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A FUNNY THING HAPPENED ON THE WAY TO NEUTRALITY: BROAD PRINCIPLES, FORMALISM, AND THE ESTABLISHMENT CLAUSE

*Frank S. Ravitch**

I. INTRODUCTION

In recent years the landscape of Establishment Clause jurisprudence has changed dramatically. Landmark decisions such as *Zelman v. Simmons-Harris*,¹ and *Good News Club v. Milford*

* Associate Professor of Law, Michigan State University-DCL College of Law. I am grateful to Stephen Feldman, Mark Janis, Brian Kalt, Mae Kuykendall, Douglas Laycock, Kevin Saunders, Steve Smith, Brett Scharffs, and Glen Staszewski for their helpful comments on an earlier draft of this Article, and to Dean Terence Blackburn for supporting this project. I am also grateful for helpful comments I received when I presented a related paper at faculty workshops at the Syracuse University College of Law, Hofstra University School of Law, Michigan State University-DCL College of Law, and at the Central States Law Schools Association Annual Meeting. Thanks also to Charles Ten Brink, Jane Edwards, Hildur Hanna, and the staff of the Michigan State University-DCL law library for their support, and to Sarah Belzer for excellent research assistance. Of course, any errors are mine alone.

¹ 536 U.S. 369 (2002).

Central School,² have placed significant emphasis on the concept of neutrality, specifically formal neutrality.³ Yet what if neutrality under the Establishment Clause is a myth—an unattainable dream? This Article explores the implications of this question, suggests that the answer raises serious concerns about the Court's approach, and points toward an alternative way of addressing Establishment Clause issues.

Interpreting the Establishment Clause has never been easy. There are many reasons for this, but a major factor is the interaction between the broad principles said to undergird the Establishment Clause and the myriad of factual contexts to which those principles must be applied. One obvious concern is the failure of the Justices of the U.S. Supreme Court to agree on underlying principles.⁴ Justices have long had disagreements about the meaning of principles such as separation and neutrality even when they agree on which principles apply.⁵ Some of these disagreements

² 533 U.S. 98 (2001).

³ For an excellent discussion of formal neutrality, see Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961) (framing notion of formal neutrality and proposing its use in religion clause cases); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) (analyzing formal and substantive neutrality and rejecting formal neutrality). See also Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 8-10 (2000) (discussing formal neutrality and trend toward its increased use by Court). As will be seen later in this Article, the current Court's notion of formal neutrality may be more formalistic than Professor Kurland's approach. See *infra* notes 38, 52-247 and accompanying text.

⁴ See Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 680-700 (2002) (tracing history of Establishment Clause doctrine from 1947 to today and suggesting that underlying rationale has moved from one based on liberty to one based on equality); Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 323-29, 388-89 (1995) (documenting disagreements among Justices over tests to be applied to variety of situations under Religion Clauses); Leslie C. Griffin, *Their Own Prepossessions: The Establishment Clause, 1999-2000*, 33 LOY. U. CHI. L.J. 237, 237-39 (2001) (referring to "disarray" in Establishment Clause jurisprudence and "the intensity of disputes about religion" on current Court).

⁵ Two stunning examples of these disagreements are *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Mitchell v. Helms*, 530 U.S. 793 (2000). In *Everson*, both the majority and the dissenting opinions agreed that separation was the appropriate underlying principle. *Everson*, 330 U.S. at 15-16; *id.* at 19, 28 (Jackson, J., dissenting); *id.* at 29, 31-32 (Rutledge, J., dissenting). Yet, the opinions disagreed about how strict that principle is in the context of its application to the school transportation program at issue. Compare *id.* at 16-18 (discussing separation and noting that wall between church and "state must be kept high and

have been about the nature of the principles themselves, and others have been about their application to specific facts and contexts.⁶ Scholars have had similar disagreements over the nature of broad principles such as neutrality and separation, as well as their application.⁷ In recent years the Supreme Court has moved toward the principle of neutrality—specifically, formal neutrality⁸—at least in cases of government aid to religious institutions,⁹ religious access to government property and funding,¹⁰ and of course in the Free Exercise Clause context.¹¹

impregnable,” but upholding New Jersey school transportation program), *with id.* at 44-58 (Rutledge, J., dissenting) (agreeing separation is guiding principle, but arguing New Jersey school transportation program violated that principle). In *Mitchell*, both the plurality and dissent claimed to be using neutrality. *Mitchell*, 530 U.S. at 809-12 (plurality opinion); *id.* at 877-84 (Souter, J., dissenting). The plurality used a formalistic version of neutrality, and the dissent rejected this formalistic approach in favor of a form of substantive neutrality that is not necessarily the determinative principle in aid cases. *Id.*

⁶ See, e.g., *Mitchell*, 530 U.S. at 809-12, 878-84 (disagreement between plurality and dissent over nature of neutrality and its application, and between plurality and concurrence over role of neutrality); *Everson*, 330 U.S. at 15-18, 49-58 (disagreement between majority and dissents about strictness of separation principle in its application to New Jersey school transportation policy in question).

⁷ See generally *infra* notes 82-126 and accompanying text (discussion of various approaches to neutrality); *infra* notes 248-324 and accompanying text (discussing various principles that scholars have argued undergird Establishment Clause).

⁸ The Court’s recent decisions suggest that formal neutrality is the appropriate governing principle in a number of contexts. See *infra* notes 52-247 and accompanying text.

⁹ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 670 (2002) (upholding voucher program based on facial neutrality of relevant law and fact that individual choice determined to which institutions voucher money flowed); *Mitchell*, 530 U.S. at 793-95 (plurality opinion) (applying facial neutrality and upholding Chapter 2 of Title I of Elementary and Secondary Education Act of 1965, which provides federal funds to state and local governments that lend equipment and educational materials to public and private schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993) (applying facial neutrality and upholding provision of sign language interpreter under Individuals with Disabilities Education Act).

¹⁰ See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001) (holding that it is unconstitutional to deny Christian group that engages in prayer and favors proselytization access to elementary school facilities outside of regular school hours if other non-school-sponsored student groups are given such access); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 837, 846 (1995) (holding that it is unconstitutional for public university to deny funding to Christian student newspaper if similar funding is available to other student groups); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (holding that it is unconstitutional to deny Ku Klux Klan the right to place large cross in public forum maintained by state); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394-96 (1993) (holding that it is unconstitutional to deny church use of school building at night for purposes of showing religious film because other non-school related groups are allowed to use school building).

¹¹ See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 881-82 (1990) (holding there is

This Article asserts that neutrality, whether formal or substantive,¹² does not exist. Other scholars have recognized this,¹³ and still others suggest that the concept of neutrality is inherently dependent upon the baseline one chooses to use in describing it.¹⁴ The nature of neutrality has always been problematic, but over the last three terms the Court has made neutrality a concept of singular importance, whereas earlier Courts had other principles driving their decisions. Most scholars who have discussed the problem

generally no constitutional right under the Free Exercise Clause to exemptions from laws of general applicability).

¹² For an excellent discussion of formal and substantive neutrality, see Laycock, *supra* note 3 (discussing formal and substantive neutrality and rejecting formal neutrality). See also *Mitchell v. Helms*, 530 U.S. 793, 877-85 (2000) (Souter, J., dissenting) (tracing move from more substantive form of neutrality to formal or evenhandedness neutrality reflected in plurality opinion).

¹³ See, e.g., STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 96 (1995) [hereinafter *FOREORDAINED FAILURE*] ("The foregoing discussion suggests that the quest for neutrality, despite its understandable appeal and the tenacity with which it has been pursued, is an attempt to grasp at an illusion."); Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 247 (1999) ("In theory and practice, neutrality theory does not live up to its own ideals. . . ."); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266, 314, 316 (1987) [hereinafter *Symbols, Perceptions, and Doctrinal Illusions*] ("[P]ervasive commitment to neutrality has not yet generated any clear and convincing account of what neutrality actually entails. It has become increasingly clear, rather, that neutrality is a 'coat of many colors' . . . our attempts to say what neutrality means turn out to be indeterminate and deeply ambiguous."). Cf. John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 92 (1986) ("The conceptual complexity, formality, and ambiguity of neutrality are interrelated and mutually reinforcing. They make the concept abstract and incomplete.").

¹⁴ See, e.g., Laycock, *supra* note 3, at 1005

((S)ubstantive neutrality requires a baseline from which to measure encouragement and discouragement. What state of affairs is the background norm from which to judge whether religion has been encouraged or discouraged? This question also requires judgment; there is no simple test that can be mechanically applied to yield sensible answers.);

cf. Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 793 (1993) ("[N]o neutral principle for selecting the baseline that defines neutrality has been established."); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 333 (1986) (" 'Neutrality,' like 'equality,' is a principle of relationship, not of content. A statement such as 'the state should be neutral' is completely vacuous; it says nothing about that with respect to which the state is supposed to be neutral."). But see Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 319-24 (1990) (critiquing argument that neutrality requires baseline and rejecting neutrality as empty ideal).

proceed either to propose some better form of “neutrality,”¹⁵ propose another broad principle to replace or work in connection with neutrality,¹⁶ recognize the problem but proceed to doctrinal issues,¹⁷ or suggest that the illusive nature of neutrality militates in favor of judicial restraint in religion clause cases.¹⁸ Nevertheless, the Supreme Court appears to be on a course towards making neutrality the centerpiece of Establishment Clause jurisprudence.¹⁹ Specifically, the Rehnquist Court has applied formal neutrality, which focuses on the facial neutrality of government action, and on the role private choice plays in directing government aid to religious entities in the aid context.²⁰

Claims of neutrality cannot be proven. There is no independent neutral truth or baseline to which they can be tethered.²¹ Thus, any baseline to which we attach neutrality is not neutral; claims of neutrality built on these baselines are by their nature not neutral.

¹⁵ See generally Laycock, *supra* note 3 (suggesting that substantive neutrality is better concept than formal or disaggregated neutrality).

¹⁶ *Id.* at 995-99 (arguing that neutrality is inadequate principle and must be supplemented with other principles). See also Brownstein, *supra* note 13, at 246-47 (suggesting that principles of liberty, equality, and free speech are key to interpreting Religion Clauses); Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 146-47, 151-52, 165-67 (1986) (suggesting that, while neutrality is sometimes adequate principle under Religion Clauses, religious liberty is guiding principle, and neutrality is acceptable corollary when it furthers that principle).

¹⁷ See generally David K. DeWolf, *State Action Under the Religion Clauses: Neutral in Result or Neutral in Treatment?*, 24 U. RICH. L. REV. 253 (1990) (discussing controversy surrounding religion in Supreme Court); Griffin, *supra* note 4 (noting Court’s disputes over religion).

¹⁸ SMITH, *FOREORDAINED FAILURE*, *supra* note 13, at 120-27 (suggesting over-reliance on judicial review in religious freedom context). See Gerard V. Bradley, *Protecting Religious Liberty: Judicial and Legislative Responsibilities*, 42 DEPAUL L. REV. 253, 260 (1992) (commenting that it is better to consider religious liberty “free of the constraints that implicit commitments to judicial enforcement impose”).

¹⁹ See generally *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (applying neutrality analysis in school voucher setting); *Mitchell v. Helms*, 530 U.S. 793, 803-36 (2000) (plurality) (applying facial neutrality to uphold Chapter 2 of Title I of Elementary and Secondary Education Act of 1965); *Mitchell*, 530 U.S. at 836-87 (O’Connor, J., concurring) (rejecting pure facial neutrality approach, and suggesting that facial neutrality plus private choice is good approach).

²⁰ See *Zelman*, 536 U.S. at 651-63 (applying neutrality analysis to uphold school voucher program against Establishment Clause challenge).

²¹ See generally SMITH, *FOREORDAINED FAILURE*, *supra* note 13; Alexander, *supra* note 14; Paulsen, *supra* note 14; Smith, *Symbols, Perceptions, and Doctrinal Illusions*, *supra* note 13; Smith, *supra* note 14.

This reasoning might seem circular—i.e., since there is no independent state of neutrality from which to derive neutral rules or applications of rules, there can be no neutral results and no means by which one can prove that a given baseline is neutral. Yet some scholars have recognized that neutrality is not provable or that conceptions of neutrality can vary depending on the baseline one chooses to undergird one's conception of neutrality.²² Moreover, the Court has used varying concepts of neutrality. In several cases Justices in the majority and dissenting opinions claimed to be relying on principles of neutrality yet reached opposite conclusions.²³ Still, for all the problems the concept of neutrality caused in terms of doctrinal coherence, the fact that the Court generally viewed it as a broad and nebulous principle forced the Justices to rely on other principles in forming their views.²⁴ Douglas Laycock and Frederick Mark Gedicks have recently reinforced the notion that separation is one such augmenting principle (or that neutrality augments separation).²⁵ Yet separation suffers some of the same problems as neutrality.²⁶

Concern about neutrality has come into clearer focus, however, since the Supreme Court's recent decision in *Zelman v. Simmons-Harris*.²⁷ This Article will suggest that even though neutrality is a

²² See *supra* notes 13-14 and accompanying text.

²³ Compare *Mitchell*, 530 U.S. at 809-11, 829-36 (plurality opinion) (applying form of neutrality analysis to support finding that aid program distributes funds evenhandedly), with *id.* at 877-84, 911-13 (Souter, J., dissenting) (criticizing plurality for relying on formal neutrality analysis not supported by precedent). Compare *Sch. Dist. v. Schempp*, 374 U.S. 203, 222-27 (1963) (equating separation with neutrality), with *id.* at 317 (Stewart, J., dissenting) (arguing that neutrality requires accommodation of religious beliefs but does not allow government to "coerce a preference among such beliefs").

²⁴ Cf. FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 1-2* (1995) (suggesting that Court has not applied neutrality as coherent principle but rather has relied on variety of other principles that have contributed to incoherence in Religion Clause jurisprudence); Steven K. Green, *Of (Un)equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. REV. 1111, 1116-17 (2002) (asserting that neutrality is an adjunct to separationism); Laycock, *supra* note 3, at 998 (arguing that neutrality "cannot be the only principle" used in Religion Clause analysis).

²⁵ Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071 (2002); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997).

²⁶ See *infra* notes 282-97 and accompanying text (discussing separation doctrine).

²⁷ 536 U.S. 639 (2002).

myth, we can still deal with the concept so long as it is unpacked and understood to be simply a construction.²⁸ Still, the current Court's version of neutrality is particularly problematic because of its intensively formalistic nature and the fact that it appears to minimize the effects of government programs.²⁹ Establishment Clause jurisprudence has traditionally been fact-sensitive, but the Court's formal neutrality approach lacks the tools to deal with the many situations to which it will invariably be applied. The more flexible *Lemon* test³⁰ was much maligned because of the questionable distinctions drawn by the Court.³¹ Thirty years from now, the Court's apparent move toward a formal neutrality test might be viewed in the same way. Formalism does not necessarily beget clarity, and in the end—when the issues that arise are complex and fact specific—a more formalistic test may lead to less clarity in the long-run. Such a test must either be contorted to fit the diversity of situations to which it will be applied, or it will ignore context and function somewhat like a bull in a china shop. All of this will be explored in greater depth in Part II.³²

The Court's decision in *Zelman* brings to mind a quotation from Professor Philip Kurland's classic 1961 article, *Of Church and State and the Supreme Court*.³³ In describing a "neutral principle" that would "give the most appropriate scope to the religion clauses,"³⁴ Kurland explained:

This 'neutral principle' has been framed in reliance on the Aristotelian axiom that 'it is the mark of an educated

²⁸ See *infra* notes 52-247, 325-463 and accompanying text.

²⁹ *Zelman*, 536 U.S. at 652-53; Steven K. Green, *The Illusionary Aspect of "Private Choice" for Constitutional Analysis*, 38 WILLAMETTE L. REV. 549, 551 (2002).

³⁰ See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (setting forth test, based on earlier cases, requiring that government action (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) avoids excessive entanglement between government and religion).

³¹ Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 127-34 (1992); Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 800-13 (1993).

³² See *infra* notes 52-247 and accompanying text.

³³ Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961).

³⁴ *Id.* at 2.

man to seek precision in each class of things just so far as the nature of the subject admits,' rather than the Platonic precept that 'a perfectly simple principle can never be applied to a state of things which is the reverse of simple.'³⁵

After considering the Court's decision in *Zelman*, I am inclined to favor the Platonic precept over the Aristotelian axiom upon which Professor Kurland relied. The vast web of factual scenarios involved in funding cases and equal access cases—situations where the Court has already applied formal neutrality³⁶—is by no means simple, yet this Article argues that formal neutrality is an intensely simple concept (although in no way perfect).³⁷ While Professor Kurland may have advocated a version of formal neutrality, it is unlikely he was advocating the kind of acontextual neutrality towards which the Court seems headed.³⁸

If indeed there is no such thing as neutrality in Establishment Clause cases, and the current Court's concept of formal neutrality is flawed, where can we turn for a less flawed Establishment Clause jurisprudence? Alternatives proposed by scholars and others include: separationism,³⁹ accommodation,⁴⁰ equality,⁴¹ liberty,⁴² non-preferentialism,⁴³ and some hybrid of these principles with

³⁵ *Id.*

³⁶ See *infra* notes 127-247 and accompanying text.

³⁷ See *infra* notes 52-247 and accompanying text.

³⁸ See Laycock, *supra* note 3, at 999 ("I will call this standard formal neutrality. I will not call it Kurland's Rule, because I am not sure he intended it in the way it has come to be understood."); see generally Kurland, *supra* note 33, at 2-6 (advocating formal neutrality, but not necessarily in rigid form used by current Court).

³⁹ See, e.g., Green, *supra* note 24, at 1116-17 (discussing role of separationism in Establishment Clause jurisprudence and its relationship with neutrality).

⁴⁰ See, e.g., Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 5-9 (discussing connection between accommodation and liberty).

⁴¹ See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard*, in LAW & RELIGION: A CRITICAL ANTHOLOGY 200, 203 (Stephen M. Feldman ed., 2000) (recommending "equal regard"). Cf. Brownstein, *supra* note 13, at 246-56 (advocating both equality and liberty).

⁴² See, e.g., McConnell, *supra* note 16, at 151-52 (suggesting that religious liberty is guiding principle under Religious Clauses). Cf. Brownstein, *supra* note 13, at 246-56 (advocating both liberty and equality).

⁴³ See, e.g., Robert L. Cord, *Church-State Separation: Restoring the 'No Preference' Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129, 136-39 (1986) (supporting

neutrality.⁴⁴ I do not mean to imply that these concepts do not make their own claims to neutrality but rather that they have been identified as broad principles in their own right. This Article will argue that most of these concepts have something to contribute to Religion Clause Jurisprudence, but no single principle is adequate across the varied contexts of religion clause cases.⁴⁵ Indeed, some of these principles are little more than malleable constructions. The Article will propose a new test, the “facilitation test,” which is based on several narrow principles.⁴⁶

Part II of this Article will explore the basic thesis that neutrality does not exist under the Establishment Clause and the implications of this thesis for three recent cases in which the Court relied heavily on that concept.⁴⁷ In the process, formal neutrality and substantive neutrality will be explored, along with competing or augmenting concepts such as separationism and accommodationism. Part III will argue that the Court and its critics have erred by placing undue reliance on “broad principles” in the Establishment Clause context.⁴⁸ The Article will propose a new test supported by multiple narrow principles. Recent discussions of liberty and equality as overarching principles will be woven into this Part, but it will ultimately suggest that they suffer some of the same flaws as neutrality. Part IV will set forth and analyze a new test for evaluating Establishment Clause claims.⁴⁹ The test is based on government facilitation of religion, and it will be applied to a variety of scenarios. Moreover, a corollary of the test—one based on government discouragement of religion—will be discussed. This corollary would also be applicable in the Free Exercise Clause context. This Article will focus on the

nonpreferentialism); Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245, 247-63 (1991) (discussing nonpreferentialism in response to Professor Laycock's repudiation of concept).

⁴⁴ See Conkle, *supra* note 3, at 2 (discussing impact of “formal neutrality” upon religious liberty); Gedicks, *supra* note 25, at 1076 (discussing separation and neutrality); Laycock, *supra* note 25, at 46 (discussing combined benefit of separation and neutrality). Cf. John H. Garvey, *What's Next After Separationism?*, 46 EMORY L.J. 75 (1997) (discussing equality and neutrality).

