salute cases, *Gobitis* and *Barnette*. When the Court understood the Jehovah's Witnesses to be requesting an exception from a law regulating conduct, it rejected their claim by a vote of eight to one: "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[133] But three years later the Court granted an identical claim because it no longer understood the flag salute laws as regulations of conduct. Instead, it saw them as an effort to enforce belief in a political orthodoxy.[134] The Jehovah's Witnesses' beliefs did not permit them to act contrary to the law, but they could not be required to abandon the beliefs themselves.

129. *Id*. at 116; *see also* Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969).

130. *See* discussion *supra* Part III.A.1.

131. The most glaring omission—parents' religious education of their children—had already received protection in *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925), and would gain further protection still in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

132. *Cantwell*, 310 U.S. at 303–04.

133. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 (1940).

134. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

The Court repeated this process in two cases concerning oaths to serve in the military. In 1945's *In re Summers*, the Court allowed Illinois to deny bar membership to those who would not swear to join the militia in time of war.[135] The Court had already rejected the claim that there was a constitutional right not to join the military;[136] why should there then be a constitutional right not to promise to join the military?[137]

Yet the very next year, the Court concluded that a citizenship application should not be denied merely because the applicant was a religious pacifist.[138] The Court's decision was statutory rather than constitutional, but it still invoked the First Amendment and recharacterized oaths promising to serve in the military as a matter of belief, not conduct: "Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. The test oath is abhorrent to our tradition."[139]

These cases demonstrate how sharply the Court distinguished between claims to constitutional protection for religious belief and claims to protection for religious practice—in effect showing that belief was part of the church from which government needed to be separated, and that practice was not.

5. Summary

At no point in this era did the Court give anything like a complete theoretical account of its separationism, with definitions of the church and state and a comprehensive statement of why this set of religious practices, and no others, should be protected. It also did not always take care to show how its decisions fit together; in particular, its crucial church autonomy decision in *Kedroff* rests more on the mere words "separation between church and state" than on any effort to show how the Free Exercise principles articulated in earlier cases applied to churches' internal governance structures. Nor did the Court always understand its decisions in the precise light I am presenting them in here. For example, *Cantwell* presented itself as a decision concerning religious conduct rather than (as I have

135. *In re* Summers, 325 U.S. 561, 570–72 (1945).

136. Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 261–65 (1934).

137. *Summers*, 325 U.S. at 572.

138. Girouard v. United States, 328 U.S. 61 (1946).

139. *Id.* at 69 (citations omitted) (internal quotation marks omitted).

argued) a decision about religious speech and therefore more closely related to belief than to conduct.[140]

Yet in retrospect, the Court's decisions make its goals very clear. Because the Court wanted to protect individuals' freedom to choose their own religious beliefs, it forbade governments from enforcing orthodoxies, whether through pledges and oaths or through jury determinations that certain religious beliefs are false. Further, because individuals are not free to choose religious beliefs they have never heard, the Court forbade governments from interfering with the teaching of religious beliefs or with churches' choice of clergy to formulate and preach their religious beliefs. On the other hand, the Court refused to strike down laws that burdened religious conduct unless they interfered with the formulation or expression of belief. At every point, the Court's Free Exercise decisions aimed to separate the state from the church, as the Court understood it—that is, to separate the state from the set of institutions and practices necessary for the free development of individual belief.

B. Seeger *and* Yoder*: The Impossibly Broad Church*

The narrow church of belief had the advantage of relative clarity—institutions and practices necessary for the free development of religious belief were protected, and other institutions and practices were not—but there were reasons to be unsatisfied with its narrow scope. In particular, "general law[s] not aimed at the promotion or restriction of religious beliefs"[141] often did in fact restrict religious beliefs through their disparate impact, burdening people who held one set of beliefs much more than people who held other beliefs. The Court noticed this problem in 1961's *Braunfeld v. Brown*, in which Jewish business owners complained that because of their Sabbatarian beliefs, Sunday closing laws effectively forced them to stay closed for two days per week, possibly destroying their businesses' economic viability.[142]

The Court denied the business owners relief, as one would have expected from its earlier decisions, but the plurality's reasoning

140. I am not alone in this interpretation. *Cf.* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990) (claiming that *Cantwell* was not merely about "religiously motivated action" but also about free speech and a free press).

141. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 (1940).

142. Braunfeld v. Brown, 366 U.S. 599 (1961).

departed from its treatment of religiously motivated conduct in *Gobitis* and *Summers*. The opinion did apply classic narrow-church separationist principles to the case, quoting Jefferson's "wall of separation" letter and appealing to the well-worn distinction between belief and conduct, concluding that it would be impossible to invalidate every conduct-regulating law "that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions."[143] But the Court innovated by going on to suggest that if the state could have achieved its goal of establishing a day of rest without burdening conduct "in accord with" or "demanded by" the claimants' religious beliefs, then the burden on their religious practice would have been impermissible.[144]

Two years later, *Braunfeld*'s suggestion became *Sherbert*'s compelling interest test, and the Court established that the sphere of protected religious practices now included all "conduct prompted by religious principles" that did not "pose[] some substantial threat to public safety, peace or order."[145] All other religious practices would be protected by the compelling interest test, and it seemed that the Court was actually willing to take the test seriously. *Braunfeld* may have deferred to the state legislature on the crucial question of whether the state's interest might be achieved by some less burdensome means,[146] but *Sherbert* showed no such deference.[147]

If *Sherbert* had been consistently followed, it would have meant a massive expansion of the church that separationism was committed to protect. The set of practices and institutions necessary to allow for the free formation of religious belief is fairly limited—preaching, reading, publishing, associating—but the set of actions that might be prompted by religious belief can include literally anything: if anyone could possibly want to do a thing, someone might want to do it for religious reasons.

143. *Id*. at 606.

144. *Id*. at 603–04.

145. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

146. *Braunfeld*, 366 U.S. at 608 ("[I]n [a previous case], we examined several suggested alternative means by which it was argued that the State might accomplish its secular goals without even remotely or incidentally affecting religious freedom. We found there *that a State might well find* that those alternatives would not accomplish bringing about a general day of rest. We need not examine them again here.") (emphasis added) (citations omitted).

147. *Sherbert*, 374 U.S. at 403.

The breadth of this nearly infinite religious sphere was only expanded by the Court's general policy of treating all individual conscientious belief as religious principle whether it is conventionally religious or not. Prior to *Sherbert*, in *United States v. Seeger*, the Court had been willing to grant conscientious objector status based on "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God" of conventional believers.[148] Quoting theologian Paul Tillich, the Court suggested that religion is whatever happens to be a person's "ultimate concern, . . . what [she] take[s] seriously without any reservation."[149] The Court would later allow for similar breadth in applying the compelling interest test, holding that a Free Exercise claim could be based on a person's own interpretation of his religious principles rather than needing to derive from the consensus of a faith community.[150]

Further, if this nearly infinite religious sphere were actually protected by the full force of the compelling interest test, it would have had an immense impact on American law, potentially requiring strict scrutiny in a breathtaking number of cases involving government actions that, on their face, had nothing to do with religion. Faced with the prospect of applying such a demanding test to such a broad religious sphere, the Court quickly found ways not to apply the *Sherbert* test as broadly or as strictly as *Sherbert* had suggested.[151] But in the end, this was not enough, and the potential unruliness of the *Sherbert* regime led the Court to abandon *Sherbert*'s broad understanding of the religious sphere.