⁴⁵ See *infra* notes 248-324 and accompanying text.

⁴⁶ See *infra* notes 325-463 and accompanying text.

⁴⁷ See *infra* notes 52-247 and accompanying text.

⁴⁸ See *infra* notes 248-324 and accompanying text.

⁴⁹ See *infra* notes 325-463 and accompanying text.

Establishment Clause, however, and will only address Free Exercise Clause concerns where necessary.⁵⁰ Still, the Article will necessarily reference free exercise issues in places because of the inevitable connection between establishment and free exercise concerns.⁵¹

II. NEUTRALITY DOES NOT EXIST

Steven Smith has explained:

[T]he quest for neutrality, despite its understandable appeal and the tenacity with which it has been pursued, is an attempt to grasp at an illusion. Upon reflection, this failure should not be surprising. The impossibility of a truly 'neutral' theory of religious freedom is analogous to the impossibility, recognized by modern philosophers, of finding some outside Archimedean point . . . from which to look down on and describe reality. Descriptions of reality are always undertaken from a point within reality. In the same way, theories of religious freedom are always offered from the viewpoint of one of the competing positions that generate the need for such a theory; there is no neutral vantage point that can permit the theorist or judge to transcend these competing positions. Hence, insofar as a genuine and satisfactory theory of religious freedom would need to be 'neutral' in this sense, rather than one that privileges one of the competing positions from the outset, a theory of religious freedom is as illusory as the ideal of neutrality it seeks to embody.⁵²

⁵⁰ Those who advocate a unified approach to the Religion Clauses may perceive this as an artificial line to draw, but the focus upon the Establishment Clause is not meant to support an absolute dichotomy in analysis between the two religion clauses. Rather, it is a reflection of the complexity of the issues involved and the added clarity—albeit via a somewhat artificial distinction—provided by focusing on the Establishment Clause.

⁵¹ See, e.g., William P. Marshall, *"We Know It When We See It" The Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 504 (1986) ("The establishment clause's tension with the free exercise clause . . . is unique and well-documented.").

⁵² SMITH, *FOREORDAINED FAILURE*, *supra* note 13, at 96-97. See also Smith, *Symbols, Perceptions, and Doctrinal Illusions*, *supra* note 13, at 314 ("[P]ervasive commitment to

Other scholars have also acknowledged the illusive and malleable nature of neutrality.⁵³ Yet, the Supreme Court has often used the term neutrality in its Religion Clause jurisprudence⁵⁴ and has recently placed a great deal of emphasis on neutrality in a number of cases.⁵⁵ The Court's use of the term until recently was largely symbolic—not in the sense that William Marshall's fascinating work has used that term⁵⁶—but rather in the sense that the Court was trying to send a message that its consideration of the issues was balanced.⁵⁷ The Court did not use neutrality as the “be all” or “end all” concept in actually deciding cases. Rather, it also had to rely on other principles because neutrality is so malleable,⁵⁸ or—as Steven Smith has argued—parasitic.⁵⁹ If there is no such thing as neutrality—or at least neutrality as more than a buzzword—this seems a logical state of affairs. The Court suggests that it is acting neutrally but can only define this neutrality by reference to other principles (which are not neutral).

neutrality has not yet generated any clear and convincing account of what neutrality actually entails. It has become increasingly clear, rather, that neutrality is a ‘coat of many colors.’”).

⁵³ See *supra* notes 13-14 and accompanying text.

⁵⁴ See *supra* notes 1-3, 5-11, 23 and accompanying text; *infra* notes 127-247 and accompanying text. See also Frederick Schauer, *Neutrality and Judicial Review*, 22 LAW & PHIL. 217, 234 (2003) (critiquing Herbert Wechsler's notion of neutral principles and noting that “the judicial creation of constitutional principles can [not] in any comprehensible form be neutral as between competing visions of just what those principles should be. To put it more bluntly, there simply cannot be a neutral principle.”).

⁵⁵ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 670 (2002) (concluding voucher program was neutral between religious and nonreligious schools); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (allowing religious club to use school grounds); *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (relying on neutrality to uphold aid program); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995) (deciding public university can provide funding to religious student group publication on neutral basis).

⁵⁶ Marshall, *supra* note 51, at 498 (advocating approach that is more focused on symbolic impact of government action than on government involvement with, and support of, religion).

⁵⁷ Of course, while the Court may have been trying to send the message that it was being balanced in its Religion Clause decisions, that message presumed there is a way to be balanced in such cases. Many people disagreed that the Court was being balanced. See, e.g., STEPHEN M. FELDMAN, *PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE*, 254 (1997) (arguing that “constitutional principle of separation of church and state does *not* equally protect the religious liberty of all, including outgroups, and does *not* determine judicial outcomes”); Gedicks, *supra* note 24, at 27 (noting that religion clause jurisprudence is viewed as both “oppressive” and “neutral”).

⁵⁸ See *infra* notes 81-126 and accompanying text; *supra* notes 13-14 and accompanying text.

⁵⁹ Smith, *Symbols, Perceptions, and Doctrinal Illusions*, *supra* note 13, at 268, 325-31.

The current Court, however, has begun to rely on neutrality more directly.⁶⁰ Neutrality is no longer a background principle that the Court sees no need to consistently define. Rather, it is an actuating principle that the Court apparently believes must be given a formalistic definition which can be rigidly applied.⁶¹ As will be seen, the Court connects its formal neutrality with what appear to be arguments for formal equality between religion and “non-religion.”⁶² Yet, as this Part will demonstrate, the current Court’s neutrality is no more neutral than past Courts’ neutrality. In fact, because of its formalistic nature, this Court’s approach is potentially “less neutral”—if it is possible to be less than something that does not exist—because at least potentially if a government action or inaction meets the Court’s definition of neutrality (and the element of individual choice discussed below), pesky things such as the effects of the program need not be considered.⁶³ This is particularly problematic because the Court does not explain why its formal neutrality is neutral given the competing views of neutrality, yet it uses terms such as “entirely neutral,”⁶⁴ “neutral in all respects,”⁶⁵ and “a program of true private choice.”⁶⁶ By relying on the term “neutrality” in this direct, yet unsubstantiated manner, the Court gives it extra power.

The Rehnquist Court’s neutrality approach will be discussed in greater detail in Part II.B of this Article.⁶⁷ For now, it is useful to understand that the Court requires a law or government policy to be facially neutral and that any benefit or funding that flows to religious entities does so as the result of the choices of private

⁶⁰ *Zelman*, 536 U.S. at 670; *Mitchell*, 530 U.S. at 809 (plurality opinion).

⁶¹ In her concurring opinion in *Mitchell*, Justice O’Connor decried the central role of neutrality in the plurality’s approach. *Mitchell*, 530 U.S. at 837 (O’Connor, J., concurring) (“[T]he plurality’s treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school aid programs.”).

⁶² See *infra* notes 127-85 and accompanying text. See generally *Zelman*, 536 U.S. at 639.

⁶³ *Zelman*, 536 U.S. at 684-86 (Stevens, J., dissenting); *id.* at 686-89, 694-708 (Souter, J., dissenting); *id.* at 726-29 (Breyer, J., dissenting).

⁶⁴ *Id.* at 662.

⁶⁵ *Id.* at 653.

⁶⁶ *Id.* at 653, 665.

⁶⁷ See *infra* notes 127-85 and accompanying text.

individuals.⁶⁸ As will be seen below, this approach has not been applied in all Establishment Clause cases, but to the extent it has been applied, the private choice element may have lost its substantive bite.⁶⁹

Lurking underneath the Court's "formal neutrality" doctrine is the notion that religion has no special status, and thus there is no need to differentiate between religion and non-religion if the government is acting "neutrally."⁷⁰ A corollary to this notion is the argument that, by treating religion differently, one is being hostile to religion. Thus, it is discrimination and hostility to religion if religious organizations are not given access to the same benefits as secular organizations,⁷¹ and at the same time there is nothing wrong with failing to provide religious exemptions to "generally applicable" laws even if those laws interfere with core religious practices.⁷² There would be significant problems with the Court's implicit presumptions even if neutrality were a real and attainable concept, but if neutrality is nothing more than an empty construction as this Article asserts,⁷³ the Court's other presumptions are even more problematic.

To understand the Rehnquist Court's notion of neutrality, it is useful to explore several of the cases where the Court has used neutrality analysis in varying contexts. Thus, Parts II.B, II.C, and II.D of this Article will evaluate the Court's recent decisions in *Zelman v. Simmons-Harris*,⁷⁴ *Good News Club v. Milford Central School*,⁷⁵ and *Capitol Square Review and Advisory Board v.*

⁶⁸ See *Zelman*, 536 U.S. at 662 (holding voucher program to be one of "true private choice"). See also *infra* notes 127-85 and accompanying text (discussing Rehnquist Court's neutrality approach).

⁶⁹ See *infra* notes 127-85 and accompanying text. See also Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 938 (2003) (discussing *Mitchell* Court's limitation on independent significance of "genuine" choice).

⁷⁰ *Zelman*, 536 U.S. at 651-53; *Mitchell v. Helms*, 530 U.S. 793, 826-29 (2002) (plurality opinion). Cf. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 110-12, 114 (2001) (addressing viewpoint discrimination).

⁷¹ *Good News Club*, 533 U.S. at 118-20; *Mitchell*, 530 U.S. at 828-29 (plurality opinion).

⁷² *Employment Div. v. Smith*, 494 U.S. 872, 881-82 (1990).

⁷³ See *infra* notes 81-185, 248-324 and accompanying text.

⁷⁴ 536 U.S. 639 (2002). See *infra* notes 127-85 and accompanying text.

⁷⁵ 533 U.S. 98 (2001). See *infra* notes 186-218 and accompanying text.

Pinette,⁷⁶ respectively. Each case represents a major area where the Court has used a version of its neutrality concept. First, in *Zelman*, the Court dealt with government aid to religious schools.⁷⁷ Second, in *Good News Club*, the issue was equal access for religious groups.⁷⁸ Finally, in *Capitol Square*, the Court considered religious speech in a traditional public forum.⁷⁹ There are a number of other cases where the Court has used its formal neutrality principle, and they will also be addressed where relevant. Based on the test proposed later in this Article, *Zelman* was wrongly decided, and the other two cases were correctly decided. However, neither the results nor the analysis the Court used in the latter two cases were neutral.⁸⁰

A. WHAT IS NEUTRALITY?

The answer to the question—"What is neutrality?"—is central to the discussion of neutrality's place in religion clause jurisprudence. Thus, the answer that neutrality in the religion clause context is a myth may seem wholly unsatisfying. Yet can there be some use for a concept that is impossible to achieve? Neutrality is nothing more than a variable social construction, and formal neutrality is nothing more than a rigid judicial construction. Even though each construction relies on a baseline that is not provably neutral, each has a value because people take solace in the notion of neutrality.⁸¹ Even if objectivity does not exist, there may be value in the *perception* of objectivity.⁸²

⁷⁶ 515 U.S. 753 (1995). See *infra* notes 219-47 and accompanying text.

⁷⁷ *Zelman*, 536 U.S. at 639.

⁷⁸ *Good News Club*, 533 U.S. at 98.

⁷⁹ *Capitol Square*, 515 U.S. at 753.

⁸⁰ See *infra* notes 325-463 and accompanying text (setting forth facilitation test).

⁸¹ See Laycock, *supra* note 3, at 998 (noting that governmental aspirations toward neutrality reassure religious minorities); Smith, *Symbols, Perceptions, and Doctrinal Illusions*, *supra* note 13, at 313, 329, 331 (noting that people take solace in notion that neutrality prevents government from exhibiting partiality).

⁸² Cf. Frank S. Ravitch, *Can an Old Dog Learn New Tricks? A Nonfoundationalist Analysis of Richard Posner's The Problematics of Moral and Legal Theory*, 37 TULSA L. REV. 967, 971 (2002) (stating that the "social belief in 'natural' rights might be useful in a given context, even if they are not objectively natural and are actually contingent on context . . .").

This sounds a bit odd at first, but it actually tracks much of what the pre-Rehnquist Court did with the concept of neutrality. Neutrality was mentioned quite a bit in numerous contexts, and sometimes the Court used a vague adjective to describe it such as “benevolent neutrality.”⁸³ Yet the Court never relied exclusively on the principle, supplementing it with separationism⁸⁴ or accommodationism.⁸⁵ For those who did not dig too deeply, there was always the reassuring tone of neutrality. For those who did dig, it was apparent that, while the Court could not substantiate its claim to neutrality,⁸⁶ it had the other principles to fall back on and one could support or attack those other principles without focusing on whether they were neutral in application or effect.⁸⁷ It would not be a reach to read these cases and perceive that the Court was essentially saying: “We are following a separationist principle or an accommodationist principle that we think is more neutral than the alternatives in this context, but neutrality is only the lofty object of the religion clauses, not something we can prove with absolute certainty.”

I do not defend the earlier Courts’ use of the term. It was in a sense false advertising because there is no way to prove that separationism or accommodationism is inherently more neutral than other principles.⁸⁸ Yet the implicit message that was at least potentially infused in these earlier decisions—we know that neutrality is just a lofty principle and we are only using it to describe the outcome in this case *vis a vis* the alternatives—is less troubling than claims that both the mode of analysis and the results

⁸³ *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970).

⁸⁴ See generally Laycock, *supra* note 25 (discussing underlying unity of separation of neutrality).

⁸⁵ See McConnell, *supra* note 40, at 3-6 (discussing concept of accommodation).

⁸⁶ See *supra* note 13 and accompanying text (listing sources which argue that neutrality does not exist).

⁸⁷ See Smith, *Symbols, Perceptions, and Doctrinal Illusions*, *supra* note 13, at 314 (suggesting that it would be impossible to prove neutrality, so other principles could not be accurately defined by neutrality ideal).

⁸⁸ It is possible that concepts such as separation and accommodation might serve as baselines for neutrality, see Laycock, *supra* note 3, at 996-98, 1004-05, but there is no place from which one can prove that any such baseline is neutral. See SMITH, FOREORDAINED FAILURE, *supra* note 13, at 96-97 (arguing that quest for neutrality is attempt to grasp an illusion).

are neutral, while the alternatives are not. The latter is the message of the Rehnquist Court. The current Court has converted neutrality from a lofty goal to both the means and ends of religion clause analysis.⁸⁹ Thus, the question "What is neutrality?" takes on greater import.

The Court's struggle with neutrality reminds me of a conversation I recently had with my five-year-old daughter who was excited when she realized that her tooth was loose and would soon fall out. She realized that I might be the tooth fairy, and she asked if the tooth fairy is real or if I was the tooth fairy. Not wanting to lie to her or burst her bubble, I responded that the tooth fairy would leave her a present when she lost her tooth. She responded that she knows I am the tooth fairy but that she wants the tooth fairy to visit and leave her a present anyway.

This is akin to the struggle for neutrality. Like the tooth fairy, neutrality is just a myth, but like children who want the tooth fairy to visit, we want neutrality to be real or at least for something to stand in for it to make us believe it is real. Unlike my five-year-old daughter, however, the Rehnquist Court has strenuously argued in essence that the tooth fairy is real, and when confronted with the question of why, the answer seems to be, "because we said so." The nuance of the stand-in concept—neutrality not as a real thing but as a lofty principle that we try to emulate—seems lost.

Of course, even though neutrality as a lofty principle is less problematic than formal neutrality because it is not used to reach or empower outcomes, it is no more neutral. Thus, it is useful to look at another conception of neutrality that is far more nuanced and sophisticated. This conception of neutrality is one that recognizes there is no agreement about what neutrality is. I am referring to Douglas Laycock's construction of substantive neutrality.⁹⁰ Laycock is not alone in arguing for substantive neutrality. Scholars,⁹¹ as well as Justices of the Supreme Court,⁹²

⁸⁹ See *infra* notes 127-85 and accompanying text.

⁹⁰ See generally Laycock, *supra* note 3, at 1001-06; Laycock, *supra* note 25, at 68-73.

⁹¹ See Hugh J. Breyer, *Laycock's Substantive Neutrality and Nuechterlein's Free Exercise Test: Implications of Their Convergence for the Religion Clauses*, 10 J.L. & RELIGION 467, 476-90 (1994) (applying Laycock's theory to select cases); Stephen V. Monsma, *Substantive Neutrality as a Basis for Free Exercise-No Establishment Common Ground*, 42 J. CHURCH &

have argued for some form of substantive neutrality. Professor Laycock's substantive neutrality has a lot to recommend it. In fact, it has had a strong influence on the facilitation approach I propose below.⁹³ Still, as I hope to show, his approach has a lot of substantive value, but no neutrality.⁹⁴ This might seem a bit nitpicky because, as will be seen, the approach has a lot to offer. But while Professor Laycock may have made a wise choice among potential baselines, his choice and the resulting baseline are no more neutral than the Court's formal neutrality.⁹⁵

Professor Laycock's formulation of substantive neutrality is reflected in the following quote:

My basic formulation of substantive neutrality is this: the religion clauses require government to minimize the extent to which it either encourages or discourages belief or disbelief, practice or nonpractice, observance or nonobservance. If I have to stand or fall on a single formulation of neutrality, I will stand or fall on that one. But I must elaborate on what I mean by minimizing encouragement or discouragement. I mean that religion is to be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. Government should not interfere with our

ST. 13 (2000) (arguing that interpretation of two religion clauses should be grounded in substantive neutrality concept).

⁹² Perhaps the most eloquent plea for substantive neutrality in recent years has come from Justice Souter. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 688, 695-98 (2002) (Souter, J., dissenting) (rejecting Court's use of formal neutrality, and arguing for substantive neutrality); *Mitchell v. Helms*, 530 U.S. 793, 877-84 (2000) (Souter, J., dissenting) (arguing that evenhandedness neutrality as stand-alone criterion of constitutional intent or effect is insufficient); see generally Liza Weiman Hanks, Note, *Justice Souter: Defining "Substantive Neutrality" in an Age of Religious Politics*, 48 STAN. L. REV. 903 (1996).

⁹³ See *infra* notes 325-463 and accompanying text.

⁹⁴ This is not because of any flaw in Professor Laycock's reasoning but rather a result of the epistemological claim inherent in any concept of neutrality. See SMITH, *FOREORDAINED FAILURE*, *supra* note 13, at 96-97 (recognizing illusory nature of neutrality). Laycock recognizes the epistemic problem with claims to neutrality and addresses the concern by pointing out that neutrality is a function of the baseline one sets for the concept. Laycock, *supra* note 3, at 994, 996, 1004-05. Yet, without some way to determine if a given baseline is neutral, the setting of such a baseline cannot make a concept neutral. Smith, *supra* note 14, at 319-24.

⁹⁵ Smith, *supra* note 14, at 319-24.

beliefs about religion either by coercion or by persuasion. Religion may flourish or wither; it may change or stay the same. What happens to religion is up to the people acting severally and voluntarily; it is not up to the people acting collectively through government.⁹⁶

Professor Laycock refers to the above as a formulation of neutrality,⁹⁷ but while it is immensely valuable, is it neutral? Professor Laycock suggests that neutrality depends on the baseline one sets in defining it, and that there are varying baselines.⁹⁸ This Article asserts that a problem arises as a result because there is no super-baseline to determine whether a given baseline is neutral.⁹⁹ Yet the very term neutrality asserts an epistemic (in the sense that it suggests some theory or way to know something is neutral) and arguably teleological claim. A given baseline might be a useful paradigm for Establishment Clause jurisprudence, but unless one can demonstrate the neutrality of the baseline itself, the baseline cannot support claims of neutrality.¹⁰⁰

The *Zelman* case is a good example through which to view this.¹⁰¹ If the Court in *Zelman* had held that vouchers are unconstitutional when given for attendance at religious schools but that districts can maintain vouchers for secular private schools and of course can maintain the secularized public schools without any voucher program, would the result encourage secularism?¹⁰² Would such a limitation advance private choice, or would it place burdens only on the private choice of religious individuals because they must choose between a secular education free of charge and their values?¹⁰³ Yet,

⁹⁶ Laycock, *supra* note 3, at 1001-02.

⁹⁷ *See id.* at 1001 (labeling his proposal "formulation of substantive neutrality").