C. Smith, Lukumi*, and* Hosanna-Tabor*: Back to the Church of Belief*

Smith is sometimes presented as the end of Free Exercise separationism, and *Lukumi* as separationism's replacement by ideas of religious equality and neutrality. The decisions themselves provide good reasons for this interpretation: neither majority opinion mentions the separation of church and state, both give the idea of neutrality a prominent place in their reasoning, and *Lukumi* is

148. United States v. Seeger, 380 U.S. 163, 176 (1965).

149. *Id.* at 187.

150. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715–16 (1981).

151. *See* discussion *supra* Part II.A.

obviously concerned with the problem of religious discrimination.[152] And, of course, the decisions turned separationist Free Exercise jurisprudence on its head, radically curtailing the circumstances in which the compelling interest test protects religious practice and thus leaving religion much more open to government interference than the broad-church separationism of the 1970s would have permitted.

There are, however, two problems with concluding on this basis that Free Exercise separationism is dead. The first is that separation and neutrality are not mutually exclusive concepts; indeed, each implies some form of the other.[153] In order to be separated from religious belief, the state must treat all religious beliefs equally. On the other hand, in order to be neutral among religions, the state must avoid establishing religious orthodoxies or, in other words, it must be separated from matters of religious belief. Further, even if the Court's version of separationism and its version of neutrality are ultimately at odds, that does not mean that the two doctrines cannot coexist in its jurisprudence. The Court may consider separationism appropriate in one context and neutrality appropriate in another, which is perhaps the most straightforward way to understand the conflict between *Smith* and *Hosanna-Tabor*.

The second problem is that *Smith* and *Lukumi*, important as they are, are still just two cases, both dealing with criminal prohibitions of religious rituals. Though they presented themselves in sweeping terms as general statements of the meaning of the Free Exercise Clause, so too did *Sherbert* and *Yoder*, and yet the *Smith* Court easily narrowed those cases almost to nothing when it thought their holdings should not be applied in a new context. The Court seems to be giving *Smith* a gentler version of the same treatment: when the Court has been asked to apply *Smith* in new contexts—distribution of religious literature[154] and churches' choice

152. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

153. *Cf.* Green, *supra* note 5 (pointing out that neutrality can be a tool of separationism or separationism can be a tool of neutrality and arguing that separation, not neutrality, should be the dominant idea).

154. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 159, 169 (2002) (reversing the Sixth Circuit's decision to uphold an ordinance because it was neutral and generally applicable).

of their ministers[155]—it has refused, finding reasons to grant relief to religious claimants that *Smith* and *Lukumi* would have denied.

To state this point more precisely, the protected church sphere prior to *Smith* and *Lukumi* included religious belief, the expression of religious belief, institutions that spread religious belief, and actions prompted by religious belief. *Smith* and *Lukumi* dealt only with the last category—actions prompted by religious belief—leaving it an open question whether separationism still protected the other aspects of the church.

The purpose of this Section is to argue that the Court retains some commitment to using separationist principles to protect these other aspects of the church, demonstrating the Court's continuing commitment to protecting religious belief (III.C.1), religious expression (III.C.2), and the autonomy of religious institutions (III.C.3). It will also argue that much of the Court's concern with religious discrimination is perfectly consistent with its new separationism.

1. The sharp distinction between belief and conduct

Smith is often understood as turning Free Exercise jurisprudence into a bare equality regime,[156] but its actual effect was to reject *Sherbert*'s expansion of the protected church and return to the narrow, belief-centric church of its early separationist cases. This can be seen most clearly in its adoption of the stark distinction between belief and conduct that the Court had originally articulated in its first Free Exercise case, *Reynolds v. United States*,[157] and recognized again in *Cantwell* and subsequent cases. Though *Smith* sharply reduced the protection afforded to religious conduct, it affirmed that belief remains absolutely protected:

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all governmental regulation of religious *beliefs* as such. 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

155. *See* discussion of *Hosanna-Tabor supra* Part II.C.

156. *See* discussion *supra* Part II.A.

157. Reynolds v. United States, 98 U.S. 145 (1878).

> to one or the other side in controversies over religious authority or dogma.[158]

This is an eminently separationist sentiment, entirely consistent with the argument from Jefferson's famous "wall of separation" letter that "the legitimate powers of government reach actions only, & not opinions."[159]

Smith's special solicitude for religious beliefs can also be seen in its reasoning. Perhaps the chief reason *Smith* rejects *Sherbert*'s compelling interest test is the fear that believers will be able to excuse themselves from whatever laws they wish—and among the chief reasons for this fear is the Court's respect for religious beliefs, which prohibits it from interrogating religious beliefs to distinguish between important and unimportant practices.[160] It is even possible to understand *Smith*'s treatment of *Sherbert* in this light: to *Smith*, the real problem with denying unemployment compensation to Adell Sherbert may not have been that it burdened her religious practice, but that it involved a determination that her religious beliefs were not "good cause" for rejecting potential employment.[161]

Further, this special concern for religious belief can be seen in the way *Smith* and *Lukumi* conceive of the Free Exercise Clause's protection for religious conduct. According to these cases, laws burdening religious conduct are constitutionally suspect only if they are not neutral and generally applicable—that is, if their purpose is to harm a particular religion or if their burden falls primarily on religious claimants.[162] According to *Smith*,

> a State would be "prohibiting the free exercise [of religion]" if it sought to ban . . . acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example,

158. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990) (citations omitted) (internal quotation marks omitted).

159. *Letter from Thomas Jefferson to Danbury Baptist Association* (Jan. 1, 1802) *in* 57 LIB. CONGRESS INFO. BULL., June 1998, http://www.loc.gov/loc/lcib/9806/danpre.html.

160. *Smith*, 494 U.S. at 886–87.

161. *See id.* at 884.

162. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–42 (1993) (neutrality analysis, focused on purpose); *id.* at 542–46 (general applicability analysis, concerned with disparate impact).

> to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.[163]

Regulations burdening religious conduct are unconstitutional if their purpose or predominant effect is government antagonism toward particular religious beliefs. This shows a special degree of concern for religious beliefs that the Court does not show for other types of belief—for example, hate crimes legislation does not become constitutionally suspect by targeting the beliefs of racists.

2. The freedom to preach

The Court's continued commitment to the free dissemination of religious beliefs is somewhat less obvious, having become obscured by its increasing commitment to the free dissemination of all beliefs—claims that would once have been brought simultaneously under the Free Speech, Free Press, and Free Exercise Clauses are now often decided solely on the basis of Free Speech doctrine.[164]

Nevertheless, the Court has continued to recognize that religious speech merits constitutional protection, possibly more protection than at least some other forms of speech. In *Smith* itself, religious speech was recognized as a hybrid right—that is, a form of religious conduct that merited extra constitutional protection because it implicated another constitutional provision (free speech) in addition to the Free Exercise Clause.[165] The idea of hybrid rights is controversial,[166] and its influence on subsequent cases has been somewhat limited,[167] but it is interesting to note that all three of the potential hybrid rights recognized in *Smith*—religious speech, the right of parents to direct their children's religious education, and the right of believers to form religious associations—have to do with the dissemination and inculcation of religious beliefs.[168]

163. *Smith*, 494 U.S. at 877–78.

164. *E.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (the words "free exercise" do not appear in any of the Court's opinions, and the word "religion" appears once).

165. *Smith*, 494 U.S. at 881.

166. *See* Note, *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494, 1494–96 (2010) (quickly summarizing the debate over hybrid rights).

167. Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN. ST. L. REV. 573, 573–74 (2003).

168. *Smith*, 494 U.S. at 881–82.

Another indication of the importance of religious speech came in 2002's *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, in which the Court relied on its long history of protecting door-to-door proselytism to invalidate a city ordinance because of the burden it placed on advocacy of both religious and nonreligious causes. John Witte and Joel Nichols understand this decision as affirming *Cantwell*'s standard of intermediate scrutiny for laws burdening religious speech.[169]

At the very least, however, the Court has recognized that religious speech deserves as much protection as other speech. *Widmar v. Vincent*,[170] *Lamb's Chapel v. Center Moriches Union Free School District*,[171] and *Rosenberger v. Rector of the University of Virginia*[172] are generally known as anti-separationist cases,[173] but when seen from a Free Exercise perspective, they have an important separationist effect: protecting the dissemination of religious beliefs by requiring the government to give religious speech access to the same public fora available for non-religious speech.

3. Church autonomy

The final area in which the Court has proved itself still committed to narrow-church separationism is churches' right to govern themselves. As discussed in Section II.C above, the Court showed this aspect of its commitment most clearly in *Hosanna-Tabor*, where it held that *Smith*'s rule of neutrality applied only to "outward physical acts" and not to "internal church decision[s] that affect[] the *faith* and mission of the church itself."[174]

Hosanna-Tabor's concern for the formation of religious belief was explicit in the Court's opinion:

> The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of

169. WITTE & NICHOLS, *supra* note 111, at 136–37.

170. 454 U.S. 263 (1981).

171. 508 U.S. 384 (1993).

172. 515 U.S. 819 (1995).

173. EISGRUBER & SAGER, *supra* note 1.

174. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012) (emphasis added).

> control over the selection of those who will personify its *beliefs*. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own *faith* and mission through its appointments.[175]

This concern for the free formation of religious belief, as well as the distinction drawn between belief and practice, corresponds closely to the Court's early separationism, which protected actions and institutions necessary for the formation of religious belief but not those that are merely expressions of religious belief.[176]

4. Summary

Although much about the evolution of the Court's Free Exercise jurisprudence fits the conventional narrative of a shift from separationism to equality, the Court continues to provide special protections for religious belief and for the institutions and practices necessary for the free formation of religious belief.

This can be seen in *Smith*'s insistence that regulation of religious belief is absolutely prohibited, in *Lukumi*'s prohibition of laws targeting conduct motivated by religious belief, and in the continuing influence of *Ballard*, all of which demonstrate that the Court still considers religious belief deserving of special constitutional status. It can also be seen in *Watchtower*'s heightened scrutiny of laws burdening religious speech and in the Court's insistence on keeping public fora open to religious speech, both of which demonstrate that the free dissemination of religious ideas remains an important constitutional goal. And it can be seen very clearly in *Hosanna-Tabor*, which drew a sharp distinction between physical actions motivated by religious teachings and decisions by churches that affect the content of their teachings.

In short, the Court has not abandoned separationism in its Free Exercise jurisprudence. It has merely narrowed the church it aims to protect.

175. *Hosanna-Tabor*, 132 S. Ct. at 706 (emphasis added); *see also id.* at 713 (Alito, J., concurring) ("A religious body's control over [its ministers] is an essential component of its freedom to *speak in its own voice*, both to its own members and to the outside world. The connection between church governance and the *free dissemination of religious doctrine* has deep roots in our legal tradition . . . .") (emphasis added).

176. *See supra* Part III.A.

IV. THE NEW SEPARATIONISM: A NARROW CONCEPTION OF THE "CHURCH"

Free Exercise jurisprudence is a useful context for explaining the expansion and subsequent contraction of the Court's understanding of the church because the changes in the church's scope are so easily visible in the doctrine: prior to *Smith*, actions motivated by belief were part of the "church"; in *Smith*, the "church" shrank and stopped including them. But the Establishment Clause is more strongly associated with separationism, and changes in Establishment Clause doctrine are the primary reason most people assume that separationism is in decline. If the apparent decline of separationism is in fact a narrowing of the Court's understanding of the church, then this narrowing should be able to explain changes in Establishment Clause jurisprudence as well as Free Exercise.

However, the way the shrinking church has influenced Establishment Clause jurisprudence is somewhat more complicated than its influence on Free Exercise Clause cases—in part because Establishment Clause jurisprudence is just more complicated than Free Exercise[177]—and its similarities to the Court's early separationist decisions are less direct. Whereas the Court's narrower conception of the church has led its Free Exercise doctrine more or less back to where it was before the 1960s, the Court's new Establishment Clause doctrine is more like a variation on an earlier theme, a new development of ideas that were present in early separationist decisions but rejected by the strict separationism of the 1970s.

The Sections that follow trace this story through the Supreme Court's direct aid cases, while Part V examines indirect aid cases. Section IV.A argues that the Court's early Establishment Clause separationism proposed a number of ways of defining the church (for direct aid purposes) without settling on one. Section IV.B argues that the Court's strict separationism of the 1970s employed a broadened understanding of the church to strike down aid that the earlier separationism might have permitted. Finally, Section IV.C argues that the Court has since abandoned this effort to broaden the church, and that its new, narrower conception of the church has led to a loosening of restrictions on aid to religious institutions.

177. WITTE & NICHOLS, *supra* note 111, at 170 ("The Court's establishment clause cases are even more confusing than [its] free exercise cases . . . .").

A. Restricting Aid to Religious Institutions

Early Establishment Clause separationism shared the goal of its Free Exercise cousin: protect the free formation of individual belief. What it added was a historical narrative about how the Establishment Clause was intended to serve this purpose. This narrative centered on the English and colonial governments' practice of supporting ministers out of tax funds and regulating religious teaching and practice. According to the narrative, this practice "shock[ed] the freedom-loving colonials into a feeling of abhorrence," leading them to the "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."[178] This conviction led to disestablishment in Virginia and then to the enactment of the federal Establishment Clause.[179]

Though this narrative may not accurately portray the church-state debates in the 1780s that led to the Establishment Clause,[180] it does vividly express the Supreme Court's concerns in the 1940s and the following decades. The Court feared that if government were allowed to aid religion, it would lead to religious conflict, as religious groups would fight to use government to fund their own institutions and suppress the religious teachings of other groups.[181] The Court also opposed government influence on the development of religious belief in society,[182] and found it immoral that taxpayers' money

178. Everson v. Bd. of Educ., 330 U.S. 1, 11 (1947).

179. *Id*. at 11–13.

180. *See* Steven K. Green, *A "Spacious Conception": Separationism as an Idea*, 85 OR. L. REV. 443, 450 (2006); *see generally* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2004).