⁹⁸ *Id.* at 994, 996, 1004-05.

⁹⁹ *See generally* THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996) (discussing paradigms in sciences and asserting that there is no super-paradigm to decide between conflicting paradigms).

¹⁰⁰ Smith, *supra* note 14, at 319-24.

¹⁰¹ *See infra* notes 127-85 and accompanying text (discussing *Zelman* case in greater detail).

¹⁰² *See generally* *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding voucher system constitutional).

¹⁰³ This Hobson's choice may be reflective of a larger issue, namely, the possibility that cultural, legal, and political currents favor secularism and may place religious adherents at

under the Court's holding which allows vouchers to be used at religious schools, there is a powerful argument that religion, and particularly more dominant and well-funded religions, will benefit from an infusion of government funds¹⁰⁴ and that private choice will be skewed toward sending one's children to schools with whose faith mission one disagrees simply to keep them on a level playing field with other children in the area who may face no such conflict.¹⁰⁵

Which of these options is neutral? Which encourages or discourages religion the most? These are actually two very different questions. The first is unanswerable in any objective way unless one has a magic key to demonstrate which contested account of neutrality is actually neutral. Yet the second question is answerable, even if it is not precisely so. More importantly, even though the answer may be contestable, the contestability of the answer is more open to debate when it is not appended to the concept of neutrality. The answer must be debated on its merits, without regard to the unprovable claim that it is neutral;¹⁰⁶ neutrality should have no power in the interpretive process. As Steven Smith has implied, calling a result neutral adds nothing of value to an argument.¹⁰⁷ Additionally, doing so may either obfuscate the nature and value of other principles that undergird an argument or unnecessarily prop up those principles.

Yet, as will be seen, this does not destroy the force of Laycock's principle.¹⁰⁸ Significantly, the fact that divorcing Laycock's substantive principle from neutrality does not undermine that principle demonstrates the lack of import the neutrality concept has. As between formal neutrality and substantive neutrality, substantive neutrality is the better option, not because it is more

a disadvantage by inducing them to take part in the dominant secularized culture at the expense of their deeply held religious convictions. *See generally* STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

¹⁰⁴ *See Zelman*, 536 U.S. at 684-85 (Stevens, J., dissenting); *id.* at 687 (Souter, J., dissenting); Green, *supra* note 24.

¹⁰⁵ *Zelman*, 536 U.S. at 704 (Souter, J., dissenting).

¹⁰⁶ SMITH, *FOREORDAINED FAILURE*, *supra* note 13, at 96-97; Smith, *Symbols, Perceptions, and Doctrinal Illusions*, *supra* note 13, at 314.

¹⁰⁷ Smith, *Symbols, Perceptions, and Doctrinal Illusions*, *supra* note 13, at 268, 325-31.

¹⁰⁸ *See infra* notes 325-463 and accompanying text (formulating facilitation test from substantive "neutrality" theory).

neutral—neither option is neutral—but because it is still useful even when divorced from its neutrality claim. The Court’s formal neutrality hinges too much on neutrality as a real concept, or at least on formal equality as neutrality,¹⁰⁹ and while a more sophisticated and consistently applied version of the equality principle could have independent value,¹¹⁰ the formal-equality-as-formal-neutrality version has little to offer since its claim to neutrality cannot be proven.

Issues surrounding governmental interaction with religious entities have become increasingly complex over the last hundred years or so as government, both state and federal, has grown and gotten involved in many areas of life where there was traditionally little or no government participation or regulation.¹¹¹ It is hard for government to act “neutrally” when its actions or failure to act in the same situation can have massive repercussions.¹¹² This creates problems for any “neutrality” test that must be applied to this massive web of government action and inaction. At the theoretical level, such a test cannot make an absolute claim to neutrality because there is no principle of super-neutrality to demonstrate a test’s neutrality; contested perspectives necessarily enter the process of developing such a test.¹¹³ It would solve the problem if one could prove neutrality by looking at the effects of a court’s approach, but as the above examples demonstrate, this is impossible to do without presuming that a certain baseline is neutral and using the presumed baseline to justify the neutrality of the outcomes.¹¹⁴

¹⁰⁹ See generally *Zelman*, 536 U.S. 639.

¹¹⁰ See generally Brownstein, *supra* note 13 (arguing for equality principle); Eisgruber & Sager, *supra* note 41 (arguing for equality principle in religious liberty jurisprudence).

¹¹¹ Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998); Feldman, *supra* note 4, at 679-80; Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994); McConnell, *supra* note 40, at 14, 23-24.

¹¹² Smith, *Symbols, Perceptions, and Doctrinal Illusions*, *supra* note 13, at 329-31. This is also reflected in the differences between the majority and dissenting opinions in *Zelman*. Compare *Zelman*, 536 U.S. at 643-63, with *id.* at 684-86 (Stevens, J., dissenting), and *id.* at 686-717 (Souter, J., dissenting), and *id.* at 717-29 (Breyer, J., dissenting).

¹¹³ Cf. Kuhn, *supra* note 99, at 150-58 (making similar argument about lack of super-paradigm in sciences that would allow one to select between various contested scientific paradigms).

¹¹⁴ See Laycock, *supra* note 3, at 994, 996, 1004-05 (proposing baseline analysis).

Let us look at another example. Suppose a creation science advocate applies to the National Science Foundation (NSF) for a grant.¹¹⁵ To make this hypothetical even more interesting, let us assume that the creation scientist is not from the “intelligent design theory school,” which makes a greater attempt to assume the mantle of mainstream science,¹¹⁶ but is a traditional advocate of creation science. Moreover, assume the creation scientist is applying on behalf of a creation science center and not a specific church or religious organization, and assume the center has no direct connection to any such religious entity. The applicant and his team all have PhD’s in biology or chemistry, some from evangelical universities. Their proposed project consists of proving that spontaneous evolution in lower organisms proves that evolution could have happened in a much shorter period of time than is currently accepted and that evolution is limited to certain organisms. They argue that the period of time would be between six and seven thousand years and that humans are not among the organisms that have evolved. In fact, they suggest *Australopithecus*, *Homo Erectus*, and *Homo Habilis* were all simply spontaneous mutations from great ape species that never took hold and died out.¹¹⁷

The NSF rejects the team’s proposal because the creation scientists have not supported their hypothesis with adequate testable data. The scientists sue, claiming that NSF’s decision demonstrates hostility to religion in a program open to secular scientific debate and that NSF undervalued their empirical data. How do we address this situation based on formal and substantive neutrality?

The natural answer is to say that the scientists were not qualified to participate in the program because they were unwilling

¹¹⁵ The idea for the NSF hypothetical was sparked by the implications of *Zelman* in combination with *Witters* and *Zobrest*, in regard to a statement made in Dhananjai Shivakumar, *Neutrality and the Religion Clauses*, 33 HARV. C.R.-C.L. L. REV. 505, 544 (1998).

¹¹⁶ For an excellent discussion of the relationship and differences between creationism and intelligent design theory, see ROBERT T. PENNOCK, *TOWER OF BABEL: THE EVIDENCE AGAINST THE NEW CREATIONISM* (1999).

¹¹⁷ *Australopithecus*, *Homo Erectus*, and *Homo Habilis* are traditionally accepted by paleontologists as ancestors of modern humans. BERNARD G. CAMPBELL, *HUMANKIND EMERGING* 167-73, 281-96 (3d ed. 1982); G.E. KENEDY, *PALEO-ANTHROPOLOGY* 205-48 (1980).

or unable to produce adequate scientifically acceptable data to support their hypothesis, and their hypothesis was unscientific, while the program from which they seek funding is a scientific program. This is of little help, however, because the creation scientists can simply charge that the whole selection process, including the reliance on secular scientific “theories” and “adequate scientific” data, is biased against faith-affected approaches, which are put at a disadvantage because they cannot compete for funding on an equal basis even if they engage in some empirical research. They would assert that the NSF’s definition of science is not neutral as between religion and irreligion.

Based on the Rehnquist Court’s formal neutrality approach, it would appear that the program discriminates against faith-based entities, or at the very least against faith-based “scientific” viewpoints trying to compete with secular scientific theories in the marketplace of ideas.¹¹⁸ To the extent it requires applicants to adhere to the scientific method preferred by secular science, it is not neutral as between religion and secularism. It prefers secular hypotheses and methods over religiously derived hypotheses, even when the “religious scientists” engage in some empirical research.

Perhaps the most obvious argument in NSF’s favor would be that, in this case, government is funding the research through a competitive process and on its own behalf, and by analogy to the free speech cases, government can “selectively fund a program to encourage activities that it believes are in the public interest.”¹¹⁹ The problem with the competitive process aspect of this argument is that the creation scientists are in essence arguing that the process is only competitive for those holding secular scientific views. It would be as if the NEA in *Finley* had said it would only allow artists

¹¹⁸ The Court applied formal neutrality in *Zelman*, 536 U.S. at 670; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 117-20 (2001); *Mitchell v. Helms*, 530 U.S. 793, 793 (2000); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 837, 846 (1995); and *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993). See also *Davey v. Locke*, 299 F.3d 748, 760 (9th Cir. 2002) (holding that denial of funding to student wishing to pursue theology degree under broad funding program violates Free Exercise Clause and that state interest in not funding religious instruction is not compelling after *Zelman*).

¹¹⁹ See generally *Rust v. Sullivan*, 500 U.S. 173 (1999); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983); *Davey*, 299 F.3d at 752.

to compete if their styles were influenced by secular art or artists. The problem with the government-as-speaker aspect of the argument is that the government does not necessarily endorse all the scientific research that arises from NSF grants, and indeed it seems to be creating a “funding forum” for the exploration of scientific ideas (thus it might be a designated public forum open to “scientists”). This might make the situation more like that in *Rosenberger*, where the University of Virginia’s system for funding student organizations was deemed a limited public forum,¹²⁰ although the competitive nature of NSF funding could still be a distinguishing factor. It is, of course, quite possible that a court would analyze the situation presented in this hypothetical under *Finley* or the government speech cases, but let us presume for the moment that, as in *Rosenberger*, it does not, and the applicable analysis is the Court’s neutrality analysis. Would a decision favoring the creation scientist be neutral?

The answer to this question must be separated from the question of whether the result would promote good policy or good science. After all, neutrality, like objectivity, makes a universal claim that cannot be addressed based on one’s policy preferences.¹²¹ One could argue that allowing creation scientists access to NSF funding is not neutral because it gives religion a preferred status over other scientific theories that are not in the scientific mainstream. This begs the question for the other side, which could argue that not including religiously affected theories would give secularism and secular science preferred status and benefits over religiously affected theories.¹²² The claim that the latter theories are not

¹²⁰ *Rosenberger*, 515 U.S. at 819.

¹²¹ See *supra* note 13 and accompanying text (noting ambiguity of neutrality).

¹²² *Zelman* leaves this possibility open, especially when one considers it in connection with cases that have found programs excluding religiously affected beneficiaries from government funds based on their religious perspectives to be unconstitutional. See, e.g., *Rosenberger*, 515 U.S. at 819 (holding that program excluding proselytizing student publication from receiving funds because of its viewpoint violates First Amendment); *Davey*, 299 F.3d at 748 (finding that denial of student wishing to pursue theology degree under government program violates Free Exercise Clause). The fact that the program in question is a scientific program does not alter this under a formal neutrality/exclusion-as-hostility-to-religion approach because scientific standards are simply one perspective under such an approach, and the exclusion of religious voices from the marketplace of ideas because they do not meet the secular standards would seemingly violate the formal neutrality approach. The fact that many in the secular

scientific or that the evaluators who make the scientific decisions reject those theories as unscientific is inadequate to address this concern under formal neutrality because the creation scientists can argue that they included empirical data in their proposal and that the NSF's policies and definition of science are hostile to religiously affected theories; therefore, the denial of funding puts those accounts at a disadvantage when compared to the secular scientific accounts.

Moreover, once this argument is made, other religious groups—for example, a UFO cult that believes humans were placed here by aliens from the planet Zermac—would also be able to challenge the use of secular scientific standards in the NSF selection process. To avoid discriminating against religion by favoring secular scientific standards in a government-funded program open to private applicants, the only neutral process for selection among those willing to include empirical data in their proposals might be a first-come-first-served system or a lottery system. As will be seen in the next few sections of this Article, the creation science scenario is not a huge leap under the Court's formal neutrality approach.¹²³

How would the creation scientist fare under a substantive neutrality approach? One could argue that giving government funds to creation scientists certainly encourages religion because of the financial aid and the credibility that NSF funding might lend to

community see the exclusion of such voices as obvious could be used to prove the point that religious views have been skewed out of the debate by massive government funding supporting the secular scientific view. The notion that the secular community may view a situation as obvious and fair, while a religious community may look at the same situation and see discrimination and hostility, is not new. *See, e.g., Gedicks, supra* note 24, at 27 (arguing that differences in perceptions of religion's place (private or public) between secular and religious discourse "explains why, all too often, religious organizations and individuals experience the Supreme Court's religion clause jurisprudence as oppressive and alienating at the same time that others sincerely believe it to be neutral").

¹²³ *See infra* notes 127-218 and accompanying text. *Rosenberger*, 515 U.S. 819, and *Davey*, 299 F.3d 748, demonstrate that exclusion of religious viewpoints from a general program of funding violates the Constitution. Add to this *Zelman* and *Good News Club*, which would apparently allow access by religious groups to almost any government program or forum that is neutral on its face, and it appears that religious entities and individuals have the potential right to access broad ranging government programs. Furthermore, religious groups will be able to claim that exclusion is hostile to religion and unnecessary under the Establishment Clause if they are excluded based on their religious viewpoints or based on government preference for secular viewpoints. *See infra* notes 127-85 and accompanying text.

creation scientists. One could also argue, however, that by funding only secular scientific theories, government increases the ability of secular science to replace religion-based theories and puts religion at a competitive disadvantage in the marketplace of ideas.¹²⁴ Professor Laycock foresaw this tension between secular programs and religion and recognized a caveat to his substantive neutrality approach: that government is not encouraging or discouraging religion by funding secular social activities.¹²⁵ I do not disagree with his caveat, but with or without the caveat, his substantive principles are not neutral in this context. Either side could argue the result is not neutral if the other side wins.¹²⁶ Thus, whatever the independent merits of the substantive neutrality approach, the term “neutrality” is a misnomer.

B. *ZELMAN V. SIMMONS-HARRIS*

Zelman is a significant case for several reasons. It is the first United States Supreme Court case to uphold a government-funded educational voucher program and thus is quite significant from the education policy perspective, as well as the law and religion perspective. Additionally, a majority of the Court affirmed the notion that, so long as a program is neutral on its face and functions through “true private choice,” the program is constitutional.¹²⁷ Finally, while the majority opinion purports to consider whether private individuals who channelled government money to religious schools had real choices, the opinion expands the pool of “choices” to include public magnet and charter schools. This leaves open the possibility that the comparison group could be further expanded to include all public schools, at least in districts that have open enrollment or public school choice programs.¹²⁸ While Justice O'Connor tries to clarify this analysis to suggest it is simply a

¹²⁴ See *supra* note 122 and accompanying text (noting different perspectives of secular and religious communities).

¹²⁵ See Laycock, *supra* note 3, at 1003 (“Government routinely encourages and discourages all sorts of private behavior. Under substantive neutrality, these encouragements and discouragements are not to be applied to religion.”).

¹²⁶ See *supra* note 13 and accompanying text; *infra* notes 150-53 and accompanying text

¹²⁷ *Zelman*, 536 U.S. at 653; *id.* at 670 (O'Connor, J., concurring).

¹²⁸ *Id.* at 686-717 (Souter, J., dissenting).

clarification of the “effects” prong of the *Lemon* test,¹²⁹ it is hard to believe earlier Courts would have so expanded the comparison groups or found no primary effect benefitting religion given the data regarding the Cleveland voucher program,¹³⁰ *Mueller v. Allen*¹³¹ notwithstanding. The latter two points are the focus of this section. This Article takes no position on the educational policy aspects of the issue.¹³²

The *Zelman* Court ostensibly followed the *Agostini/Lemon* test.¹³³ Yet the Court’s application of the “effects” prong of that test is the key. As a preliminary matter, *Zelman* did not present a secular purpose issue because the goal of providing a better education to students in the Cleveland School District was an adequate secular purpose.¹³⁴ Indeed, at least in government aid and equal access

¹²⁹ *Id.* at 668-69 (O’Connor, J., concurring).

¹³⁰ Compare *Zelman*, 536 U.S. at 647 (noting that 96% of voucher program participants enrolled in religiously affiliated schools), with *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 779-80, 788-89 (1973) (striking state law providing maintenance and repair grants and tuition reimbursement grants for nonpublic schools because effect of law was to subsidize and advance mission of sectarian schools), *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (finding unconstitutional state statutes that gave state aid to church-related educational institutions), *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (finding unconstitutional released time program in which children could take religious classes taught by outside personnel in public school buildings during public school hours), and *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (allowing general program that reimbursed parents for expenditures for their children’s bus transportation to and from schools including parochial schools). See also *Zelman*, 536 U.S. at 686-717 (Souter, J., dissenting) (comparing majority’s approach in *Zelman* with long line of aid cases).

¹³¹ 463 U.S. 388 (1983) (upholding Minnesota statute allowing parents to deduct tuition, textbook and transportation expenses of their children, although deduction primarily benefitted parents of children attending parochial schools).

¹³² Contrary to the assertions of voucher advocates, the data on the educational success of vouchers for private schools is mixed. Compare JOHN F. WITTE, *THE MARKET APPROACH TO EDUCATION* 125, 133-43 (2000) (asserting that students enrolled in private schools under Milwaukee’s voucher program have not improved math or reading skills), with Paul E. Peterson, *School Choice: A Report Card*, 6 VA. J. SOC. POL’Y & L. 47, 69-70 (1998) (arguing that students enrolled at private schools under Milwaukee voucher program did improve over time). Since this Article is only concerned about vouchers in the context of their constitutionality under the Establishment Clause, the question of whether they work or not is beyond the scope of this Article. If they are unconstitutional, it is irrelevant whether they work. If they are constitutional, it is up to state and local governments to determine whether or not they work, and the courts are unlikely to second guess such choices. Moreover, the relative effectiveness of vouchers should be a factor in determining whether or not a voucher program violates the Establishment Clause.

¹³³ *Zelman*, 536 U.S. at 648-50; *id.* at 668-70 (O’Connor, J., concurring).

¹³⁴ *Id.* at 648-49.

cases, it is hard to imagine a situation where there would not be an adequate secular purpose. Thus, the case centered on the effects of the program,¹³⁵ as have several other funding cases.¹³⁶

Yet there is a significant catch. In order for an indirect aid program to satisfy the *Zelman* test, the program must be neutral on its face, and the money must flow through individuals who have “true private choice” regarding where to direct the aid.¹³⁷ If a program is neutral on its face between religious and nonreligious entities, it is highly unlikely that it would ever fail the secular purpose test. Further, there is no significant distinction between direct and indirect aid, since so long as the government entity drafting the program relates the aid that flows to religious institutions to the number of individuals who choose to use the private service, it does not matter that the check is written from the government directly to the religious institution.¹³⁸ Thus, as Justice O’Connor argued in her concurring opinion in *Mitchell v. Helms*,¹³⁹ neutrality is assigned singular importance. It is not a stretch to say that, at least in cases of government aid to religious institutions, the test is one of facial neutrality plus a private “circuit breaker”—i.e., the money ostensibly flows to the religious institution because of the choices of private individuals.¹⁴⁰ Significantly, the “circuit breaker” element is connected to the Court’s broader neutrality analysis. It is the private individual “choice” that makes a facially neutral program “entirely neutral.”¹⁴¹

This begs the question, however, of what constitutes “true private choice” under the Court’s analysis. The Court’s answer to this question is significant because it involves a statistical sleight of hand that could potentially make all public schools the relevant comparison group to religious schools for purposes of government

¹³⁵ *Id.*

¹³⁶ This is especially true since the Court rolled the “entanglement” prong of the *Lemon* test into the “effects” prong. See *Agostini v. Felton*, 521 U.S. 203, 232 (1997) (stating that “the factors we use to assess whether an entanglement is ‘excessive’ are similar to the factors we use to examine ‘effect’”).