181. *Everson*, 330 U.S. at 9 ("With the power of government supporting them . . . Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews."); Engel v. Vitale, 370 U.S. 421, 429 (1962) (Early Americans "knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power.").

182. *Everson*, 330 U.S. at 12 ("Almighty God hath created the mind free . . . ."); *id*. at 41 n.29 (Rutledge, J., dissenting) ("[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?") (internal quotation

should be used to support the teaching of religious beliefs—particularly beliefs with which they disagreed.[183] (This last concern was particularly important to the strictly separationist dissenting Justices.)[184] All of these problems pointed toward the same solution: a constitutional prohibition on government aid to religion.

This solution, however, led to a more intractable problem: religious people and institutions are not solely religious. They are also people and institutions, and as people and institutions not only depend on government aid but frequently have a constitutional right to it. As *Everson* put it, government may not permissibly

> hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.[185]

The "difficulty" lay "in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion."[186] In other words, the difficulty lay in defining the church from which the state had to be kept separate—in distinguishing between situations in which aid goes to religion itself, and is therefore impermissible, and situations in which aid goes to people or institutions that happen to be religious, and is therefore permissible.

It would not be accurate to say that the Court had no answer to this question; indeed, already in *Everson* it had several answers and could not bring itself to say which of them was correct. All of them did have one thing in common: like the Court's Free Exercise separationism, each solution presumed that the core of religion was

marks omitted); *Engel*, 370 U.S. at 429 ("Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs.").

183. *Everson*, 330 U.S. at 12 (noting that Madison's Memorial and Remonstrance "eloquently argued . . . that no person, either believer or non-believer, should be taxed to support a religious institution of any kind . . . "); *id.* at 13 ("[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . . .").

184. *Id.* at 44–45 (Rutledge, J., dissenting).

185. *Id.* at 16 (majority opinion).

186. *Id.* at 14.

the teaching of religious belief, and each aimed to keep government separate from the teaching of religious belief.[187] But these answers took varying approaches to determining when aid was actually going to the teaching of religious belief and when it was not. One of these possible answers—a distinction between direct and indirect aid—is discussed in Part V. The others appear in the paragraphs below.

Purpose. The *Everson* Court opposed aid "designed to support institutions which teach religion,"[188] and its Due Process analysis acknowledged that New Jersey's bus subsidy was "legislation intended to facilitate the opportunity of children to get a secular education" and served a "public purpose."[189] Nevertheless, the Court did not suggest that all aid with a secular purpose is permissible, and for good reason: the practice of establishing a religion for purely political purposes goes back millennia.

Neutrality. In *Everson*, the Court emphasized repeatedly that the program of aid was neutral with respect to religion, saying that it did "no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[190]

Writing in dissent, Justice Jackson expressed an understanding of separationism that combined the ideas of secular purpose and religious neutrality with a pair of vivid examples:

> A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid "Is this man or building identified with the Catholic Church?"[191]

187. This prefigured the Court's concern in later cases that public aid should not be used for religious instruction and that the government itself should not be engaged in religious instruction. *See* Lee v. Weisman, 505 U.S. 577 (1992); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). It also fit the Court's historical claim that the government-paid ministers were among the primary evils the Establishment Clause was intended to prevent.

188. *Everson*, 330 U.S. at 14.

189. *Id*. at 7.

190. *Id*. at 18.

191. *Id*. at 25 (Jackson, J., dissenting).

Yet the Court left unclear whether aid to religious institutions was always permissible if it had a secular purpose and was religiously neutral. Instead, it mentioned at least one more potential criterion for distinguishing between permissible and impermissible aid:

"Marked off from the religious function." Unlike Justice Jackson, the majority saw police and fire protection and the provision of roads and public utilities as permissible not merely because they were neutral and had a secular purpose, but because they were "separate" and "indisputably marked off from the religious function."[192] This distinction—between aid closely related to the teaching of religion and aid "marked off from" it—would be echoed in the Court's later cases.

To summarize: the Court's early separationism aimed to avoid religious conflict, to insulate the teaching of religion from government influence, and to prevent taxpayers' money from being spent on the teaching of religion. The Court pursued these goals by (among other things) announcing restrictions on aid to religious institutions, but it did not make clear how to distinguish between aid to religion, which was impermissible, and aid to the general public, which was permissible even though religious groups would inevitably benefit from it. The *Everson* Court emphasized that, in order to be permissible, aid had to be religiously neutral and have.a non-religious public purpose, but the Court left open the possibility that there might be other requirements as well.

B. Direct Aid: The Lemon *and* Nyquist *Approach*

The conventional understanding of what separationism means for direct aid to religious institutions was defined not by *Everson*, but by nine direct aid cases decided between 1971 and 1977. Even in these cases, separationism did not mean that all government actions that benefitted religion were unconstitutional; rather, even the Court's strictest separationist decisions recognized, as *Everson* had recognized, that the Court's task was to distinguish between permissible and impermissible aid to religious institutions, rather than to ban all such aid. Further, as in *Everson* and in the Court's Free Exercise jurisprudence, the Court considered the formation of religious belief to be the heart of the church, and it therefore agreed with *Everson* that the chief evil to be prevented was the funding of

192. *Id.* at 18 (majority opinion).

religious education. The Court's motives were even somewhat similar, with an emphasis on preventing conflict among religious groups.

The 1970s Court differed from *Everson* in the way it discerned whether aid actually went to religion or merely to people or institutions that were involved in religion. Whereas *Everson*'s analysis focused primarily on the aid's religiously neutral character, with secondary emphasis on its indirect nature and legitimate secular purpose, *Lemon* declared that in addition to a secular purpose, permissible aid had to have a secular "primary effect" and had to avoid "excessive entanglement" with religion.[193] These requirements were applied in eight more direct aid cases in the space of seven years,[194] but new cases did more to express the Court's confusion than to resolve it.

In particular, the primary effect analysis was hopelessly indeterminate. For example, would a neutral program distributing aid directly to parochial schools have the primary effect of helping students or the primary effect of advancing recipient schools' religious purposes? As Eisgruber and Sager have pointed out, the answer is unavoidably "both."[195] How would it even be possible to aid students at parochial schools without making parochial schools more attractive to potential students and thus helping the schools fulfill their religious mission?

193. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

194. The string of cases beginning with *Lemon* follows, in chronological order: *Lemon*, 403 U.S. 602 (invalidating a subsidy for the salaries of teachers of secular subjects at religious schools); *Tilton v. Richardson*, 403 U.S. 672 (1971) (upholding construction grants for secular buildings at religious universities); *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973) (invalidating reimbursement of certain state-mandated administrative costs); *Hunt v. McNair*, 413 U.S. 756 (1973) (permitting the issue of revenue bonds for religious universities); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (invalidating direct grants for building maintenance at religious schools); *Meek v. Pittenger*, 421 U.S. 349 (1975) (allowing textbook loans to religious schools, but striking down various other kinds of support), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976) (permitting construction grants to religious universities); *Wolman v. Walter*, 433 U.S. 229 (1977) (allowing some forms of aid but prohibiting others; in particular, prohibiting provision of transportation for religious schools' field trips), *overruled by Mitchell*, 530 U.S. 793; *New York v. Cathedral Academy*, 434 U.S. 125 (1977) (prohibiting reimbursement of certain state-mandated record-keeping costs). The third appendix of WITTE & NICHOLS, *supra* note 111, at 305–38, was invaluable for this research.

195. *See* EISGRUBER & SAGER, *supra* note 1, at 31.

Despite the confusion, the Court's definition of the church from which government had to be kept separate began to develop certain contours. Decisions turned primarily on two questions. The first was whether the recipient was pervasively sectarian, meaning that its religious and secular functions could not be separated from each other. If the school was not pervasively sectarian, then its secular functions could be funded so long as the funding had a secular purpose and was religiously neutral.[196] But if the recipient was pervasively sectarian, then it was effectively always part of the religious sphere, always a religion and never an institution that merely happened to be religious. Whether aid to such an institution was permissible depended on the second question: whether the nature of the aid was such that it could not be converted to religious use—an echo of *Everson*'s idea of aid "indisputably marked off from the religious function."[197] If the aid could be used only for non-religious purposes, such as distribution of secular textbooks to religious schools, then the aid was permissible.[198]

These two questions had the virtue of diverting attention from the intractable problems of the "primary effect" analysis, but they put the focus squarely on the Court's understanding of religion and the church, which the Court failed to articulate coherently. How exactly could courts distinguish between a religious charity's secular and religious functions? Religious charities often do not perceive any of their work as secular,[199] and they may consider all of their efforts to be part of preaching their religion. Likewise, if a court concluded that an institution was pervasively sectarian, how could it tell whether aid could be put to religious use? In both of these issues, the Court's answer was to understand religion (as it had in *Everson*) as sectarian belief, and to try to prevent governments from being too closely associated with the propagation of sectarian belief.[200]

Yet this was insufficient to distinguish reliably between sacred and secular, especially in the context of pervasively sectarian

196. *See Roemer*, 426 U.S. 736; *McNair*, 413 U.S. 734; *Tilton*, 403 U.S. 672; Esbeck, *supra* note 4, at 10; Stephen V. Monsma, *The "Pervasively Sectarian" Standard in Theory and Practice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 323 (1999).

197. *Everson*, 330 U.S. at 18.

198. *See Meek*, 421 U.S. 349.

199. *See, e.g.*, *Ten Ways Catholic Charities Are Catholic*, CATHOLIC CHARITIES USA, http://catholiccharitiesusa.org/mission-faith/catholic-values/ ("The work we do has its roots deep in the scriptures.").

200. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977).

institutions. The Court's efforts to define "pervasively sectarian" led to "an uncertain, wavering standard that . . . [was] applied in a sporadic, inconsistent manner"[201] In practice, it seemed that religiously affiliated elementary and secondary schools were pervasively sectarian, while religiously affiliated colleges and universities were not,[202] but it was unclear from the Court's reasoning why that should be the case. Worse, the decisions concerning the sorts of aid that could not be converted to religious purposes led to some of the worst confusion in the history of Religion Clause jurisprudence, including the famously nonsensical holding in *Wolman v. Walter* that state governments may give religious schools books, but not maps.[203] As Senator Moynihan quipped, what would the Court have said about "atlases, which are books of maps?"[204]

The "pervasively sectarian" doctrine also proved problematic because it seemed to require not just discrimination between religious and secular institutions—separationism has always required that—but discrimination among religious institutions based on how much they chose to integrate their religious beliefs into their work, a sort of discrimination much more difficult to square with separationist principles, and one with an embarrassing anti-Catholic past.[205] It also required courts to investigate institutions' religious beliefs and how much those beliefs were reflected in their practices—hardly the sort of inquiry a court committed to separating church and state should be comfortable with.[206]

In short, most of the difficulties in the Court's strict separationism arose not from the idea of separationism nor from the principle that government should not pay for religious instruction but from the Court's particular approach to distinguishing between aid to religion and aid to people who happen to be religious. In particular, the difficulties arose from the Court's theologically dubious attempt to distinguish between institutions that are pervasively religious and institutions that are only partially religious,

201. Monsma, *supra* note 196, at 325.
202. Esbeck, *supra* note 4, at 11.
203. *Wolman*, 433 U.S. at 255.
204. EISGRUBER & SAGER, *supra* note 1, at 32.
205. Mitchell v. Helms, 530 U.S. 793, 828 (2002) (plurality opinion).
206. *Id.*

and from its economically dubious attempt to discern whether aid could be put to a religious purpose.

C. Direct Aid and Religious Speech: Modern Version

Since the 1980s, the Court's "pervasively sectarian" distinction has fallen apart. The doctrine's influence began diminishing in the 1980s, when the Court declined to apply it in a number of cases to which it was arguably relevant.[207] In 2000, the plurality opinion of *Mitchell v. Helms* explicitly repudiated it,[208] and it has not been mentioned by any of the Court's majority or plurality opinions since.

By abandoning the "pervasively sectarian" doctrine, the Court in effect narrowed the religious sphere. No longer are any institutions so pervaded with religion that they have to be treated as religious all the time—all religiously affiliated institutes are recognized to have both religious and non-religious elements, and every institution is treated as religious when it is teaching its sectarian beliefs and as secular when it is not. This principle allows churches to be just buildings when seen by the fire department and just crime victims when protected by the police, and also to remain religious organizations whose religious beliefs the government must not interfere with or promote. In other words, the abandonment of the pervasively sectarian doctrine is easily reconciled with *Everson*.

Likewise, the Court has largely abandoned its futile attempts to distinguish between aid that can be put to religious purposes and aid that cannot. Once the Court's efforts in this area had tied its doctrine thoroughly in knots,[209] it increasingly concluded that only

207. *See id.* at 826–27.

208. *Id.* at 829.

209. In 1985, Justice Rehnquist described the chaos as follows:

> [A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden . . . but the State may conduct speech and hearing diagnostic testing inside the sectarian school. . . . Exceptional parochial school students may receive

the lack of a secular purpose or failure to be religiously neutral made an aid program impermissible. Now the government can pay for remedial instruction in secular subjects on religious school campuses[210] and lend instructional materials to religious schools for use in their secular curriculum.[211] So long as the aid has a secular purpose and is religiously neutral, it is not constitutionally invalid. "The question," according to the *Mitchell* plurality, "is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action."[212]

Both of these doctrinal developments are commonly taken as evidence that the Court has repudiated separationism. But in fact, the Court has only repudiated a single problematic approach to determining whether the state was impermissibly aiding the church—an approach the Court did not adopt before the 1970s and already began retreating from in the 1980s. And once the Court had retreated, the core of *Everson*'s separationism remained: a requirement that all aid have a secular purpose and a requirement that it be religiously neutral.

V. THE NEW SEPARATIONISM: RECOGNIZING "THE INSTITUTIONS OF PRIVATE CHOICE"

Perhaps the most controversial element of the Court's supposed repudiation of separationism is the Court's increasing willingness to allow the government to subsidize students' tuition to religious private schools. The Court's 1970s separationism strictly forbade this sort of aid on the grounds that it paid for religious as well as secular instruction.[213] Even the *Everson* Court would likely have balked before a neutral subsidy that helped students pay their parochial

> counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. . . . A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects."