¹³⁷ *Zelman*, 536 U.S. at 653.

¹³⁸ *Mitchell v. Helms*, 530 U.S. 793, 816 (2000) (plurality opinion).

¹³⁹ *Id.* at 837-38 (O’Connor, J., concurring).

¹⁴⁰ *Id.*; *Zelman*, 536 U.S. at 653.

¹⁴¹ *Zelman*, 536 U.S. at 662.

aid programs, even in areas with no secular private schools or where such private schools cannot afford to take voucher students, so long as secular private schools would be included in the program if they existed.¹⁴² This makes the Court's new test an exercise in almost pure formalism.¹⁴³ If a program is neutral on its face—that is, it does not specify religious entities as beneficiaries—and there is some government or nonreligious private entity that the recipients could conceivably choose to go to for service, the test is met because the program is neutral on its face and provides “true private choice,”¹⁴⁴ even if virtually all funding going to private organizations goes to religious organizations.¹⁴⁵

If this really were neutral, and neutrality was an appropriate actuating principle under the Establishment Clause,¹⁴⁶ the Court's approach would be perfectly acceptable. Conversely, if the Court's approach is not neutral, calling it neutral should give it no further power, and it should be adequately supported by some other principle.¹⁴⁷ In fact, if the Court's approach is not neutral, having the Court pronounce its neutrality is especially dangerous because the Court would simply be placing the label of neutrality on analysis that is neither neutral nor likely to lead to “neutral” results and using the label to validate its approach. The Court could call its undergirding principle “Ralph” and it would have the same descriptive accuracy.¹⁴⁸ In fact, “Ralph” might be more descriptively

¹⁴² *Id.* at 696-98 (Souter, J., dissenting).

¹⁴³ *Id.* at 689 (Souter, J., dissenting) (arguing that the “espoused criteria of neutrality in offering aid, and in private choice in directing it, are shown to be nothing but examples of verbal formalism”).

¹⁴⁴ *Id.* at 663 (O'Connor, J., concurring) (using term “true private choice”).

¹⁴⁵ *Id.* at 696-702 (Souter, J., dissenting).

¹⁴⁶ *See supra* notes 81-126 and accompanying text (suggesting that neutrality is not appropriate as central actuating principle under Establishment Clause).

¹⁴⁷ *See supra* note 16 and accompanying text (discussing inadequacy of neutrality as sole principle).

¹⁴⁸ I am reminded of Alfred Kahn's famous substitution of the term “recession” for the word “banana” (he later used “kumquat”) after President Carter had asked advisors not to use the term “recession” (Kahn was a member of the Carter administration). Peter Carlson, *Yes, We Have No Banana*, NEWARK STAR-LEDGER, Feb. 11, 2001, at 001. Of course, the distinction between that brilliant and comical substitution and the one suggested herein (aside from the latter not being brilliant) is that there is at least some “objective” definition of the term “recession” that economists can agree upon—levels in certain economic indicators that mean we are in a recession. William Neikirk, *Economy Remains Largely Stagnant, Jobless Rate Up as Payrolls Show 2nd Straight Dip*, CHI. TRIB., Nov. 2, 2002, at 1 (defining recession as

accurate because one would still have to determine what the essence of Ralphness is, and the nature of the term does not suggest that it has any extra power or reality until it is defined.

This might seem a bit tongue-in-cheek (and it is, to a point), but it demonstrates the serious problems with claims to neutrality. Since there is no neutral foundation or baseline that can be used to prove that something is “truly” neutral, neutrality is nothing more than a buzzword and a dangerous one at that, because it implies that the supposedly neutral approach should be taken more seriously because it is actually neutral.¹⁴⁹ Legal tests and definitions of neutrality do not make an approach neutral—they are simply tests or definitions and neutrality is nothing but extra baggage.¹⁵⁰ As was explained above, this does not mean that conceptions of neutrality—such as Douglas Laycock’s substantive neutrality¹⁵¹—are not useful tools, but it does mean that they are not neutral and should gain no additional validity from the use of that term.¹⁵²

This suggests that the Court’s formal neutrality approach is especially dangerous, because the formalistic approach leaves little room for introspection, and its very nature makes it less likely to account for nuances or context. Supporting such a rigid regime with a concept that cannot be proven is particularly perilous, since once the formalistic test controls outcomes, there will be little opportunity to adapt to varied circumstances without sacrificing the clarity such formalistic tests are intended to create. Thus, courts applying the test must either rigidly apply a test that has never adequately justified itself because it is based on a non-existent principle, attempt to modify the test in its application to varied circumstances without the help of a useful guiding principle, or in the case of the Supreme Court, abandon *stare decisis* and either

“sustained decline of at least six months in gross domestic product, the total output of the economy’s goods and services”).

¹⁴⁹ See *supra* notes 81-126 and accompanying text (defining neutrality).

¹⁵⁰ Smith, *Symbols, Perceptions, and Doctrinal Illusions*, *supra* note 13, at 325-31.

¹⁵¹ Laycock, *supra* note 3, at 1001-06.

¹⁵² See *supra* notes 81-126 and accompanying text (discussing danger of relying on one theory of neutrality).

overturn the decisions giving rise to the approach or apply the approach in a manner that goes against its underlying purpose.¹⁵³

A response to this line of reasoning might be that none of this is relevant if the Court's approach is "truly" neutral. I will respond to this argument next. My response will proceed in three parts. First, I will look at whether the individual beneficiaries of the program in *Zelman* had "true private choice."¹⁵⁴ Second, I will examine whether the notion of a private circuit breaker can make a government funding program "neutral" where that program ultimately gives a disproportionate amount of public money meant for private entities to religious institutions. As will be seen the answer to this question is related to the first question, even if one accepts the notion that neutrality exists and that it consists of treating both religious and nonreligious individuals and institutions the same.¹⁵⁵ Finally, I will explore whether the "facial neutrality" of a law—the fact that a law does not distinguish between potential recipients within the broad class of recipients eligible for aid—¹⁵⁶has anything to do with neutrality as an actuating principle for Establishment Clause jurisprudence.

In *Zelman*, the Court found that the parents of the students in the Cleveland School District, the private "circuit-breakers" in this case, had real individual choice regarding where to send their children.¹⁵⁷ In finding this "true" choice, the Court went beyond the private school options the parents had and included several public school options.¹⁵⁸ Thus, government-run programs became part of the field of options the Court considered. Arguably, a program would be neutral and parents would have "true" choices even if one hundred percent of the money going to private entities went to

¹⁵³ Some would argue that is exactly what the Court did in *Mitchell* and *Zelman*. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 688 (2002) (Souter, J., concurring); *Mitchell v. Helms*, 530 U.S. 793, 837 (2000) (O'Connor, J., concurring); *id.* at 899-900 (Souter, J., dissenting).

¹⁵⁴ *Zelman*, 536 U.S. at 653.

¹⁵⁵ See *supra* notes 70-72 and accompanying text.

¹⁵⁶ This might be called "verbal neutrality" and contrasted with actual neutrality, i.e., with provable neutrality if there is such a thing. Similarly, Justice Souter has used the term "verbal formalism" to describe the Court's approach. *Zelman*, 536 U.S. at 689 (Souter, J., dissenting).

¹⁵⁷ *Zelman*, 536 U.S. at 653; *id.* at 663 (O'Connor, J., concurring).

¹⁵⁸ *Id.* at 653; *id.* at 663 (O'Connor, J., concurring).

religious entities or if the only private choices parents had were religious.¹⁵⁹ This would seemingly be so even if the resulting government-funded regime put nonreligious private programs at a competitive disadvantage and led to religious institutions funded by a single sect taking over a market for services.¹⁶⁰

One argument in favor of so expanding the comparison group is that government is so pervasive¹⁶¹ that to exclude government-run programs—which are by their nature secular—from the comparison group would be to put religion at a disadvantage in the marketplace of ideas and programs.¹⁶² Yet this argument is something of a red herring. For example, religious groups have not generally had equal access to compete to run police or fire services, nor would one have thought (prior to *Zelman*) that religious organizations could compete to take over road services or state-run children and family services. Moreover, religious organizations could not administer a public school or a charter school that relies on public funds for its existence. The relevant comparison group in the context of a voucher program is thus private schools.¹⁶³ Such schools are the only relevant entities that are not government-run, wholly reliant on government funds, or subject to pervasive government regulation and oversight.

The relevant statistics regarding private schools in the Cleveland area were skewed such that the bulk of the money passing through the voucher program into private hands went to religious schools, and parents who participated in the voucher aspect of the Cleveland program had few nonreligious options.¹⁶⁴ More than 3,700 students participated in the voucher program, and of those, ninety-six

¹⁵⁹ *Id.* (Souter, J., dissenting).

¹⁶⁰ *Cf. Green, supra* note 29, at 559-60 (suggesting that market will favor more established faiths with existing schools over less established faiths and that adherents of former will have more options than adherents of latter).

¹⁶¹ *See supra* note 111 and accompanying text (noting increased governmental regulation in general).

¹⁶² *But see Laycock, supra* note 3, at 1003 (arguing that secular programs should not be considered when determining whether government encourages or discourages religion simply because they are secular and noting that relevant comparison is between religious and antireligious government action).

¹⁶³ *Zelman*, 536 U.S. at 645-48 (Souter, J., dissenting).

¹⁶⁴ *Id.* at 649-50 (Souter, J., dissenting).

percent enrolled in religious schools.¹⁶⁵ Forty-six of the fifty-six private schools participating in the program were religious schools.¹⁶⁶ Moreover, the nonreligious private schools were generally small and had fewer seats for voucher students.¹⁶⁷ These figures are not unusual because religious schools make up a significantly larger proportion of private schools nationally than nonreligious schools.¹⁶⁸

Rather than rehashing the debate regarding this data—a debate that played out between the various opinions in *Zelman* and in the law review literature—this Article will focus on the Court's characterization of the Cleveland program as an "entirely neutral" program of "true private choice."¹⁶⁹ Let us assume for the moment that the Court's statistical sleight of hand was a valid comparison of apples to apples, and thus in addition to the 3,765 voucher students in the program, we can consider the 1,400 students who stayed in public school and received subsidized tutorial aid, the 1,900 students enrolled in publically-funded community schools, and the 13,000 enrolled in public magnet schools.¹⁷⁰ The percentage of students attending religious schools drops to below twenty percent when the reference group shifts from 3,765 students to 20,000 students.¹⁷¹ In fact, if we were to include the entire Cleveland school system in the comparison group using the *Zelman* majority's approximate figure of 75,000,¹⁷² the percentage going to religious schools under the voucher program would be approximately 4.85%.¹⁷³ The 75,000 figure would represent all the "choices"

¹⁶⁵ *Id.* at 647. As Justice Souter points out in his dissent, the exact statistic is 96.6%. *Id.* at 703 (Souter, J., dissenting).

¹⁶⁶ *Id.* at 647.

¹⁶⁷ *See id.* at 650 (Souter, J., dissenting) (stating that, of the more than 3,700 participating voucher students, only 129 attended nonreligious private schools, and all such schools combined had a total of only 510 seats between kindergarten and eighth grade, including seats for non-voucher students).

¹⁶⁸ *Id.* at 657-58; *see also* Joseph M. O'Keefe, S.J., *What Research Tells us About the Contributions of Sectarian Schools*, 78 U. DET. MERCY L. REV. 425, 425 n.1 (2001) ("According to the National Center for Educational Statistics, nearly 80 percent of all private schools are sectarian . . .").

¹⁶⁹ *Zelman*, 536 U.S. at 662.

¹⁷⁰ *Id.* at 647.

¹⁷¹ *Id.* at 659.

¹⁷² *Id.* at 644.

¹⁷³ This figure was obtained by comparing Justice O'Connor's figure of 3,637 students

parents in the Cleveland District had (or could have assuming open enrollment at all Cleveland public schools).¹⁷⁴

Yet if parents choose to take advantage of the voucher program because of dissatisfaction with all public school options (including community schools), the inability to get into a magnet school, or failure to win a lottery slot at a community school,¹⁷⁵ the parent may have little choice but to send his or her children to religious schools or forego the voucher option entirely.¹⁷⁶ If parents in the area do not subscribe to the faith of any participating religious school, as is likely for nonbelievers and many religious minorities, they can make the same "choice" as their neighbors, who participate in the voucher program and who do subscribe to one of the represented faiths, only by sending their children to a religious school that may indoctrinate them in a faith with which the family disagrees or at the very least does not believe in. This choice hardly seems neutral. Nor does the Court's assurance that the program is neutral because it provides everyone with "true private choice" and does not discriminate on its face, provide much solace to a parent who desperately wants to provide the best education possible for her children but who is afraid that her children will be confronted daily with lessons and choices that are alien to the family's faith.¹⁷⁷

This is the problem with neutrality. One person's neutrality is another's discrimination or favoritism, and if a court proclaims

attending private religious schools under the voucher program to the overall number of 75,000 (4.85% would represent 3,637.5 out of 75,000 students). *Zelman*, 536 U.S. at 664 (O'Connor, J., concurring).

¹⁷⁴ The majority also mentions that suburban school districts could have participated in the program, but none chose to participate. *Id.* at 646-47. There are significant financial disincentives for suburban districts wishing to participate in the program because the districts would only receive a per pupil amount equaling the voucher amount plus the state's normal contribution, but this would not cover the per pupil expenditures in such districts because a significant amount of their funding comes from local property taxes. *Id.* at 707 n.17 (Souter, J., dissenting).

¹⁷⁵ *Id.* at 646 (noting that admission to community schools is by lottery).

¹⁷⁶ *Id.* at 703-04 (Souter, J., dissenting).

¹⁷⁷ The fact that children may be exempted from religious classes does not alter the sectarian messages and pedagogy that pervade (appropriately so) at many religious schools, or the possible discrimination that outsider children may face in such environments. *Cf.* FRANK S. RAVITCH, *SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS* 7-18 (1999) (discussing instances of religious discrimination and harassment aimed at religious minorities and dissenters that occurred in public schools which engaged in religious exercises in relatively homogeneous areas).

something to be neutral, there is no way of proving the proclamation to be true. The Rehnquist Court relies on "true private choice" and facial neutrality as the basis for demonstrating that a program is "entirely neutral."¹⁷⁸ It is easy, however, to dispute the availability of "true private choice," and the facial neutrality of a program does not mean that the program is neutral or even that it was not designed to discriminate against religious minorities or to favor dominant religious groups in a given area.¹⁷⁹

Even if the Court was correct in concluding that parents had a choice of multiple, equally viable nonreligious options, the program is not neutral. The overwhelming amount of money flowing into private (*i.e.*, not *initially* dependent on government for survival) hands flows to religious schools, as does the overwhelming number of students.¹⁸⁰ Unless the Court explains how the existence of "true private choice" under such circumstances is neutral, especially in light of the inequity in same-sect options between the denominational "haves" and "have nots," there is no reason to take the Court's word for it. The Court's reasoning is circular: neutrality equals private choice and facial neutrality because, if a program is facially neutral and provides private choice, it is neutral. The neutrality claim remains unsubstantiated. Without the claim to neutrality, however, the Court is left having to justify why religion is indistinct as a matter of constitutional law and why excluding only religion from the voucher program would exhibit hostility towards religion. The claim that the program is neutral allows the Court to evade significant doctrinal and conceptual problems.

What if, on the other hand, a voucher program had a large number of participating nonreligious private schools?¹⁸¹ Would this program be neutral? Where would the line be drawn if private

¹⁷⁸ *Zelman*, 536 U.S. at 653.

¹⁷⁹ *Cf. Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533-40 (1993) (explaining that law can be facially neutral yet not neutral in its object, and that law in this case was designed to discriminate against religious group).

¹⁸⁰ *Zelman*, 536 U.S. at 696-704 (Souter, J., dissenting).

¹⁸¹ Justice Souter suggests the constitutionality of such a program in his dissenting opinion in *Zelman*, but only if it provides a range of choices compatible with that in *Witters*, a highly unlikely and expensive possibility. *Id.* at 706-07. *See Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486-89 (1986) (upholding voucher program because of range of choices).

choice is the *sine qua non* of neutrality so long as a program is neutral on its face? Seventy five percent religious schools? Fifty percent? Forty percent? What if seventy percent of the forty percent of participating schools that are religious belong to one denomination? What if one hundred percent belong to one religion? These questions can be answered—even if not with perfect precision—but not by claiming the programs or the answers to the questions are neutral.¹⁸² This Article asserts that if there were a real range of choices available to parents within the voucher option, as was the case with the programs in *Zobrest*¹⁸³ and *Witters*,¹⁸⁴ the program would be constitutional. This is not because the private choice makes an otherwise biased program neutral, but rather because the effects of such a program do not give religion a disproportionate and substantial benefit.¹⁸⁵

C. *GOOD NEWS CLUB V. MILFORD CENTRAL SCHOOL*¹⁸⁶

Good News Club presents another version of the Court's formal neutrality, again grounded in the notion that treating religion differently would be hostile to religion.¹⁸⁷ *Good News Club* derives from a long line of equal access cases that at least arguably have a more consistent pedigree than the aid cases.¹⁸⁸ Equal access cases are those where a religious organization seeks access to government-owned facilities or government-funded fora to which

¹⁸² See *infra* notes 325-463 and accompanying text.

¹⁸³ *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10-11 (1993).

¹⁸⁴ *Witters*, 474 U.S. at 486-89.

¹⁸⁵ See *infra* notes 325-463 and accompanying text.

¹⁸⁶ 533 U.S. 98 (2001).

¹⁸⁷ *Id.* at 114, 118-20.

¹⁸⁸ See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763-64 (1995) (explaining that it is viewpoint discrimination to deny access to traditional public forum based on religious message). See *generally, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding guidelines that limit speech in public forums are unconstitutional); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (explaining that denying churches access to school premises open to other groups violates free speech); *Bd. of Ed. v. Mergens*, 496 U.S. 226 (1990) (Equal Access Act, which prohibits exclusion of religious clubs from open school forums, is constitutional); *Widmar v. Vincent*, 454 U.S. 263 (1981) (explaining that state could not exclude religious students group from using University facilities unless regulations were content neutral).

nonreligious entities have access.¹⁸⁹ The primary difference in *Good News Club* is that the forum the religious group sought access to was a central school that included an elementary school.¹⁹⁰

I will note at the outset that I think all of the equal access cases up until *Good News Club* were correctly decided and that *Good News Club*, while a closer call, was also correctly decided, but not because the analysis or results were neutral or because religion should automatically be treated the same as non-religion. In fact, by automatically connecting the exclusion of the religious group with hostility to religion, and thus non-neutrality,¹⁹¹ the Court makes another leap that it fails to adequately support.

Good News Club is in many ways a straightforward speech case.¹⁹² The school district allowed a variety of non-curricular student groups access to school facilities when school was not in session.¹⁹³ Both parties agreed that the district provided a limited public forum for a variety of groups at the school.¹⁹⁴ The religious club was denied access because the religious character of its meetings were the equivalent of religious instruction.¹⁹⁵ The school district argued that the denial of access under such circumstances was in compliance with New York law.¹⁹⁶ It was specifically the group's deeply religious mission, as well as its proselytizing nature, that gave the school district pause.¹⁹⁷ Thus, from a free speech perspective, the issue was one of viewpoint discrimination rather than content discrimination.¹⁹⁸

Content discrimination occurs when the government discriminates against or excludes an entire subject. Viewpoint

¹⁸⁹ *Good News Club*, 533 U.S. at 106-07.

¹⁹⁰ The school building included students from kindergarten to twelfth grade. *Id.* at 118.

¹⁹¹ *Id.* at 114, 118-20.

¹⁹² See *id.* at 106-12 (applying tests established in prior decisions involving Free Speech Clause of First Amendment).

¹⁹³ *Id.* at 102, 108.

¹⁹⁴ *Id.* at 108. The district, however, disputed the scope of the forum. *Id.* at 110-11.

¹⁹⁵ *Id.* at 103-04.

¹⁹⁶ *Good News Club v. Milford Cent. Sch.*, 21 F. Supp. 2d 147, 149 (N.D.N.Y. 1998), *rev'd* 533 U.S. 98 (2001). See N.Y. EDUC. LAW § 414 (McKinney 2000) (stating purposes for which schools may be opened for public use).

¹⁹⁷ *Good News Club*, 533 U.S. at 103-04. See *id.* at 137-39 (Souter, J., dissenting) (describing activities of Club as "evangelical service of worship").

¹⁹⁸ *Id.* at 107-10.

discrimination occurs when the government discriminates against speech based on the specific viewpoint involved. Thus, it would be content discrimination to exclude all religious speech from a public forum, but it would be viewpoint discrimination to exclude only speech from a Jewish perspective. Claims of content discrimination in a public forum give rise to strict scrutiny.¹⁹⁹ Thus the district would need to demonstrate first, that it had a compelling governmental interest, and second, that its action was narrowly tailored to serve that compelling interest.²⁰⁰ The Court has suggested that viewpoint discrimination in a public forum is presumed unconstitutional,²⁰¹ but the Court did not answer this question in *Good News Club*,²⁰² and there is some support for applying strict scrutiny to viewpoint discrimination, albeit *especially* strict scrutiny.²⁰³ Regardless, the line between content and viewpoint discrimination is somewhat blurred.

The district argued that its compelling interest was compliance with the Establishment Clause because the group was intensely religious, believed in proselytizing, was run by outside adults, and, most importantly, was geared for elementary school students who are young and impressionable.²⁰⁴ Thus, this case had the potential to confront directly the issue of whether religion is constitutionally different from other aspects of life, but the majority passed on the opportunity to deeply analyze this question. Instead, the Court presumed that treating religion differently was hostile to religion and would send a message of hostility to students in the same way

¹⁹⁹ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995). See *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996) ("Content-based restrictions are subject to strict scrutiny. Viewpoint-based restrictions receive even more critical judicial treatment.") (citations omitted).

²⁰⁰ *Church on the Rock*, 84 F.3d at 1279.

²⁰¹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995).

²⁰² 533 U.S. at 112-13.

²⁰³ See *Bartnicki v. Vopper*, 532 U.S. 514, 544 (2001) (Rehnquist, J., dissenting) (implying discrimination based on viewpoint is subject to strict scrutiny); *Church on the Rock*, 84 F.3d at 1279 ("Content-based restrictions are subject to strict scrutiny. Viewpoint-based restrictions receive even more critical judicial treatment.") (citations omitted). The fact that the Court in *Good News Club* refused to decide whether viewpoint discrimination might be justified in order to prevent violations of the Establishment Clause in rare circumstances at least leaves the question open. *Good News Club*, 533 U.S. at 112-13.

²⁰⁴ *Good News Club*, 533 U.S. at 113-16; *id.* at 137-39 (Souter, J., dissenting).

the school feared the group's meetings would send a message of endorsement of religion to non-believing students.²⁰⁵

As the dissent points out, the group was connected to a national organization that focuses on getting a foothold with elementary-aged children precisely because they are young and impressionable.²⁰⁶ Yet the majority argued that religious organizations are the same as other organizations, and to deny them the same rights as other organizations is to discriminate against religion or religious viewpoints—that is, to do so would be non-neutral.²⁰⁷ Therefore, differential treatment is not mandated by the Establishment Clause and indeed might violate that clause.²⁰⁸

Once again, the analysis boils down to formalism—this time with the aid of the Free Speech Clause. If religion is treated differently in a limited public forum, even in a sensitive context like an elementary school, this is viewpoint or content discrimination (depending on whether a specific viewpoint(s) or category of speech is focused upon).²⁰⁹ Yet treating religion differently in a forum neutrally open to all student groups is never a compelling government interest, because such differential treatment is not required by the Establishment Clause. That clause requires religion be treated the same as non-religion.²¹⁰ By assuming that religion must be treated the same as non-religion, the Court both sets up the claim of viewpoint discrimination and answers the compelling interest defense to that claim.²¹¹ Yet beyond asserting that differential treatment in this context is hostility to religion, the Court never explains why religion should be treated the same as non-religion, and why differential treatment in this context is automatically non-neutral.²¹² This is akin to a longstanding critique of the Court's formal equality doctrine under the Fourteenth Amendment: Is treating differently situated groups the same

²⁰⁵ *Id.* at 118-20.

²⁰⁶ The mission of the club is reflected in the format of the club's meetings as described by Justice Souter in his dissenting opinion. *Id.* at 137-39 (Souter, J., dissenting).

²⁰⁷ *Id.* at 111-12, 114, 118-20.

²⁰⁸ *Id.* at 118-20.

²⁰⁹ *Id.* at 106-12.

²¹⁰ This is certainly implicit in *Good News Club*. *Id.* at 112-20.

²¹¹ *Id.*

²¹² *Id.*

equality?²¹³ The Court's formal neutrality, different-treatment-as-hostility argument presumes that a differently situated (both textually and historically) classification is the same as every other classification for purposes of religion clause analysis.²¹⁴

Yet, as noted above,²¹⁵ I think the general result in *Good News Club* was correct. How is it possible to reach this conclusion without at least accepting the idea that government needs to treat religion the same as non-religion in the equal access context? My reasoning, which will be explained in greater detail later in this Article,²¹⁶ is that the policy allowing a variety of student groups to meet does not substantially facilitate religion as compared to non-religion. If it did, it would be perfectly acceptable to treat religion differently because of Establishment Clause concerns. Additionally, the facilitation approach proposed in this Article would not preclude the school from preventing completely equal access. For example, the school can limit the group's ability to advertise in the classroom (as opposed to bulletin boards) or can limit announcements over a generally available public address system to basic information about meeting times and locations, even if other groups are not so limited (and so long as all religious student groups have the same limitations).²¹⁷ Perhaps most importantly, if the group begins to interfere with the rights of other students through organized proselytization or by overreaching in recruitment efforts, the school

²¹³ Cf. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1061, 1087 (1991) ("Recognizing race validates the lives and experiences of those who have been burdened because of their race. White racism has made 'blackness' a relevant category in our society."); Frank S. Ravitch, *Creating Chaos in the Name of Consistency: Affirmative Action and the Odd Legacy of Adarand Constructors, Inc. v. Pena*, 101 DICK. L. REV. 281, 292-93 (1997) ("[T]o treat legislation aimed at remedying the effects of past or present discrimination directed at racial minorities and legislation meant to discriminate against those minorities as the same, one must completely divorce the legislation from its historical context and turn the debate into an ahistorical analysis of racial categorization."); David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 105-06 (stating that race neutral policies "give weight" to disabilities that racism has genuinely created for African Americans).

²¹⁴ See Conkle, *supra* note 3, at 25 ("[T]he doctrine of formal neutrality implies that religion is neither distinct nor distinctly important. Indeed, it implies that religion is virtually an irrelevancy, to be treated under the Constitution in the same way that race is treated under the Constitution.").

²¹⁵ See *supra* notes 190-91 and accompanying text.

²¹⁶ See *infra* notes 325-463 and accompanying text (examining *Good News Club* in light of proposed "facilitation test" for Establishment Clause cases).

²¹⁷ *Id.*

can revoke access. In situations where the group is favored by the school, an “as applied” challenge could be brought.

The key is that the *Good News Club* result is correct, not because it is inherently neutral—many religious minorities might not have the numbers or the desire to form such clubs, and thus the result may favor religions with greater numbers or a greater will to proselytize²¹⁸—but because the free speech concerns cannot be rebutted on these facts. Thus, precluding the group is not automatically hostile to religion, and allowing it to meet does not automatically favor religion. The concepts of hostility and favoritism, like neutrality, are quite manipulable and can vary depending on who is evaluating the claim.

D. *CAPITOL SQUARE REVIEW AND ADVISORY BOARD V. PINETTE*²¹⁹

This case shares some of the features of the *Good News Club* case. In *Capitol Square*, the Ku Klux Klan brought suit after it was denied a permit to erect a large cross in a park area near the capitol building.²²⁰ The area was considered a traditional public forum, where a variety of groups could place materials or speak out on a variety of issues.²²¹ Thus, as with *Good News Club*,²²² this case raised significant free speech issues.²²³

The Court held that since the square was a public forum, the government would need to show a compelling governmental interest to support the exclusion of the cross.²²⁴ This is because the state’s actions constituted content discrimination.²²⁵ The Court acknowledged that compliance with the Establishment Clause could constitute a compelling government interest,²²⁶ but the state’s action

²¹⁸ Cf. Green, *supra* note 29, at 559-60 (suggesting that vouchers will favor groups with larger numbers and established schools over those with fewer numbers and lower support for sectarian schools).

²¹⁹ 515 U.S. 753 (1995).

²²⁰ *Capitol Square*, 515 U.S. at 758 (plurality opinion).

²²¹ *Id.*

²²² See *supra* notes 186-218 and accompanying text.

²²³ *Capitol Square*, 515 U.S. at 760-63 (plurality opinion).

²²⁴ *Id.* at 761.

²²⁵ *Id.*

²²⁶ *Id.* at 761-62.

in this case was not mandated by the Establishment Clause.²²⁷ A plurality of the Court rejected what it referred to as the “transferred endorsement test”²²⁸ advocated by Justice O’Connor in her concurring opinion.²²⁹ This was the plurality’s shorthand for the idea that the state may be liable for endorsement of religion if a reasonable observer would perceive the expression of private actors on public land as endorsed by the government.²³⁰ The plurality rejected the idea that actions of private individuals could be endorsed by government in a public forum, even if an outsider might mistake the private action for state action.²³¹

This case is easily resolved under the Free Speech Clause if religion must be treated the same as non-religion. If equal treatment between religion and everything else is the *sine qua non* of religion clause jurisprudence, the preclusion of the cross from a public forum would be hostility to religion.²³² Thus, viewpoint or content discrimination based on the religious nature of the speech would be an obvious violation of both the Free Speech and Establishment Clauses.²³³

While I do not advocate the equal treatment view of the religion clauses, *Capitol Square* demonstrates that, even if equal treatment is the appropriate mode of analysis, it is not neutral. First, when a nonbeliever or a member of a religious minority passes the capitol square and sees a large cross, it is quite possible that the cross will be perceived as a symbol of majoritarian dominance even if the viewer realizes that the government did not put it up.²³⁴ Second, since the majority religion in the United States is Christianity,²³⁵ and proselytization is a component of a number of Christian

²²⁷ *Id.* at 762-70.

²²⁸ *Id.* at 767-68.

²²⁹ *Id.* at 772 (O’Connor, J., concurring).

²³⁰ *Id.* at 764-70 (plurality opinion).

²³¹ *Id.* at 765.

²³² *See id.* at 768 (stating that suppressing lawful displays would be a violation of free exercise or free speech).

²³³ *Id.* at 765.

²³⁴ *Cf. id.* at 798 (Stevens, J., dissenting) (noting that some citizens might perceive cross “as a message of exclusion—a statehouse sign calling powerfully to mind their outsider status”).

²³⁵ FELDMAN, *supra* note 57, at 232.

denominations,²³⁶ it is likely that to the extent religious symbols are exhibited on the square and religious messages shared, the vast majority of the messages will be Christian,²³⁷ or at the very least reflective of mainstream Western religions.²³⁸ This may be compounded during the holidays because Christmas trees and appropriate “holiday” decorations may be displayed by government.²³⁹ The resulting message to nonbelievers and religious minorities may be, to use Justice O’Connor’s language, “that they are outsiders and not full members of the political community.”²⁴⁰

While the reasonableness of such perceptions can be debated from a variety of perspectives,²⁴¹ the impact of the equal treatment approach is not neutral unless one first defines neutrality as equal treatment. This is apparently what the Court did, but the Court never demonstrated that its baseline was neutral. The Court quickly wrote off what it suggested were the unreasonable inferences that nonbelievers or religious minorities might draw from the display of the cross.²⁴² Yet if the goal is neutrality, or for that matter equality, writing off alternative perceptions of the issue being analyzed hardly supports such goals.

Significantly, this does not mean that *Capitol Square* was wrongly decided. As with *Good News Club*,²⁴³ it simply means that neither the result or the analysis was neutral. While I am troubled by the message that may be sent to nonbelievers and religious minorities when a big cross is set up next to a state capitol building, such is the nature of a public forum. As long as someone who wishes to post an upside-down cross or an antireligious message is free to do so in the square, and so long as none of the symbols are permanently left there, excluding specific religious symbols is content or viewpoint discrimination. The harder question is why the

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ This is reflected in *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), where a creche (*Lynch*), and a Christmas tree and menorah (as well as a creche) (*Allegheny*) were the displays at issue.

²³⁹ *Lynch*, 465 U.S. at 680; *Allegheny*, 492 U.S. at 573.

²⁴⁰ *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring).

²⁴¹ *Capitol Square*, 515 U.S. at 768-69 n.3 (plurality opinion).

²⁴² *Id.* at 765.

²⁴³ See *supra* notes 186-218 and accompanying text.

Establishment Clause does not bar the symbols even if the Free Speech Clause protects them. As will be seen later, the answer is that the maintenance of a public forum does not substantially facilitate religion over non-religion, nor does it necessarily facilitate specific religions over others.²⁴⁴ The approach advocated herein would support “as applied” challenges in situations where a forum has essentially been taken over by a specific religion or by religion generally, or where it is administered in a manner that favors religion, antireligion, or a specific religion.²⁴⁵ As will be seen, the facilitation approach proposed herein has greater problems with government-sponsored holiday displays, and with privately sponsored holiday displays on government property where there is not a public forum, than with a privately sponsored religious display in a public forum.²⁴⁶ Although an important issue, the argument for excluding the cross because of the obvious racist and antisemitic meaning attached to a cross erected by the Ku Klux Klan is beyond the scope of this Article.²⁴⁷

III. PRINCIPLES AND TESTS

The notion that there is tension between the broad principles traditionally used in Establishment Clause cases and the results in those cases is not new.²⁴⁸ Moreover, the relationship between broad principles and the tests used under the Establishment Clause has been well explored. Without reinventing the wheel, it is useful to explore the principles often used in Establishment Clause cases and the notion that it would be far better to rely either on a variety of narrow principles or upon doctrinal tests that may or may not be anchored to any specific principle.²⁴⁹

²⁴⁴ See *infra* notes 325-463 and accompanying text.

²⁴⁵ See *infra* notes 325-463 and accompanying text.

²⁴⁶ See *infra* notes 325-463 and accompanying text.

²⁴⁷ See *Capitol Square Review Advisory Bd. v. Pinette*, 515 U.S. 753, 797-98 (1995) (Stevens, J., dissenting) (stating icon of intolerance also violates Establishment Clause because Clause prohibits official sponsorship of irreligious messages as well as religious messages).

²⁴⁸ Marshall, *supra* note 51, at 500.

²⁴⁹ But see Greenawalt, *supra* note 4, at 329 (“As I have here defined tests, a court may do without one, measuring relevant factors against basic constitutional values but not offering

While the concept of neutrality has always been lurking in religion clause jurisprudence, other principles, such as separation and accommodation, have also played an important part.²⁵⁰ Moreover, these principles did not automatically conflict with earlier Courts' more ethereal concepts of neutrality.²⁵¹ In fact, separation was initially framed as furthering neutrality.²⁵² The current development of neutrality as both the overarching broad principle and the test for deciding cases is far different from the earlier notion of neutrality as an overarching but ethereal principle that needed something more, such as separationism, to make it function.²⁵³ In this earlier context, the formal equality of religion was relevant, but it was not equated with neutrality in the way it is in *Zelman* and *Mitchell*.²⁵⁴

This section will assert that none of the other broad principles traditionally discussed in the religion clause context work as broad principles. Thus, separation, accommodation, equality, and liberty all may be valuable in some contexts, but some of these concepts are too vague to be of great use beyond platitudes and buzzwords, while others suffer some of the same problems as neutrality. This Article does not address nonpreferentialism²⁵⁵ because it has never been directly adopted by the Court, although an argument could be made that aspects of the Rehnquist Court's formal neutrality come closer to nonpreferentialism than it might appear at first glance.²⁵⁶

any linguistic formula for its resolution."). This Article asserts that rigid adherence to overarching and universal principles may lead to some of the same problems identified by Professor Greenawalt.

²⁵⁰ See *supra* notes 52-247 and accompanying text.

²⁵¹ Cf. Laycock, *supra* note 25, at 46 (asserting that "separation" and "neutrality" are incorrect labels and noting that it is "tactical mistake to contrast these labels so sharply").

²⁵² *Id.* at 46.

²⁵³ See *id.* at 63-65 (stating that Court has been inconsistent with theories and that theories are not necessarily mutually exclusive).

²⁵⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002); *Mitchell v. Helms*, 530 U.S. 793, 809-10 (2000) (plurality opinion).

²⁵⁵ For a discussion of nonpreferentialism, see generally Cord, *supra* note 43 (supporting nonpreferentialism) and Smith, *supra* note 43 (discussing nonpreferentialism in response to Professor Laycock's repudiation of concept).

²⁵⁶ The *Mitchell* plurality's approval of potentially wide-ranging nonpreferential aid demonstrates the implicit connection between formal neutrality and nonpreferential aid. *Mitchell*, 530 U.S. at 809-10 (plurality opinion). Of course, nonpreferential aid within a program open to secular entities is not the same as nonpreferentialism, which would allow government to favor religion generally so long as no sect was favored over others. Yet the

Once the various principles are explored, the Article proposes that something similar to Douglas Laycock's substantive neutrality,²⁵⁷ tweaked with aspects of separationism and accommodationism, should prevail as a guiding principle for Establishment Clause purposes, but divorced from the term neutrality and wary of any such claim. The proposed principle will act as a narrow rather than broad principle in applying the test proposed later in this Article.²⁵⁸

Writing about principles such as separationism and accommodationism is hard to do without either spending hundreds of pages reinventing the wheel or oversimplifying the concepts. I fear that I may do the latter to an extent, but given the focus of this Article, it is necessary in order to address these important concepts which do have a role to play in the test proposed later in this Article,²⁵⁹ while at the same time keeping the Article focused and manageable. As will be seen, none of the functional principles has a clear pedigree, and even principles which have a strong historical pedigree, such as religious liberty, are vague and hard to define.

A. SEPARATIONISM

In *Everson v. Board of Education*,²⁶⁰ the Court laid down its separationist mantra:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or

result of *Zelman* could be similar to that under nonpreferentialism in some contexts. In some areas, the only private beneficiaries of government aid might be religious entities, and in others, the primary private beneficiaries may be religious entities. *See Zelman*, 536 U.S. at 696-98 (Souter, J., dissenting) (saying majority reasoning finds neutrality only in setting eligibility, not in actually using public money). This would apparently be acceptable so long as the formal neutrality test is met and there is no favoritism as between religious beneficiaries.

²⁵⁷ Laycock, *supra* note 3, at 1001-06.

²⁵⁸ *See infra* notes 325-463 and accompanying text.

²⁵⁹ *Id.*

²⁶⁰ 330 U.S. 1 (1947).

prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."²⁶¹

Both the majority and the dissenters in *Everson* agreed that the above statements reflected the proper approach to religion clause questions.²⁶² Their disagreement was over the application of that approach. The majority used it to uphold a program that provided bus service for parochial school students under a general school transportation program,²⁶³ while the dissent believed the program breached the wall of separation.²⁶⁴ Interestingly, the Court also referred to neutrality as a guiding principle in the case.²⁶⁵

As a matter of history, the Court almost certainly overstated its case by relying heavily on an obscure letter written by Jefferson,²⁶⁶ but the notion of separation was reflected elsewhere in the framer's writings.²⁶⁷ The historical argument for strict separationism is rather weak when one considers all the variables involved in

²⁶¹ *Id.* at 15-16 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

²⁶² *Everson*, 330 U.S. at 15-16; *id.* at 19, 28 (Jackson, J., dissenting); *id.* at 29, 31-32 (Rutledge, J., dissenting).

²⁶³ *Id.* at 16-18.

²⁶⁴ *Id.* at 44-58 (Rutledge, J., dissenting).

²⁶⁵ *See id.* at 18 (stating that First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers").

²⁶⁶ PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 3 (2002); Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1596 (1989).