Wallace v. Jaffree, 472 U.S. 38, 110–11 (1985) (Rehnquist, J., dissenting) (citations omitted).

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

211. *Mitchell*, 530 U.S. at 793.

212. *Id*. at 809.

213. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973) (invalidating a tuition reimbursement program because "[t]here has been no endeavor to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former") (internal quotation marks omitted).

school tuition, despite all its emphasis on neutrality and despite the transportation subsidy it approved having a similar (if smaller) effect. The Court's willingness to allow such aid is one of the strongest pieces of evidence for the conventional narrative.

Nevertheless, the Court's new willingness to allow indirect aid to religious institutions can be defended both as consistent with separationism and as a development of ideas implicit in the Court's earliest separationist cases: *Everson* and *Board of Education v. Allen*.[214] The metaphor of separating church and state does not preclude the possibility of there being a middle ground between the two; there may be entities in society that are neither part of the church nor the state, and which do not need to be separated from either of them. If such entities are recognized, then they may interact freely with both the church and the state without violating the separation of church and state. *Everson* and *Allen* recognized the possible importance of such entities, and it was not until the 1970s that the Court began striking down aid that was passed through intermediaries in this manner. Contrary to the conventional narrative, the rejection of the 1970s' approach was not a rejection of separationism itself, but a return to and redevelopment of an older separationism.

A. The Theoretical Possibility, and Practical Necessity, of a Middle Ground

Among the important implications of the separation metaphor is that, for purposes of separating church and state, "church" and "state" are not necessarily collectively exhaustive categories. There remains the possibility of some entities that do not need to be separated from either church or state. Expressed in terms of separationism's spatial metaphor, these phenomena could be conceived of as the middle ground between church and state, a place where both church and state can be active without implicating separationism.

Admittedly, separationist reasoning both on the Court and in scholarship has not generally recognized the possibility of middle ground between church and state. Instead, when the Court or scholars have applied the metaphor of separation, they have usually described differences between possible approaches to separationism in terms of how absolute separation needs to be, how high

214. 392 U.S. 236 (1968).

Jefferson's "wall of separation" needs to be, where the wall should be, and so forth, without talking about how church and state relate to the rest of society.[215] Further, both the Court and scholars have sometimes used "public" and "private" to describe the government and religious spheres respectively,[216] and there is not obviously a middle ground between public and private the way there may potentially be between church and state. But there are several persistent aspects of separationist reasoning that can best be understood as assuming the existence of a middle ground, and these aspects were visible from the early years of the Court's separationism.

The most important of these aspects is the Court's recognition, even in its most separationist decisions, that the separation of church and state cannot be absolute.[217] As the Court recognized as early as *Everson*, religion and government will inevitably interact in a variety of ways, not all of which implicate separationism.[218] One of the chief categories of church-state interaction that are commonly understood to be permissible is interaction that is mediated by civil society.

I illustrate with two examples of church-state interactions that could not possibly be considered contrary to separationism, or at least to any form of separationism that could ever be plausible in the United States. The first example occurs when government employees or welfare recipients choose to donate money to churches. In this case, the money being donated clearly comes from the government, since all of the donor's money comes from the government, and it is clearly given to religion. Of course, the government does not give the money to the donor for the purpose of having it donated to a church, but it pays its employees and the beneficiaries of its social

215. EISGRUBER & SAGER, *supra* note 1, at 22.

216. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 589 (1992) ("[P]reservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere."); Engel v. Vitale, 370 U.S. 421, 432 (1962) ("[R]eligion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."); Denise Meyerson, *Why Religion Belongs in the Private Sphere, Not the Public Square*, *in* LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT 44, 44–71 (Peter Cane, Carolyn Evans & Zoe Robinson, eds. 2009).

217. *See, e.g.*, *Nyquist*, 413 U.S. at 760 ("It has never been thought either possible or desirable to enforce a regime of total separation."); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("[T]otal separation is not possible in an absolute sense.").

218. Everson v. Bd. of Educ., 330 U.S. 1, 17–18 (1947) (arguing that the First Amendment does not aim to completely sever the benefits of any public service from religious institutions).

programs knowing that many will pass some of that money along to churches, where the money will be used for religious purposes.

The second example is the influence of religion on elections by way of voters' religious beliefs. Although legislation passed for exclusively religious reasons is unconstitutional,[219] the stricter Rawlsian idea that political arguments must be based on public reason has never become part of the Court's First Amendment jurisprudence.[220] Nor indeed could it. Under the Free Speech Clause, citizens have a constitutional right to make whatever political arguments they wish, regardless of the arguments' religious or irreligious character.[221] Citizens may vote based on whatever criteria they choose, including a candidate's religious identity or the perceived agreement between the candidate's ideology and the citizens' religious beliefs. Conversely, candidates have a right to make their religious identity known and to choose platforms consistent with their own or their constituents' religion. If the candidates are elected, they may be influenced by religion so long as they can also give secular reasons for their actions.[222]

One way of understanding why these two examples are permissible is to explain them as a compromise. Under this approach, these examples are contrary to separationism, but they must be permitted for the sake of other constitutional values. Government employees must be allowed to donate to religious groups because banning such contributions would be discriminatory and infringe on several First Amendment rights: Free Exercise, Free Speech, and Freedom of Association. Religion must be permitted to influence politics by way of voters' religious beliefs because the Free

219. *See, e.g.*, *Lemon*, 403 U.S. at 612 (holding that statutes "must have a secular legislative purpose").

220. *Compare* JOHN RAWLS, POLITICAL LIBERALISM: EXPANDED EDITION 212–47 (1993) (arguing that ideal public discourse about political issues excludes references to religious concepts, doctrines, and values), *with* McGowan v. Maryland, 366 U.S. 420, 445 (1961) (holding that laws requiring the cessation of commerce on Sundays did not violate the Establishment Clause because they served secular purposes apart from their original religious purposes).

221. *See, e.g.*, Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.").

222. *See, e.g.*, *McGowan*, 366 U.S. at 445 ("Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original [religious] purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens.").

Speech Clause does not permit the government to censor religiously based political arguments or to require voters to vote based on public reason (perhaps by requiring them to swear an oath to that effect when they register). This approach has some intuitive appeal because separationism, if it is a constitutional value, must of course coexist with other constitutional values.

But a better way of understanding these examples is that they do not violate separationism even in principle. As I suggested in Section II.B, there is nothing about the metaphor "separation of church and state" that requires the categories "church" and "state" to include everything. If we recognize the existence of a middle ground, which is by definition neither religion nor government but may interact with both, then we can conceive of both of these examples as involving the middle ground rather than direct interactions between church and state. In the case of government employees' religious donations, the government gives money not to religion but to free private citizens, and religion receives money not from the government but from these free private citizens. In the case of voters' religious motivations, we can conceive of religion not as influencing government, but as influencing free private citizens who are then free to influence the government. These citizens act as a buffer, a neutral zone, a way of mediating interactions between government and religion while keeping the church and state separate (whatever "church" and "state" mean in one's particular understanding of separationism).