²⁶⁷ Green, *supra* note 24, at 1121-25.

gleaning the intent of the many framers and ratifying conventions, as well as the interpretations and practices of early government entities in the United States.²⁶⁸ Yet for the same reasons the case is not any stronger for the competing theories as a historical matter.²⁶⁹ If we look to the broad intent of the framers and interpret historical practices and principles in light of today's diverse society and massive government, the argument for separation may be stronger.²⁷⁰ This has been called soft-originalism in other contexts.²⁷¹

This Article does not attempt to take sides in this historical debate, because even if we accept that separationism is at some level a guiding principle—as this Article does—it is, like neutrality, a principle in search of a baseline. The difference is that separation need not make the same type of claim that neutrality does. Separation can be a broad or limited concept depending on how we define it.²⁷² There can be degrees of separation. Neutrality, on the other hand, is not provably neutral regardless of how broadly or narrowly we define it.²⁷³

Scholars and the Court have long recognized that “strict separation” is impossible, because at least at the margins there is bound to be some interaction between religion and government.²⁷⁴ Strict separation would amount to establishing a purely secular state, where secularism is at least implicitly encouraged and favored and religion banished from the public square and public life.²⁷⁵

²⁶⁸ HAMBURGER, *supra* note 266, at 3; Adams & Emmerich, *supra* note 266, at 1596.

²⁶⁹ Adams & Emmerich, *supra* note 266, at 1596; Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 875-902, 913-19 (1986); Theodore Sky, *The Establishment Clause, the Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1401-03, 1464-65 (1966).

²⁷⁰ Green, *supra* note 24, at 1121-25.

²⁷¹ Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL’Y 311, 313 (1996).

²⁷² See generally Laycock, *supra* note 25; Gedicks, *supra* note 25.

²⁷³ See *supra* notes 81-126 and accompanying text (discussing meaning of neutrality).

²⁷⁴ See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (“Our prior holdings do not call for a total separation of church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.”).

²⁷⁵ Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 249 (1994); cf. McConnell, *supra* note 40, at 14 (“Excluding religious institutions and individuals from government benefits to which they would be entitled under neutral and secular criteria, merely because they are religious, advances secularism, not liberty.”).

Moreover, it would be impossible—or at the very least, highly impractical—to maintain.

Another possibility is to use a narrow concept, such as prohibiting direct aid to religious institutions, as a limit.²⁷⁶ Thus, separation would be defined by a context and a test, not by some broad notion of absolute separation. The current Court has rejected or muddled (depending on one's perspective) the long-standing prohibition on direct aid to religious institutions.²⁷⁷ At the very least, the prohibition against direct aid has little of the force it used to have since the circuit breaker concept of “true individual choice” has been interpreted to allow the government to write the check directly to a religious entity so long as the amount of the check is determined by the number of people who decide to enroll.²⁷⁸ Even if it were revived, the direct aid version of separation only applies in the context of government aid programs, and even then it is more of a formalistic test than a guiding principle.

Another possibility is to use separation as a guiding principle in some contexts, but not others.²⁷⁹ Thus, separation would be used in the school prayer context, the public school curriculum context, and perhaps the direct aid context, but not in equal access or indirect aid cases. This is not too far from the current situation.²⁸⁰ The current situation, though, is more a result of the positions of the swing voters on the Court, none of whom take a consistent separationist position, than of a dedication to separation on these issues.

Depending on which baseline one picks for separation, in given contexts it could function as a narrow test, a broad principle that urges as much separation between the government and religion as possible, or somewhere in between. Separation is less problematic

²⁷⁶ See Green, *supra* note 24, at 1120-21 (discussing “no-aid principle” and asserting that it is not only value “furthered by separationism”).

²⁷⁷ See generally *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion).

²⁷⁸ See *Mitchell*, 530 U.S. at 815-16 (plurality opinion) (stating that Establishment Clause does not require formality of passing aid through hands of private individuals).

²⁷⁹ See generally *Gedicks*, *supra* note 25 (discussing separation).

²⁸⁰ Compare *Zelman*, 536 U.S. at 639 (upholding voucher program where bulk of money flowing to private school hands went to religious schools), with *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 290 (2000) (finding prayer at high school football games unconstitutional, where games are school-sponsored and school district drafted and implemented “student initiated” prayer policy).

than neutrality because some degree of separation may be achieved. Separation by itself, however, is problematic at the practical level because one must still choose where and how to implement it, and short of a draconian absolute separation which is hard to implement, troubling from a policy perspective, and contrary to the historical idea of the religion clauses, separation is a malleable concept that may function best if implemented as a narrow principle. The test set forth later in this Article is guided in part by the benefits of keeping some form of separation in the religion clause equation, but not a form that all separationists will be happy about.²⁸¹

B. ACCOMMODATIONISM

Like separation, accommodation can arguably function both at the level of a broad principle and as a narrow principle, or as a facet of a doctrinal test.²⁸² Accommodationist arguments are most common under the Free Exercise Clause.²⁸³ In that context, accommodationism would support exemptions from laws of general applicability.²⁸⁴ However, accommodationism can also be used in the Establishment Clause context.²⁸⁵ In fact, one might justify the results of the three cases discussed in Part II of this Article on accommodationist principles. When accommodationism functions in the Establishment Clause context as a broad principle of strict accommodationism, for lack of a better term, it becomes hard to distinguish from nonpreferentialism.²⁸⁶

Moreover, even where accommodationism functions as a background principle, as it arguably did in *Lynch v. Donnelly*²⁸⁷ and *County of Allegheny v. ACLU*,²⁸⁸ the results can be troubling both for devoutly religious people and for nonbelievers. In those cases,

²⁸¹ See *infra* notes 325-463 and accompanying text (discussing facilitation test).

²⁸² See generally McConnell, *supra* note 40 (exploring connection between accommodation and broad concept of liberty).

²⁸³ *Id.* at 24-27.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 29-32; *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970).

²⁸⁶ See *supra* notes 255-56 and accompanying text (discussing nonpreferentialism).

²⁸⁷ 465 U.S. 668 (1984) (plurality opinion).

²⁸⁸ 492 U.S. 573 (1989).

Christmas was declared to be essentially a general or commercial holiday with religious roots, at least to the extent that it is "celebrated" in public life,²⁸⁹ and in *Lynch* the religious impact of a creche—the depiction of the birth of Jesus—while acknowledged, was deemed sufficiently minimized because it was included with secular symbols of the "holiday season."²⁹⁰ In *Allegheny*, the religious impact of a Menorah was somehow offset by its location near a Christmas tree and a sign saluting liberty.²⁹¹ The reasoning and results in these cases have been decried by many scholars, both secular and religious, and I need not rehash the rich arguments here. The salient points are that these holdings trivialize a sacred holiday for devout Christians by trying to accommodate public recognition of it without crossing the line into government support of a particular religion,²⁹² and at the same time insult non-Christians by suggesting that Christ's Mass is somehow our holiday too, even if we do not celebrate it.²⁹³ Moreover, *Allegheny* suggests that a clearly religious symbol, the Menorah, can be displayed by government when placed next to a Christmas tree and a sign saluting liberty.²⁹⁴ Much as the commercial version of Christmas is offensive to devout Christians, the minimization of the religious nature of a religious object is degrading to the religious meaning of the Menorah.²⁹⁵

Accommodationism does not work well by itself in the Establishment Clause context. This is not because it is not feasible—nonpreferentialism is feasible—but because, short of moving toward nonpreferentialism, accommodationism requires distinctions to be made that allow government to engage in or foster

²⁸⁹ *Lynch*, 465 U.S. at 680, 683.

²⁹⁰ *Id.* at 680-86; cf. Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 1002-03 (1989) (asserting that critics of *Lynch* decision misunderstood *Lynch* majority's secularization position: position did not result from conclusion that creche lost its religious meaning because of its placement; rather, majority employed broad notion of "secular" and found that religious symbol served secular purpose in context involved).

²⁹¹ *Allegheny*, 492 U.S. at 573.

²⁹² *Lynch*, 465 U.S. at 711-12 (Brennan, J., dissenting).

²⁹³ *Id.*

²⁹⁴ *Allegheny*, 492 U.S. at 573.

²⁹⁵ *Id.* at 633-34 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 643-44 (Brennan, J., concurring in part and dissenting in part).

religious activities while somehow denouncing the religious nature or impact of those activities. An example is turning religious symbols or rituals into a form of ceremonial deism in order to accommodate them without acknowledging that government is sponsoring or performing a religious function.

To the extent that accommodationism is connected to notions of formal equality between religion and non-religion, it may be a more plausible approach than neutrality. However, it would not by itself solve the problems raised in the NSF funding hypothetical above or address the concern that the formal equality approach ignores the disparities between more dominant and minority religions thus giving dominant religions in given areas a competitive edge and a preferred status.²⁹⁶ Still, accommodationism has a role to play under the Establishment Clause and a potentially important role to play in the Free Exercise Clause context.²⁹⁷ Yet over-reliance on accommodationism under the Establishment Clause might force the big square peg of religion into narrow round holes in order to maintain some minimal level of separation. As will be seen, however, a narrow view of accommodationism, together with a narrow view of separationism, may serve as a useful animating principle.

C. RELIGIOUS LIBERTY

Michael McConnell and others have made powerful arguments that religious liberty is the guiding principle under the religion clauses.²⁹⁸ Of course, this does not answer the obvious question: What is religious liberty? The problem is that religious liberty is more like neutrality than separation or accommodation.

The concept of religious liberty must struggle with its underlying epistemic claim: that there is some way of knowing what religious liberty is. Yet every school of thought that has addressed the religion clauses claims to be promoting religious liberty at some

²⁹⁶ See *supra* notes 115-26 and accompanying text (posing NSF hypothetical).

²⁹⁷ See McConnell, *supra* note 40, at 24-27 (discussing role of accommodation).

²⁹⁸ See McConnell, *supra* note 40, at 1 (asserting that religious liberty "is the central value and animating purpose of the Religion Clauses," and that religious accommodation often furthers religious liberty).

level, and some view their approach as synonymous with religious liberty.²⁹⁹ Thus, religious liberty must either be tied to some baseline or viewed simply as an aspiration to be fulfilled by the doctrine or theory *du jour*. Yet whatever baseline or results one argues are consistent with religious liberty, there can be a competing baseline.

For example, let us take what should be the easiest situation for promoting the religious liberty principle: Free Exercise Clause Exemptions. It is arguable that the reasoning and results in *Goldman v. Weinberger*,³⁰⁰ *Lyng v. Northwest Indian Cemetery Protective Ass'n*,³⁰¹ and *Employment Division v. Smith*,³⁰² to name just a few cases, are inconsistent with religious liberty. The reasoning is by now standard (and I would argue valid). That is, laws of "general applicability" sometimes interfere with religious practice, and in fact, are more likely to interfere with the religious practices of those who are not in the religious mainstream.³⁰³ This is attenuated by the fact that the dominant religion in the United States is heavily faith-based (although that is a highly oversimplified description) and that many minority religions are practice oriented. These practices are not preferences in most contexts,³⁰⁴ but rather central to the faiths of the practitioners. Thus, laws of general applicability should not be allowed to interfere with these practices without a compelling governmental interest

²⁹⁹ See, e.g., McConnell, *supra* note 40, at 1 (noting that permissible accommodations are based on, consistent with, and further religious liberty).

³⁰⁰ 475 U.S. 503 (1986).

³⁰¹ 485 U.S. 439 (1988).

³⁰² 494 U.S. 872 (1990).

³⁰³ *Cf. Smith*, 494 U.S. at 919 (Blackmun, J., dissenting) (noting that courts need not "turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion").

³⁰⁴ See *Goldman*, 475 U.S. at 508 (noting that wearing yarmulke is akin to "personal preference").

and narrow tailoring.³⁰⁵ To find otherwise is to interfere with a central aspect of religious liberty.³⁰⁶

Yet there is an easy response that also claims to be consistent with religious liberty: that the Free Exercise Clause absolutely protects religious faith and belief. Still, laws of general applicability do not require religious exemptions, even though this might be helpful to some religious practitioners. Everyone has the same level of religious liberty, but unfortunately, some religions or religious practices will be more impacted by laws of general applicability than others, and there is no absolute right to religious liberty that trumps the interest in maintaining social order.³⁰⁷ Each of the above approaches could claim that it is consistent with the principle of religious liberty.

Let us look at another example, this one based on *Santa Fe Independent School District v. Doe*.³⁰⁸ In *Santa Fe*, the Court held, among other things, that prayer at public school football games coerced students to participate in a religious exercise.³⁰⁹ This is a serious interference with religious liberty. The school argued, however, that excluding the prayer would impose on the free speech rights, and implicitly on the religious liberty, of the students who wanted to pray under the "student initiated" prayer policy.³¹⁰ Each of these is a claim about religious liberty, and each is a potentially viable argument. As will be seen in Part IV, I think *Santa Fe* was correctly decided, but not because the result was inherently more supportive of religious liberty than the alternative.³¹¹

At its broadest, religious liberty is more a platitude than a principle. When we try to define it, we are faced with competing

³⁰⁵ I would further assert that this requires more than the weak application of the compelling interest test that was prevalent in the years following *Sherbert v. Verner*, 374 U.S. 398 (1963). See William P. Marshall, *What Is the Matter With Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 195-196 (2000) (acknowledging that *Smith* was not major shift from results of earlier post-*Sherbert* cases even if it was major shift in doctrine).

³⁰⁶ See McConnell, *supra* note 40, at 24-27 (discussing general purposes of religious accommodation).

³⁰⁷ *Smith*, 494 U.S. at 890.

³⁰⁸ 530 U.S. 290 (2000).

³⁰⁹ *Id.* at 311-12.

³¹⁰ *Id.* at 302, 309-10.

³¹¹ See *infra* notes 325-463 and accompanying text.

and contestable notions of what religious liberty is, and thus the concept can not rely on a provable baseline of "liberty," but rather must rely on other concepts or doctrinal tests to fill the gap. Through accommodation, the principle of religious liberty operates best in the Free Exercise Clause context, but even there, competing views of religious liberty preclude one baseline of religious liberty from being "the" correct view.

I like the lofty goal of religious liberty. It sounds good. But then again, it is *my* concept of religious liberty that I like, and I doubt that others, such as Justice Scalia, share my concept of religious liberty. I have no means, though, to prove that my view of religious liberty is any more correct than his view. I can argue based on other principles or history that his view of religious liberty is wrong, but I cannot prove that it is any less or any more "religious liberty" than my view without some super-baseline of religious liberty (or perhaps an absolutely decisive historical record, which does not exist here).

D. EQUALITY

Like religious liberty, an approach to religion clause analysis grounded in the quest for equality sounds good. If it could be delivered, all religions would be treated equally and religion would be treated equally with nonreligion. Scholars who have advocated an equality-based approach to the religion clauses are not naive enough to think that such a state of perfect equality could exist,³¹² just as scholars who have advocated a neutrality-based approach are not naive enough to think that perfect and incontestable neutrality could exist.³¹³ Yet, as with neutrality, one person's equality is another's hostility. Do we measure equality by government purpose? By the facial equality of government action? By the effects of government action? Is treating similarly situated groups the same "equality," even if doing so has a disparate impact based

³¹² See generally Brownstein, *supra* note 13, at 246-47 (discussing equality); Eisgruber & Sager, *supra* note 41 (arguing for equality standard).

³¹³ See, e.g., Laycock, *supra* note 3, at 994 ("We can agree on the principle of neutrality without having agreed on anything at all.").

on social factors? Is treating differently situated groups the same “equality”?

Various equality-based approaches have attempted to answer these questions, and some are quite impressive in their intellectual rigor and potentially of great use.³¹⁴ Yet, they all rest on creaky theoretical claims. As with Laycock’s substantive neutrality, which as we saw is quite valuable but not provably neutral,³¹⁵ equality-based approaches may be valuable, but whether they foster equality, and what equality is, remain open questions. This makes the “equality” garnered by the application of such principles contestable even among those who accept a given approach, and of course there are a variety of “equality based approaches.” As will be seen in Part IV, one such approach, Eisgruber and Sager’s “Equal Regard” approach,³¹⁶ is useful in framing the facilitation test and its Free Exercise Clause counterpart.³¹⁷

The important point here is that equality, like religious liberty, can function as a broad amorphous principle that is never clearly definable or reachable, but it cannot do the work of answering questions in a variety of contexts without the help of some other narrow principle.³¹⁸ To the extent the Court has tied formal equality to formal neutrality in its more recent cases, the results have hardly been equal for many religious minorities and nonbelievers.³¹⁹ If the Court is relying on another principle, such as majoritarianism or nonpreferentialism, some of the results in recent religion clause cases may make more sense (even if they are disagreeable), but using neutrality and equality in the way the Court recently has only masks the fact that it is relying on other principles.

To the extent that equality under the religion clauses is construed to require formal neutrality between religion and non-

³¹⁴ See generally Eisgruber & Sager, *supra* note 41 (attempting to answer such questions from perspective of equality).

³¹⁵ See *supra* notes 81-126 and accompanying text (analyzing neutrality approach).

³¹⁶ See generally Eisgruber & Sager, *supra* note 41 (formulating equality approach).

³¹⁷ See *infra* notes 325-463 and accompanying text.

³¹⁸ Cf. Laycock, *supra* note 3, at 996 (“[E]quality is an insufficient concept Claims about equality, or neutrality, always require further specification: equality with respect to what classification, for what purpose, in what sense, and to what extent?”).

³¹⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 685-86 (2002) (Souter, J., dissenting); Green, *supra* note 29, at 558-60.

religion, it is subject to all of the problems pointed out earlier.³²⁰ This Article will argue, however, that equality does have a role to play in religion clause jurisprudence. That role is the opposite of the role equality plays in the Court's formal neutrality approach. Equality comes into play because we should consider the results of even facially neutral government actions (including those that utilize private intermediaries) in order to determine whether those actions give substantial benefits to some religions over others or to religion over non-religion.³²¹

Needless to say, this focuses a great deal more on the effects of government activity than the current Court seems willing to do in the aid and equal access contexts,³²² but as will be seen in Part IV, the impact of the effects focus is greater in the aid context. To the extent the approach proposed below (and the test it supports) uses equality, it does not do so in an absolute way, and it acknowledges that any claim to equality is simply based on a construction of that term that deals with significant disparities in the effects of government actions.³²³ The facilitation test makes no claim to have found the answer to the meaning or achievement of religious equality.³²⁴

IV. THE FACILITATION TEST

It should be clear by now that this Article does not advocate reliance on specific broad principles, especially for purposes of developing legal doctrine, but various principles can inform the development of useful doctrine. For this to happen, the principles must be honestly confronted. This requires acknowledgment that some principles are simply social or judicial constructions that have no claim to accuracy or truth. Thus, narrower principles that do not

³²⁰ See *supra* notes 1-247 and accompanying text.

³²¹ See *infra* notes 325-463 and accompanying text.

³²² See *supra* notes 127-247 and accompanying text.

³²³ See *infra* notes 325-463 and accompanying text.

³²⁴ As with neutrality, this Article asserts that there is no clear answer to the question: What is religious equality? Moreover, there is no gauge which can prove that we have achieved it—at least no gauge that is not attached to some artificial construction of the meaning of equality, such as formal equality. Compare *supra* notes 313-24 and accompanying text, with *supra* 52-247 and accompanying text.

suggest universal truth and which are readily subject to degrees of implementation without undermining their meaning are more useful in developing legal tests.

At the base though, the tests themselves are central to the practical meaning of the religion clauses, even if that meaning has become quite confused as a result of the application of such tests. Thus, which test a court uses—whether the *Lemon/Agostini* test,³²⁵ the endorsement test,³²⁶ the coercion test,³²⁷ the tradition test,³²⁸ or the Court's new formal neutrality test (ostensibly part of the *Agostini* test)³²⁹—can have a significant impact on the meaning of the Establishment Clause. Yet how a given test is applied may be more important than the choice of tests,³³⁰ and each of these choices can be affected by the principles one believes undergird the Establishment Clause (or subconsciously assumes undergird that clause).³³¹

This interplay between principles and tests is important and complex, but where does it leave us if we accept the idea that most broad principles are impossible to pin down and that there is no super-principle that enables us to choose correctly between competing narrow principles because there is no way to gauge “correctness” in this context? Ironically, it leaves us with doctrinal tests that must necessarily be divorced from any one principle

³²⁵ The classic *Lemon* test, set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), was modified in *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997), with the Court folding the “entanglement” prong of *Lemon* into the “effects” prong and changing the Court’s earlier focus on divisiveness as an element of entanglement.