But if this is the case, then how do we tell when the middle ground effectively stands between church and state? This will depend on just what one understands "church" and "state" to be, since the middle ground must by definition be neither church nor state. But the examples above suggest that a defining characteristic of the middle ground is the presence of free, private choice.[223] The reason government employees can donate money they have received from the government to churches is that they, not the government, choose to make the donations. The reasons voters can vote based on their religious beliefs is that they choose whether to be persuaded by

223. The Supreme Court itself alludes to this characteristic: "The Constitution decrees that religion must be a private matter for the individual, the family, and *the institutions of private choice*." *Lemon*, 403 U.S. at 625 (emphasis added). *Cf.* Esbeck, *supra* note 4, at 7 ("So long as individuals may freely choose or not choose religion, merely enabling private decisions logically cannot be a governmental establishment of religion.").

religious arguments or not—at no point does religion itself, however defined, actually dictate which candidate they will vote for, and at no point does a religious organization gain actual authority over government.

Defining civil society in terms of free private choice also helps explain the persistent connection between separationism and neutrality. There seems to be no reason in principle why separating church and state would require the government to be neutral between religion and non-religion. Indeed, it seems to require the opposite: as Eisgruber and Sager point out, separating religion from government requires government to treat religion both better and worse than non-religion, since non-religion does not need to be separated from government and therefore does not have the special rights and disabilities that come with separation.[224]

Yet as early as *Everson*, the Court already associated separation with the idea that government may neither "handicap" nor "favor" religions,[225] nor "aid all religions."[226] There are many reasons to associate this idea with separationism—one of which figures prominently in Part IV above—but one important reason derives from free private choice as a characteristic of civil society.

If free private choice is necessary for private citizens to insulate religion and government from each other, then any government actions that restrict free private choice take private citizens out of the equation, thereby bringing church and state into direct contact with each other and potentially violating separationism. A law subsidizing government employees' donations to religious organizations but not to other charities would thus violate the separation of church and state, as would a requirement that voters take an oath promising to vote based on religious teachings rather than purely secular reasoning, or a religious test insuring that only candidates of a particular religious identity could be elected.[227] Neutrality between religion and non-religion thus supports separation of church and

224. EISGRUBER & SAGER, *supra* note 1, at 29.

225. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

226. *Id.* at 15.

227. *Cf.* Torcaso v. Watkins, 367 U.S. 488, 493–94 (1961) (appealing to separationism to strike down religious tests for office).

state by preserving free private choice and allowing "the institutions of private choice" to insulate church and state from each other.[228]

B. Expanding the Middle Ground; Shrinking Separationism

Separationism has become less important in the Court's jurisprudence because the Court has been increasingly willing to see interactions between religion and government as mediated by private choice and therefore not implicating separationism. Without being repudiated, separationism thus becomes less important simply because it decides fewer cases.

To be more specific, one of the doctrinal developments that has been given as evidence of separationism's decline is the series of cases, beginning in 1983 with *Mueller v. Allen*,[229] permitting greater indirect aid to religious schools—that is, aid given to individuals rather than directly to the schools themselves.[230] Scholars who use these cases as evidence of separationism's decline assume that indirect aid to religious schools violates separationism,[231] but that is not necessarily the case. It depends in large part on whether one's conception of separationism permits private choice to act as a buffer between religion and government and on how one defines private choice.

Prior to separationism's decline, the Court heard only four indirect aid cases, upholding indirect aid in *Everson* and *Board of Education v. Allen*[232] before striking it down in *Committee for Public Education v. Nyquist*[233] and *Sloan v. Lemon*.[234] Importantly, all four of these cases presented themselves as consistent with separation of church and state—in particular, *Everson* and *Allen* did not consider indirect aid to religion a departure from separation of church and

228. *Lemon*, 403 U.S. at 625. *Cf.* Esbeck, *supra* note 4, at 7 ("In situations of indirect assistance [to religion], the equal treatment of religion—not separationism—is the Court's operative rule for interpreting the Establishment Clause.").

229. Mueller v. Allen, 463 U.S. 388, 403 (1983).

230. *See, e.g.*, Lupu, *supra* note 8, at 242 (presenting the Court's decision to allow states to make private school tuition tax deductible as part of "a process of repudiation of *Lemon* in the very aid-to-parochial-schools context in which it originated"). I borrow the term "indirect aid" from Carl Esbeck. Esbeck, *supra* note 4, at 7.

231. *See, e.g.*, Lupu, *supra* note 8, at 242; Esbeck, *supra* note 4, at 7.

232. 392 U.S. 236 (1968).

233. 413 U.S. 756 (1973).

234. 413 U.S. 825 (1973).

state.[235] *Everson* itself, the case that introduced the phrase "separation between church and state" into modern constitutional law, was especially emphatic on this point: "[The] wall between church and state . . . must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."[236]

Of these four cases, *Everson* makes the greatest use of the idea of civil society as a middle ground between church and state. Although the *Everson* Court did not draw any clear line between the types of aid to religion that violate separationism and those that do not, its attempt to reconcile New Jersey's aid program with the separationist principles it endorsed relied on the same two points that defined my discussion of the middle ground above. First, although the Court acknowledged that religious schools might benefit from the program,[237] it emphasized that the aid was not actually distributed to religious schools: "The State contributes no money to the schools. It does not support them."[238] Second, the Court emphasized that the money was given to individuals on neutral terms, leaving them free to spend it religiously or otherwise: "[This] legislation, as applied, does no more than provide a general program to help parents get their children, *regardless of their religion*, safely and expeditiously to and from accredited schools."[239] In other words, the Court permitted the aid in part because it was distributed to private individuals and only benefited religion through individuals' free choice to use it at a religious school rather than a secular one.

But the Court did not hold that aid distributed to private individuals is always permissible, and the Court's next three indirect

235. *See* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947); *Allen*, 392 U.S. at 242; *Nyquist*, 413 U.S. at 795; *Sloan v. Lemon*, 413 U.S. at 832 (holding, based on *Lemon*'s separationist reasoning, that the aid in question was impermissible).

236. *Everson*, 330 U.S. at 18. Of course, the Court's emphatic assertion has not persuaded everyone. Justice Jackson joked that the Court, while "whispering I will ne'er consent,—consented." *Id.* at 19 (Jackson, J., dissenting) (internal quotation marks omitted); *see also* SEHAT, *supra* note 40, at 236 ("The majority's argument consisted largely of a ringing endorsement of church-state separation as a way to prove its concern for the concept while at the same time affirming a connection between religion and the state.").

237. *Everson*, 330 U.S. at 17 ("It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets.").

238. *Id.* at 18.

239. *Id.* (emphasis added).

aid decisions would gradually abandon *Everson*'s focus on civil society.

In the next indirect aid case, *Board of Education v. Allen*, civil society analysis reminiscent of *Everson* still played an important role,[240] helping the Court conclude that lending secular textbooks to students at parochial schools did indeed have a secular purpose.[241] But there were already signs of civil society's diminished influence. Most importantly, the Court left open the possibility that if the secular textbooks had been proven to aid schools' religious instruction, the outcome might have been different.[242] This marked a departure from *Everson*, where obviously the bus money given to students helped them receive religious instruction as well as secular.