³²⁶ *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

³²⁷ See *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (noting that Constitution guarantees that government may not coerce anyone to support or participate in religion).

³²⁸ See generally *Marsh v. Chambers*, 463 U.S. 783 (1983) (discussing tradition test).

³²⁹ See *Zelman v. Simmons-Harris*, 536 U.S. 630, 651-53 (2002) (discussing Court decisions that approve neutral programs).

³³⁰ Justice O’Connor’s perplexing application of the Endorsement Test is a prime example of the importance of how one applies a test. The Endorsement Test has the potential to seriously address the impact of religious establishments, or alleged religious establishments, on religious minorities. Yet, her application of that test in cases like *Lynch* and *Allegheny* does not necessarily bare out that potential. KENNETH KARST, *LAW’S PROMISE, LAW’S EXPRESSION* 147-60 (1993); Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O’Connor’s Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 845-57 (2001).

³³¹ See *supra* notes 248-324 and accompanying text.

because of the impossibility of absolutely realizing that principle but which can be informed by multiple principles once we realize and acknowledge the limitations inherent in those principles. Thus, this Article proposes a test for Establishment Clause cases that I assert can work in the varied Establishment Clause contexts such as school prayer, government display of religious symbols, government aid, and access to government facilities and programs. The test does not work because it fits any one broad principle, but because it is informed by a number of principles that ebb and flow in their import depending on the context.³³²

As will be seen, the test is informed by notions of liberty, equality, separation, and accommodation. None of these principles serves as the overarching principle. This is where Douglas Laycock's version of substantive neutrality comes into play, minus any claim to neutrality.³³³ His approach gels aspects of liberty, equality, separation, and accommodation, because each of these principles has a role to play in minimizing government encouragement or discouragement of religion.³³⁴ Yet in a massive regulatory state how one minimizes government encouragement of religion without discouraging religion is a complex problem.³³⁵ The facilitation test is an attempt to avoid government encouragement of religion without unduly discouraging religion.

The test is essentially this: Government action that substantially facilitates or discourages religion violates the Establishment Clause. The definition of "government action" and substantial facilitation or discouragement of religion are essential to understanding this test. Before addressing these two issues, it is useful to note that the test is very much focused on the *effects* of government action and, as will be seen, purpose is only relevant when there is relatively clear evidence of an intent to favor or discriminate against religion. Focusing on effects is certainly not a new idea.³³⁶ The "effects"

³³² See *infra* notes 385-463 and accompanying text.

³³³ See *supra* notes 81-126 and accompanying text.

³³⁴ Laycock, *supra* note 3, at 1001-06.

³³⁵ Cf. *id.* at 1018.

³³⁶ Effects were a central element of the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Of course, as was explained earlier, the Court seems to have moved away from any serious "effects" test, at least in the aid context. See *supra* notes 52-247 and accompanying text. See also Stephen M. Feldman, *Religious Minorities and the First*

prong of the *Lemon* test is a good example,³³⁷ and the endorsement test also focuses on effects, at least in theory.³³⁸ Additionally, a number of scholars have proposed effects oriented tests, often based on the *Lemon* “effects” prong.

For purposes of this test, “government action” consists of any program, activity, or decision supported by government entities or officials in their official capacity. Whether the actions or decisions of private individuals can cut off the government’s role in facilitating religion depends on the nature of the government action and the role of the private individual or individuals. This is a clear rejection of the formalistic “true private choice” doctrine espoused in *Zelman* and *Mitchell*,³³⁹ but it allows for private choice to play a role in the analysis. This will be demonstrated below when the test is applied to a variety of situations.

Defining substantial facilitation or discouragement of religion is both hard and easy. Facilitation is not the same thing as support. One can provide attenuated support for something without facilitating it.³⁴⁰ Facilitation is about furthering the religious activities of a program or entity, or about furthering religious practice or the stature of a given religion or of religion generally.³⁴¹ Thus, facilitation does not rely on bright-line distinctions such as direct or indirect aid, because it is the effect of the aid that determines whether it facilitates religion under the test. While it is more likely that direct aid to a religious organization will

Amendment: The History, The Doctrine, and the Future, 6 U. PA. J. CONST. L. 222, 263-64 (arguing that *Zelman* Court essentially gutted “effects” test in aid context and that current doctrine will uphold programs that have effect of providing substantial benefits to mainstream religions but will not likely have similar effect for programs that benefit religious minorities).

³³⁷ The outcome in *Lemon* itself was determined by the entanglement element of the test, and thus the Court did not reach the “effects” element. *Lemon*, 403 U.S. at 613-14.

³³⁸ See *Lynch v. Donnelly*, 465 U.S. 668, 691-94 (1984) (O’Connor, J., concurring) (discussing relationship between endorsement test and “effects” prong of *Lemon*).

³³⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002); *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (plurality opinion).

³⁴⁰ “Facilitate” is defined as “to make easier; help bring about,” MERRIAM-WEBSTER DICTIONARY (New ed. 1994), and “to ease a process.” THE OXFORD DESK DICTIONARY 202 (American ed. 1995).

³⁴¹ This latter point will be further defined when the test is applied to government displays of religious symbols. See *infra* notes 440-54 and accompanying text.

facilitate religion than indirect aid (although indirect aid can facilitate religion as well), it is not automatically so.

Discouragement of religion is highly relevant in the Free Exercise Clause context, but for present purposes, the key is that discouragement relates more to religious adherents than to religious organizations. Thus, for example, government cannot facilitate the religious work of religious organizations, nor can it prevent individuals from using public funds at religious institutions under truly broad and open government programs.³⁴² These two concepts would dramatically conflict with each other were it not for the substantiality requirement.

Substantial facilitation is more than simply giving some minor support to a religious institution—it is not a strict separationist concept. It is a balancing approach that looks to the real-world impact of government action. Significantly, substantiality is tied to the government action—*i.e.*, whether a substantial effect of the action is to facilitate religion. Thus, in some contexts, such as government-sponsored prayer, it is always violated, while in the context of government aid programs the total amount of aid going to religious entities matters, as does the proportion of program funds that go to religious entities. There is a vast difference between *Zobrest* and *Zelman* under the facilitation test.³⁴³ As will be seen, the result in *Zobrest* would have been the same under the facilitation test, while the result in *Zelman* would have been different.³⁴⁴

The facilitation test will not provide bright-line answers in some contexts, but it might in others. Bright-line answers, however, are not the primary goal of the facilitation test. Rather, reasonable consistency is the most that can be expected. Reasonable consistency is possible under the test even in aid cases where

³⁴² As will be seen, this suggests that *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), and *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), were correctly decided.

³⁴³ Compare *infra* notes 406-25 and accompanying text (arguing that Cleveland voucher program is unconstitutional under facilitation test), with *infra* notes 427-39 and accompanying text (suggesting that broad programs of government aid that do not give disproportionate benefits to religious entities as compared to other private entities are constitutional).

³⁴⁴ *Id.*

context has the largest impact on its application. The goal is to provide reasonable consistency while remaining sensitive to the variety of principles that are at play in religion clause cases. To gain a better understanding of how the facilitation test functions, it will be applied to a school prayer situation,³⁴⁵ a school voucher program,³⁴⁶ a program of general educational aid,³⁴⁷ the display of holiday symbols by government,³⁴⁸ and an equal access case.³⁴⁹ Finally, how the test might be used under the Free Exercise Clause will be addressed.³⁵⁰

It is essential to point out here that this is the first attempt to frame the test. Thus, this Article provides a sketch of the test at best. While the test is not perfect, it has the potential to be useful as an alternative to the current formalistic approach without sacrificing a reasonable level of consistency. The test attempts to effectuate various principles, especially separationism and accommodationism, and through its application the false antinomy between these principles will hopefully be reduced. The next subsection attempts to answer the question: "Why base the test on facilitation?" This will be followed by subsections applying the test to a variety of situations that have arisen under the Establishment Clause.

A. WHY FACILITATION?

Given the many possible tests that could be based on the various narrow principles that undergird the Establishment Clause, why should facilitation be the preferred test? There are several reasons for focusing on facilitation. First, facilitation resonates better with both separation and accommodation when they are construed as narrow principles. Moreover, it resonates with broad notions of liberty and equality, even considering the malleability of those concepts. Second, as will be seen, facilitation works well across the

³⁴⁵ See *infra* notes 385-405 and accompanying text.

³⁴⁶ See *infra* notes 406-25 and accompanying text.

³⁴⁷ See *infra* notes 427-39 and accompanying text.

³⁴⁸ See *infra* notes 440-54 and accompanying text.

³⁴⁹ See *infra* notes 455-59 and accompanying text.

³⁵⁰ See *infra* notes 460-63 and accompanying text.

varied issues that arise under the Establishment Clause.³⁵¹ Third, the facilitation test is designed to minimize the real-world encouragement or discouragement of religion by government, and thus embodies Professor Laycock's substantive principle (minus its claim of neutrality) which this Article has suggested is quite valuable in analyzing Establishment Clause claims.³⁵² Finally, the facilitation test melds aspects of a variety of tests the Court has used in the past, and thus is not a completely new test. Its reliance on a variety of narrowly construed principles is new,³⁵³ as is an attempt to avoid the tension between principles and tests that has been inherent in much of the Court's doctrine; but the test is not alien to that doctrine, even if it is not perfectly consistent with it.³⁵⁴

Any test that arises in the Establishment Clause context must function in a space where thousands of religious traditions thrive among hundreds of millions of people in a complex regulatory state. It must grapple with the constitutional command that religion, like speech, is special,³⁵⁵ and it must do so in the context of a diverse array of issues.³⁵⁶ The current Court seems to believe that the way to approach religion in the constitutional realm is to treat it the same as everything else in some contexts, yet recognize that it is different in other contexts.³⁵⁷ While there are some plausible

³⁵¹ See *infra* notes 385-459 and accompanying text.

³⁵² See *supra* notes 52-247 and accompanying text.

³⁵³ The concept of relying on multiple and varied approaches to constitutional interpretation, however, is not new. Philip Bobbitt's modalities of Constitutional Interpretation are an example of an approach that relies on a variety of factors whose importance vary given the interpretive situation. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11-22 (1991). Admittedly, Bobbitt's modalities operate more as interpretive devices than the narrow principles suggested herein, which must be actuated through the interpretive process. *Id.* at 22 ("The modalities of constitutional argument are the ways in which law statements in constitutional matters are assessed; standing alone they assert nothing about the world. But they need only stand alone to provide the means for making constitutional argument.").

³⁵⁴ This should come as no surprise given that the Court's doctrine has not been consistent over the years. See *supra* notes 1-247 and accompanying text.

³⁵⁵ U.S. CONST. amend. I.

³⁵⁶ A number of these issues are discussed *infra* notes 385-463 and accompanying text.

³⁵⁷ Perhaps the best example of this is the Rehnquist Court's treatment of financial aid that flows to religious entities and Free Exercise Clause exemptions on the one hand, and school prayer on the other hand. Compare *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002) (using formal neutrality to uphold school vouchers), *Mitchell v. Helms*, 530 U.S. 793, 794-95 (2000) (plurality opinion) (using formal neutrality to uphold lending of equipment to

distinctions between the contexts in which the Court has treated religion like other considerations and where it treats religion differently, the likely reason for the dichotomy is the vastly different alignment of Justices in the various cases. With the exception of Justices Kennedy and O'Connor, for example, no Justice in the majority in *Zelman* was also in the majority in *Santa Fe v. Doe*.

From the time of *Everson* until recently, the Court seemed to understand that religion is different.³⁵⁸ The early cases, animated as they were by notions of separation, clearly did not see religion the same as other considerations.³⁵⁹ Yet even in those cases, it was understood that religion could not be discouraged or discriminated against by government.³⁶⁰ Ironically, the distinction seemed to be

religious schools), and *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (using formal neutrality type argument to hold that there is no constitutional right to exemption from generally applicable law that burdens one's religious practice), with *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (holding prayer at public school football games delivered by student pursuant to school policy that allowed students to elect speaker is unconstitutional).

³⁵⁸ Compare *Lee v. Weisman*, 505 U.S. 577, 591 (1992)

(The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full expression even when the government participates. . . . The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all.),

McColum 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."), and *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."), with *Zelman*, 536 U.S. at 670 (holding that facially neutral school voucher program is constitutional where 96.6% of voucher students attend religious schools because a few secular private schools and sizeable number of public magnet and charter schools are available, thus giving parents "true private choice" in deciding that their children will attend religious schools).

³⁵⁹ See, e.g., *Everson*, 330 U.S. at 18 ("The First Amendment has erected a wall between church and state."); *McColum*, 333 U.S. at 212 ("[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.").

³⁶⁰ See, e.g., *Everson*, 330 U.S. at 16-18.

[W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief. . . . State power is no more to be used so as to handicap religions than it is to favor them.

Id.

based on the real-world functioning and effects of a program in the aid context, a distinction that was later reflected in *Zobrest* and *Witters*.

The facilitation test attempts to maintain fidelity to this distinction, and its focus is on the real-world impact of the government action or program in question—a necessary focus given the massive web of government programs in the modern regulatory state. It also tries to maintain consistency across issues so that the same test, relying on the same narrowly construed principles, can function in the aid context, the equal access context, the school prayer context, the religious symbolism context, and so on. Inconsistency in the treatment of claims between (and within) these various contexts has been a hallmark of Establishment Clause jurisprudence, because none of the tests works well in this diverse array of contexts without betraying the (often broad) principles said to undergird them. The facilitation test, however, can be applied across these contexts without betraying the narrow principles that undergird it. This can only be done by recognizing that religion is indeed constitutionally special or different; therefore, religious entities and exercises should only be treated the same as others when treating them differently would discourage religion *and* where treating them the same would not cause government to substantially facilitate religion. The context and real-world impact of government action is of central importance in striking this balance. As a corollary, formalism is not the friend of consistency, and indeed, consistency across the many issues that arise can only be achieved by carefully analyzing government actions in their context and by maintaining a connection to the narrowly construed principles that govern Establishment Clause analysis under the facilitation test.

I make no suggestion that the facilitation test is determinate in the sense that notions of formal neutrality or strict separation claim determinacy. Indeed, no universal principal of facilitation can be automatically applied to varied factual contexts to yield consistent results. Context matters. Yet underlying the test is a narrow view of separation, which requires that government not facilitate the religious mission of religious institutions or enhance the stature of religion *vis a vis* irreligion or of specific religions. Also underlying

the text is a narrow view of accommodation, which requires that government not discourage religion, that it allow religious organizations and views equal access to public forums, and that it not exclude religious entities from broad funding programs that would not substantially facilitate religion. An inherent tension between separation and accommodation exists, even when they operate as narrow principles. The facilitation test is an attempt to balance the competing aspects of these principles.

In attempting to balance separation and accommodation, the facilitation test attempts to maintain equality as a narrow concept, but not by always treating religion like other phenomena. Rather, the test requires religion be treated the same where doing so does not substantially facilitate religion. The latter qualification recognizes that religion need not always be treated the same, and in fact, that sometimes treating religion the same as nonreligion will give dominant religions an advantage over less dominant religions and would therefore foster "inequality." Thus, facial evenhandedness is not the animating force behind this narrow view of equality. Equality in this context can only be judged by looking at the effects of a government policy or action and determining whether religion, a religious entity (or irreligion or an antireligious entity), or a specific religion is receiving a symbolic benefit not received by others or a material benefit not practically available to others. Even then, it is not claimed that this is equality in any universally recognized sense, and it must be considered in light of the narrow versions of separationism and accommodationism. No approach to Establishment Clause cases would result in absolute and universal equality given the vast number of religions and potential government interactions with religion in the United States, but the facilitation test attempts to make sure government actions do not make some religions "more equal" than others, or religion "more equal" than irreligion—and vice versa.

Additionally, the test attempts to protect religious liberty to the greatest extent possible, given the amorphous nature of that concept. It does so by attempting to minimize government interference in religious affairs and institutions. This is, of course, consistent with Douglas Laycock's notion of substantive

neutrality.³⁶¹ Thus, the facilitation test views religious liberty in the narrow sense of noninterference. It is, though, cognizant of the fact that in a massive regulatory state noninterference by itself may not always promote what many people think of as religious liberty; such a formulation is one of many said to further religious liberty, and like all the others, is contestable.

In attempting to minimize government encouragement or discouragement of religion, the facilitation test recognizes that as a practical matter any choice will, to some extent, encourage or discourage religion. Nevertheless, as Laycock has argued, the goal must be to minimize the encouragement and discouragement of religion, not to make it nonexistent.³⁶² The substantiality requirement in the facilitation test is meant to help provide balance here. If the government action in question substantially facilitates the religious mission or status of a religion, religious individual, or religious organization, it encourages religion and conflicts with the separation principle. Moreover, allowing such substantial facilitation can not be said to simply accommodate religion because religion would be receiving an important material or symbolic benefit from government. Conversely, if the facilitation is not substantial, religion is probably not being encouraged. Thus allowing the government action is less likely to conflict with the separation principle. Failing to provide the benefit to religion in these contexts might discourage religion and thus allowing the benefit would be consistent with the accommodation principle.

The facilitation test is somewhat (although not completely) consistent with Court doctrine, both past and present. Its focus upon real-world effects has much in common with the "effects" prong of the *Lemon* test. Yet the substantiality requirement would likely have allowed the programs at issue in *Meek v. Pittenger*,³⁶³ *Wolman v. Walter*,³⁶⁴ and *Aguilar v. Felton*³⁶⁵ to survive, while the programs

³⁶¹ See Laycock, *supra* note 3, at 1001-06.

³⁶² *Id.* at 1004 ("Absolute zero is no more attainable in encouragement and discouragement than in temperature. We can aspire only to minimize encouragement and discouragement.").

³⁶³ 421 U.S. 329 (1975).

³⁶⁴ 433 U.S. 229 (1977).

³⁶⁵ 473 U.S. 402 (1985).

upheld in *Mueller v. Allen*³⁶⁶ and perhaps *Bowen v. Kendrick*³⁶⁷ would have most likely been struck down. The application of the facilitation test in the aid context is discussed further below.³⁶⁸

As will be seen, it is a given that government sponsored or endorsed prayer substantially facilitates religion,³⁶⁹ but the display of religious symbols is very much connected to the question of whether a given display is a private display in a public forum or something else.³⁷⁰ As will be seen, *Marsh*, *Lynch*, and *Allegheny* would have come out differently under the facilitation test, but every other symbolism, school prayer, and equal access case would most likely have come out the same way, albeit for reasons different than the Court's.³⁷¹ Yet the facilitation test retains aspects of the endorsement test. For example, while the facilitation test generally rejects looking at legislative purposes, given the problems with determining the purpose of a broad group of individuals acting as a legislative body, it does allow a "purpose" analysis in situations where a government actor, including a legislature, demonstrates a purpose to endorse religion as defined by Justice O'Connor.³⁷² An example of such a situation is provided by the recent and troubling behavior of the Chief Justice of the Alabama Supreme Court, Roy Moore.³⁷³ Moreover, while the facilitation test is not directly

³⁶⁶ 463 U.S. 388 (1983).

³⁶⁷ 487 U.S. 589 (1988).

³⁶⁸ See *infra* notes 406-39 and accompanying text.

³⁶⁹ See *infra* notes 385-405 and accompanying text.

³⁷⁰ See *infra* notes 440-59 and accompanying text.

³⁷¹ See *infra* notes 395-98, 443-54 and accompanying text.

³⁷² Justice O'Connor defined endorsement as follows:

In my concurrence in *Lynch*, I suggested a clarification of our Establishment Clause doctrine to reinforce the concept that the Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." The government violates this prohibition if it endorses or disapproves of religion. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Disapproval of religion conveys the opposite message.

Allegheny, 492 U.S. at 625 (O'Connor, J., concurring in part and in the judgment) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984)).