Nyquist and *Sloan*, decided on the same day in 1973, both addressed state programs that subsidized parents' expenditures on private school tuition,[243] and both used the *Lemon* test to invalidate the tuition subsidies.[244] *Sloan* did not cite *Everson* or *Allen*'s civil society reasoning at all, while *Nyquist* devoted a lengthy passage to distinguishing it.[245]

According to *Nyquist*,that the state gave money to parents rather than directly to the schools weighed in favor of constitutionality, but it was "only one among many factors to be considered" in determining whether the aid's primary effect advanced or inhibited religion.[246] The *Nyquist* Court argued that the aid in *Everson* and *Allen* was "indisputably marked off from the religious function" in a way that tuition subsidies could not be, even though the transportation subsidy in *Everson* helped students receive religious instruction as well as secular.[247] That the parents were the primary beneficiaries did not ultimately matter because helping the parents

240. 392 U.S. 236, 243–44 (1968) ("[N]o funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.").

241. *Id*.

242. *See id*. at 248 (dismissing an argument based on the textbooks' supposed usefulness for religious teaching because the necessary facts had not been established—not because the issue was legally irrelevant).

243. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 764 (1973); Sloan v. Lemon, 413 U.S. 825, 837 (1973). *Nyquist* also concerned a direct subsidy to religious schools for building maintenance, 413 U.S. at 762–64, but as it is not relevant to my civil society analysis, I will not discuss it here.

244. *See Nyquist*, 413 U.S. at 772–73; *Sloan*, 413 U.S. at 828–830.

245. *See Nyquist*, 413 U.S. at 780–87.

246. *Id*. at 781.

247. *Id*. *at* 782 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947)).

helped the schools;[248] it was the effect on religion that mattered, even if the effect was indirect. And the idea that the parents' free choice to send their children to religious schools might sufficiently insulate religion from government was dismissed out of hand:

> The parent is not a mere conduit, we are told, but is absolutely free to spend the money he receives in any manner he wishes. There is no element of coercion attached to the reimbursement, and no assurance that the money will eventually end up in the hands of religious schools. *The absence of any element of coercion, however, is irrelevant to questions arising under the Establishment Clause*.[249]

Nyquist thus rejected the idea that the free choice of members of civil society provides sufficient insulation between religion and government for separationist purposes. What mattered was how much religion benefited in the end, not whether the benefit to religion really came from the government and not from the parents.

But the Court has never again restricted indirect aid as it did in *Nyquist* and *Sloan*, and a mere ten years later in *Mueller*, the Court used civil society reasoning to uphold a tuition subsidy, this time in the form of a tax deduction instead of vouchers and tax credits. Like *Nyquist*, *Mueller* applied the *Lemon* test,[250] but key to the *Mueller* Court's reasoning was that "under Minnesota's arrangement public funds become available [to religious institutions] only as a result of numerous private choices of individual parents of school-age children."[251] This would become a common theme in the Court's indirect aid cases. In *Witters* in 1987, the Court pointed out that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[252] In *Zobrest* in 1993, the Court cited *Mueller*'s and *Witters*'s language about private choice and declared, "That same reasoning applies with equal force here."[253] In *Zelman* in 2002, the Court claimed that

> our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have

248. *Id*. at 783.

249. *Id*. at 786 (emphasis added).

250. Mueller v. Allen, 463 U.S. 388, 394 (1983).

251. *Id*. at 399.

252. Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481, 488 (1986).

253. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 9–10 (1993).

> confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.[254]

Most recently, in 2011, *Arizona Christian School Tuition Organization v. Winn* demonstrated the continued vitality of civil society reasoning by using it to limit taxpayer standing, pointing out that the religious schools in question did not receive funds from government but from "the decisions of private taxpayers regarding their own funds."[255]

Again, the common interpretation of these developments is to see them as repudiations of separationism, and certainly there is some evidence for that conclusion—in particular, the Justices who have supported indirect aid have often supported non-separationist outcomes in other cases.[256] But seeing the cases that loosen restrictions on indirect aid as nothing but repudiations of separationism means failing to see the conflict within separationism where indirect aid is concerned. It means assuming that *Nyquist* represents the sole correct separationist position on indirect aid without acknowledging that other cases have upheld indirect aid regimes on explicitly separationist grounds, usually by concluding that the aid to religion in question really came from civil society and not from government.

VI. CONCLUSION: THE FUTURE OF SEPARATIONISM

Separationism is not dead. Religion in general may no longer be separated from government to the extent it once was, but religious belief still receives special constitutional protection. This special protection for religious belief leads to special constitutional status for the practices and institutions through which religious belief is

254. Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002). The "three times" the Court mentions are *Mueller*, *Witters*, and *Zobrest*. *Id*. Apparently the Court did not consider *Everson*, *Mueller*, *Zelman*, or *Sloan* "true private choice programs."

255. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1439 (2011).

256. For example, Chief Justice Burger dissented in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 805 (1973) (Rehnquist, J., dissenting), and joined the *Mueller v. Allen* majority, 463 U.S. 388 (1983), and he also wrote the non-separationist majority opinion in *Marsh v. Chambers*, 463 U.S. 783 (1983). Similarly, Justice Rehnquist joined the *Mueller* majority only two years before launching a frontal attack on separationism in his *Wallace v. Jaffree* dissent. 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

formed. This special status still gives these institutions special rights under the Free Exercise Clause and special disabilities under the Establishment Clause: the government's ability to regulate religious speech and institutions is specially curtailed, and it is still specially prohibited from involving itself in the teaching of religion.

The difference between the Court's religion jurisprudence in the 1970s and its jurisprudence today is not that the 1970s Court was committed to separationism and the current Court is not. Instead, today's Court's separationism is narrower because it is committed to a narrower conception of the church from which the state needs to be separated. In Free Exercise jurisprudence, the state no longer needs to be separated from all actions motivated by religious belief, but rather only from those necessary for the formation of religious belief.

Under the Establishment Clause, the Court no longer recognizes some institutions as being "pervasively" religious. Instead, it recognizes that all religious people and organizations are, for some purposes, just people and organizations, and that they may therefore be aided and supported by the state without regard to their religion. The state may not, however, aid them without a secular purpose, since giving them money in order to encourage the teaching of religion would involve the state in the teaching of religion.

Likewise, because the free choice of private citizens to choose religious rather than non-religious education cannot be attributed to a neutral state aid program, the state may freely subsidize private citizens' choices so long as the subsidies are neutral. Thus, the Court's emphasis on neutrality, far from supplanting separationism, is actually an approach to implementing separationism that can already be seen in the *Everson* decision.

In reality, the strict separationism whose death has been mourned by some and celebrated by others was only a brief phase in separationism's long history on the Court—a phase that, if it is to be considered superior to this one, must say more for itself than that it is the inevitable logical conclusion of an American tradition of church and state. It is not. If there is such a tradition, the Court's present separationism is arguably more faithful to it than the 1970s' model.

I admit, I have my reservations about even the best separationism as an all-encompassing theory of the Religion Clauses. Separationism is too individualistic, too focused on religion as a

matter of belief—in short, too Protestant for my decidedly non-Protestant religious commitments, which are focused more on ritual, practice, and community than the Supreme Court's religion jurisprudence has tended to be. But the freedom to believe is nevertheless precious, and the Court's current separationism really does protect it more than a pure neutrality regime would. As far as it goes, I hope it lasts.