³⁷³ *Glassroth v. Moore*, 335 F.3d 1282, 1284-86 (11th Cir. 2003). Chief Justice Moore installed a massive stone tablet of the Ten Commandments in a central location in the

concerned with the effect of government actors on reasonable observers, a government action that substantially facilitates religion is likely to result in a perception of endorsement by a reasonable observer—although whether it does or not, the conclusion remains that such an action would be unconstitutional.³⁷⁴

Additionally, an act that coerces participation in a religious event or program would ordinarily be one that substantially facilitates religion,³⁷⁵ but the facilitation test is concerned with far more than coercion.³⁷⁶ Of the Court's three major tests, the facilitation test probably has the least in common with the coercion test, but as a practical matter, the results in cases involving religious exercises (where that test has been most clearly used by the Court) would likely be the same.³⁷⁷ What coerces an individual to participate or remain silent while the government endorses or engages in a religious ceremony will substantially facilitate religion, but coercion is not necessary for the facilitation test to be violated.³⁷⁸

Finally, the facilitation test does not rely on a hard originalist approach.³⁷⁹ Unlike the Court's early separationist approach and the approach of the Justices who opposed the Court's reading of history,³⁸⁰ the facilitation test acknowledges that both sides of the

courthouse in the middle of the night without informing the other justices and with a film crew from Coral Ridge Ministries present to film the event. *Id.*

³⁷⁴ See *infra* notes 440-54 and accompanying text (discussing facilitation test as applied to government display of religious symbols).

³⁷⁵ It is the state sponsorship or endorsement of a religious activity that facilitates religion, and coercion is simply a byproduct of something that would be unconstitutional under the facilitation test even if there were no coercion. See *infra* notes 385-405 and accompanying text (applying facilitation test to school prayer cases). However, in its coercion analysis, the *Lee* Court repeatedly engaged in analysis that would support a similar result under the facilitation test. See *Lee v. Weisman*, 505 U.S. 577, 598 (1992) ("The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.").

³⁷⁶ See *supra* notes 335-44 and accompanying text.

³⁷⁷ See *infra* notes 385-405 and accompanying text.

³⁷⁸ *Id.*

³⁷⁹ See Sunstein, *supra* note 271, at 312 (explaining why hard originalism is unacceptable).

³⁸⁰ Compare *McCullum v. Bd. of Educ.*, 333 U.S. 203, 213-21 (1948) (Frankfurter, J., concurring) (using historical arguments to support separationism), *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-16 (1947) (same), and *id.* at 31-43 (Rutledge, J., dissenting) (same), with *Wallace v. Jaffree*, 472 U.S. 38, 91-106 (1985) (Rehnquist, J., dissenting) (using historical argument to rebut historical support for separationism), and *McCullum*, 333 U.S. at 244-52 (Reed, J., dissenting) (same).

debate can support their preferred approach with snippets of history.³⁸¹ In essence, history and the views of the Framers can be manipulated to support either side because of the large number of actors involved in drafting and ratifying the First Amendment (and the Fourteenth for that matter), and the massive differences in both religious pluralism and the nature of government then and now.³⁸² At best, in this context we might glean some consistency from the broad intentions of those involved in drafting and ratifying the Constitution—what has been called a “soft originalist” approach.³⁸³ The historical debate in this area is both fascinating and enlightening, but no legal test can faithfully rely on history given the types of issues that arise today and the dramatic increase in religious diversity and the role of government, even if one were able to determine whether we should rely on the broad intent or narrow practices of the Framers (which would often conflict in modern times).³⁸⁴

Perhaps the best way to understand the above discussion is to see the facilitation test applied to some of the common situations that

³⁸¹ The opinions on both sides marshal a great deal of historical support, but neither adequately rebuts the other's historical proof. See *supra* note 380.

³⁸² Rena M. Bila, Note, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535, 1545 (1995); Laycock, *supra* note 269, at 919-20.

³⁸³ See Sunstein, *supra* note 271, at 313 (explaining that, for soft originalist, history is important, but at “certain level of abstraction or generality”); cf. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 375, 431-32 (1996) (deriving group of “first principles” from detailed and careful analysis of history of religious freedom in United States, but acknowledging that these principles were subject to different interpretations and cannot be applied as rigid legal doctrine).

³⁸⁴ See, e.g., *Sch. Dist. v. Schempp*, 374 U.S. 203, 237-41 (1963) (Brennan, J., concurring).

A too literal quest for the advice of the Founding Fathers upon the issues in these cases seems to me futile and misdirected for several reasons: First, on our precise problem the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. . . .

Second, the structure of American education has greatly changed since the First Amendment was adopted. . . .

Third, our religious composition makes us a vastly more diverse people than were our forefathers. . . .

Whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord's Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes, not specific practices.

Id.

arise under the Establishment Clause. The following subsections will apply the facilitation test to such situations. As with any test in this area of constitutional law there may be a tendency for those predisposed toward the results reached by the test to like it and those not so predisposed to reject it. Of course, this may not bode well for the facilitation test as folks on all sides of the Establishment Clause debate will like some of the results reached and dislike others. I see this as a strength of the test, because by considering context and rejecting either formalistic extreme (formal neutrality and strict separation), the test is able to reach results that resonate better with the narrow principles undergirding it and many of the Court's holdings (although certainly not all of them).

B. SCHOOL PRAYER CASES

School prayer is perhaps the easiest scenario for the facilitation test. When government sponsors school prayer or other quintessentially religious exercises such as Bible reading, whether non-sectarian or not, it substantially facilitates religion.³⁸⁵ The question gets trickier when someone claims that the prayer is not government-sponsored.³⁸⁶ If the prayer occurs at a government-sponsored event, it generally violates the test because the government controls the forum and thus facilitates the prayer,³⁸⁷ but what if the government-sponsored forum is a public forum? In this limited case, government is not substantially facilitating religion. Contrary to the odd ruling of the United States Court of Appeals for the Eleventh Circuit in *Chandler v. Siegelman*,³⁸⁸ events such as graduation ceremonies are not public fora unless the government opens them up to counter-speech.³⁸⁹ Even in a limited or designated

³⁸⁵ In this situation, the test leads to results similar to those in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), *Lee v. Weisman*, 505 U.S. 577 (1992), *Schempp*, 374 U.S. at 203, and *Engel v. Vitale*, 370 U.S. 421 (1962), but as will be seen, under somewhat different reasoning.

³⁸⁶ This was exactly the claim made by the school district in *Santa Fe*, 530 U.S. at 302.

³⁸⁷ *Id.* at 302-06.

³⁸⁸ 230 F.3d 1313, 1316-17 (11th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001) (stating that student-initiated prayer aloud or in front of audience gathered for some other purpose is not prohibited by Constitution).

³⁸⁹ *Santa Fe*, 530 U.S. at 301-03.

public forum, the forum would have to be open to other speech by those appropriately using the forum.³⁹⁰

Thus, the results in *Engel v. Vitale*,³⁹¹ *School District of Abington Township v. Schempp*,³⁹² *Lee v. Weisman*,³⁹³ and *Santa Fe Independent School District v. Doe*,³⁹⁴ were all correct under the facilitation test. On the other hand, *Marsh v. Chambers*,³⁹⁵ which dealt with legislative prayer, was wrongly decided. Maintaining the chaplaincy and having the daily prayers in the Nebraska legislature substantially facilitated religion, both because the most substantial aspect of the prayer was religious,³⁹⁶ and because a formal daily prayer substantially singles out religion for special ceremonial recognition.³⁹⁷ Moreover, under the facts in *Marsh*, the special recognition went primarily to a single religion.³⁹⁸

Interestingly, *Wallace v. Jaffree*³⁹⁹ is a questionable decision under the facilitation test. The legislative purpose to favor religion would violate the test if that purpose were clear, but given the large number of legislators involved in passing a state statute, such clarity can be hard to come by.⁴⁰⁰ The evidence relied upon by the Court, including statements by the bill's sponsor, might not reflect the overall legislative purpose (assuming that such a purpose could be determined), and the facilitation test might not be violated.⁴⁰¹ Under that test, a moment of silence that allows for silent meditation, prayer or any other silent reflection a student may wish to engage in is not facially invalid.⁴⁰² In this context, prayer may be a small portion of the effect of such a moment of silence, and to the extent the moment of silence does allow prayer, the prayer remains

³⁹⁰ *Id.* at 302-04 (noting that access to the forum cannot be selective).

³⁹¹ 370 U.S. 421, 424, 430-31 (1962).

³⁹² 374 U.S. 203, 205 (1963).

³⁹³ 505 U.S. 577, 598-99 (1992).

³⁹⁴ 530 U.S. 290, 316-17 (2000).

³⁹⁵ 463 U.S. 783, 791 (1983).

³⁹⁶ *Marsh*, 463 U.S. at 797 (Brennan, J., dissenting).

³⁹⁷ *Id.* at 798 (Brennan, J., dissenting).

³⁹⁸ *Id.* at 822-23 (Stevens, J., dissenting).

³⁹⁹ 472 U.S. 38 (1985).

⁴⁰⁰ *Id.* at 86-87 (Burger, J., dissenting).

⁴⁰¹ *Id.*

⁴⁰² *Contra id.* at 59-61 (noting that such policy is facially invalid if legislature did not have valid secular purpose in enacting law).

personal to the student who chooses to silently pray.⁴⁰³ If a statute were written in such a way that prayer was the primary option, or if prayer were encouraged under the statute as may have been the case in *Wallace*, the statute would be unconstitutional for the same reasons as in *Marsh*.⁴⁰⁴ More importantly, if a moment of silence law were applied in a manner that encouraged prayer, it would be unconstitutional as applied.⁴⁰⁵

C. SCHOOL VOUCHERS

The Cleveland program upheld in *Zelman v. Simmons-Harris*⁴⁰⁶ would violate the facilitation test. Yet not all voucher programs would automatically violate the test. There is little doubt that the Cleveland voucher program substantially facilitated religion even if one uses the comparison group the Court used in its analysis. As explained above, the Court's choice of comparison schools is highly questionable.⁴⁰⁷ The facilitation test is clearly and significantly violated if we remove the public school programs the Court relied upon to dilute the choice statistics.

Assuming that the Court was correct to include magnet schools, community schools, and tutoring stipends for public school students in the comparison group with private schools,⁴⁰⁸ the voucher program still substantially facilitates religious entities. The fact that 3,637 students were given tuition vouchers to attend religious schools,⁴⁰⁹ and that those vouchers were more than enough to cover full tuition for many of the students,⁴¹⁰ would have a substantial impact on enrollment at religious schools. Those schools are benefitting from thousands of students they would otherwise not get. As a result, the sponsoring religious institutions will have substantially increased their ability to meet budgetary needs and

⁴⁰³ *Id.* at 85-86, 89-90 (Burger, J., dissenting).

⁴⁰⁴ *See Marsh*, 463 U.S. at 791 (holding prayer in state legislature constitutional).

⁴⁰⁵ *See Walter v. W. Va. Bd. of Educ.*, 610 F. Supp. 1169, 1177 (D. W. Va. 1985) (finding application of moment of silence law unconstitutional).

⁴⁰⁶ 536 U.S. 639 (2002).

⁴⁰⁷ *See supra* notes 81-126 and accompanying text.

⁴⁰⁸ *Zelman*, 536 U.S. at 645-48, 658-59; *id.* at 663-64, 672-78 (O'Connor, J., concurring).

⁴⁰⁹ *Id.* at 664 (O'Connor, J., concurring).

⁴¹⁰ *Id.* at 704-06 (Souter, J., dissenting).

further their religious missions. Thousands of students will worship and receive religious training at taxpayer expense.⁴¹¹ Perhaps more significantly, since nearly two thirds of those “choosing” to go to religious schools had inadequate religious school options within their own faiths, over two thousand students are attending schools outside of their own faiths.⁴¹² This gives those religious sects that believe in proselytization a captive audience, and even if students are excused from religious worship and religious training, they are still a captive audience in a potentially religiously infused environment with peers and teachers who may overwhelmingly believe in the sponsoring religion.⁴¹³

While the largest group of religious schools in Cleveland are Catholic schools, which have a solid track record of tolerance toward those of other faiths in many areas,⁴¹⁴ the reasoning in *Zelman* is not limited to Cleveland. For those who live in areas of the country where the dominant religious schools are Evangelical, the likelihood that students will be regularly witnessed to by peers and others even if they are excused from religion classes is higher. Even in a religious school environment where there is extreme sensitivity to nonbelievers, the impact of spending one’s elementary and secondary school years in an environment dominated by a religious faith different from one’s own is bound to cause many voucher students to be more open to the school’s faith. All of this on the government’s dollar.

The above scenarios—increased student bodies with full tuition paid at government expense and impressionable students who may face serious challenges to their core beliefs or be influenced to adopt the core beliefs of the religious schools they attend—are indications of substantial facilitation of religion. The percentage of students in the Cleveland schools is irrelevant from this perspective. One could expand the comparison group to include the entire Cleveland school system. Still, more than 3,637 students are given up to \$2,250 each

⁴¹¹ *Id.* at 686-87 (Souter, J., dissenting).

⁴¹² *Id.* at 704 (Souter, J., dissenting).

⁴¹³ *Cf. Lee v. Weisman*, 505 U.S. 577, 598-99 (1992) (applying captive audience concept to graduation ceremony).

⁴¹⁴ *See O’Keefe, supra* note 168, at 425-27 (noting important contributions of Catholic schools, including production of well-informed students).

at religious schools,⁴¹⁵ for a total of approximately \$8,200,000.00 in the 1999-2000 school year based on use of the full \$2,250 by all students,⁴¹⁶ or a total of \$5,790,104.00 if one uses the lower Catholic school tuition rate. This is enough to substantially facilitate religion.

When one excludes the public school options that the Court included in the comparison group, the facilitation is even more obvious—3,637 out of 3,765 students⁴¹⁷ (96.6%) receiving private school vouchers used them at religious schools.⁴¹⁸ Moreover, there were almost five times as many religious private schools as secular private schools participating in the program,⁴¹⁹ and on average, the secular schools had fewer seats per school than the religious schools.⁴²⁰ This is in addition to the millions of public dollars flowing to religious entities and the possibility of indoctrination mentioned above. Yet under the facilitation test voucher programs are not inherently unconstitutional just because a substantial amount of money may flow to religious entities and indoctrination may occur.

Ironically, since the facilitation test is not a rigid formalistic test, if there were a program of “real private choice,” the program would be constitutional even if money flowed to religion through such a program. The reason for this is similar to the Court’s reasoning in *Zobrest v. Catalina Foothills School District*,⁴²¹ because in a situation where government gives money to a large number of individuals to spend as they choose on a particular service, and there really are a wide array of comparable choices, both religious and non-religious, it is no longer government that facilitates religion.⁴²² Moreover, the amount and percentage of funds in such programs that flow to religious schools is likely to be relatively

⁴¹⁵ Or \$1,592—the average Catholic School tuition. *Zelman*, 536 U.S. at 704-06 (Souter, J., dissenting).

⁴¹⁶ *Id.* at 664 (O’Connor, J., concurring); *id.* at 700-01 (Souter, J., dissenting).

⁴¹⁷ *Id.* at 664 (O’Connor, J., concurring).

⁴¹⁸ *Id.* at 703 (Souter, J., dissenting).

⁴¹⁹ *Id.* at 646.

⁴²⁰ *Id.* at 704-05 (Souter, J., dissenting).

⁴²¹ 509 U.S. 1 (1993).

⁴²² *Id.* at 10.

small.⁴²³ Yet if a large amount of funds in a given program did flow to religious institutions, the program might be subject to an “as applied” challenge under the facilitation test because the test focuses on the effects of government action.

Of course, the Court used each of these points (except the last one) to support its ruling in *Zelman*.⁴²⁴ The difference under the facilitation test is how seriously one looks at the effects of the government program and what counts as an effect that facilitates religion as compared to the Court’s formalistic neutrality-plus-private-choice approach. Under the facilitation test, the neutrality of a program on its face is only relevant to the extent that a program openly discriminates between religions or between religion and nonreligion. The individual choice, or “circuit breaker,” concept is essentially a defense to claims that the effects of a government action substantially facilitate religion. Still, a program that provides “true individual choice”—something this Article has argued did not exist in *Zelman*⁴²⁵—is not completely immune from constitutional scrutiny. Moreover, whether a program provides such choice is dependant on the way that program actually functions and the effects it has. As noted above, the Cleveland voucher program in *Zelman* did not provide such choice, and even if we use the Court’s expanded comparison group⁴²⁶ the effects of the program substantially facilitate religion. Let us turn now to a situation where the private choice factor comes into play under the facilitation test in order to see how the test works when there is indeed a broad program that supports private choice.

D. GENERAL EDUCATIONAL AID PROGRAMS

For purposes of this Article, “general educational aid programs” are programs that provide money to individuals to be used at an educational institution for a specified service or services. Cases like

⁴²³ *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 485-86, 488 (1986).

⁴²⁴ See generally *Zelman*, 536 U.S. at 639.

⁴²⁵ See *supra* notes 81-126 and accompanying text (discussing importance of individual “choice” in neutrality test).

⁴²⁶ Thus expanding the choice between private schools and certain types of publicly supported schools but still not expanding the choice within the private school subset.

*Zobrest v. Catalina Foothills School District*⁴²⁷ and *Witters v. Washington Department of Services for the Blind*⁴²⁸ provide excellent examples of such programs, both of which involved funding for disability-related services. Other examples would be the G.I. Bill and Pell grants. These programs give a specified amount of funding to an individual based on legislatively or administratively determined factors. The funding is to be used for a given purpose at a qualifying educational institution.⁴²⁹ Therefore, a variety of secular and religious institutions qualify,⁴³⁰ and there is generally breadth in the level of religiosity and religious affiliation of such institutions.⁴³¹

Such programs do not substantially facilitate religious institutions as compared to non-religious institutions, because there are generally a large number of qualifying institutions and a wide range of program beneficiaries from across a given state or the entire nation. To the extent that they funnel money to religious institutions, these programs generally fund only a particular service, such as a sign language interpreter or other accommodation,⁴³² or tuition for only a small proportion of students attending a given institution.⁴³³ Thus, these programs do not provide the disproportionate and possibly substantial benefit to religious institutions that the Cleveland voucher program did in *Zelman*.⁴³⁴ Still, by enabling students to attend religious institutions that they otherwise might not be able to attend, these programs might allow a substantial amount of money to flow to religious institutions over time. This is where the private choice defense comes into play.

⁴²⁷ 509 U.S. 1 (1993).

⁴²⁸ 474 U.S. 481 (1986).

⁴²⁹ See *Zobrest*, 509 U.S. at 3-4 (noting that purpose was to accommodate petitioner's disability pursuant to IDEA). See generally Individuals With Disabilities Education Act, 20 U.S.C. §§ 1400-1487 (2000).

⁴³⁰ *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 487.

⁴³¹ Cf. *Zobrest*, 509 U.S. at 10 (noting that benefits are distributed under IDEA "without regard to the 'sectarian-non-sectarian, or public-nonpublic nature' of the school the child attends").

⁴³² *Zobrest*, 509 U.S. at 3, 13.

⁴³³ *Witters*, 474 U.S. at 488.

⁴³⁴ See *supra* notes 81-126, 406-25 and accompanying text.

As was explained in the last section, if there really is a wide range of compatible alternatives for program participants to choose from under a government program, the government is no longer facilitating religion unless the program consistently and disproportionately funds religious institutions as applied. Thus, the private choice of the individual recipient really does act like a circuit breaker, but the defense only comes into play where a program that does not disproportionately support religion provides substantial funding to a religious institution or institutions. Where a program does not disproportionately support religion and substantial funds do not go to religious institutions, the facilitation test is not violated. When the former is true, but not the latter, the private choice defense can come into play to demonstrate that the government is not substantially facilitating religion: rather, individuals choose from a wide array of options to go to a religious institution.⁴³⁵

Two significant definitional problems arise here. First, what constitutes “disproportionate support of religion,” and second, what would constitute a “substantial sum” of money? Both of these questions would be answered on a case-by-case basis based on the dynamics of the programs involved. Still, some guidance is in order. The most obvious examples of disproportionate funding would be where most of the funding in a given program went to religious institutions, or where one particular religious organization or a variety of entities from a specific religion or sect get the bulk of the funding that goes to religious institutions. In the second situation, so long as the program does not disproportionately support religion over non-religion, the individual choice defense would be available.

What constitutes a substantial sum of money depends on the breadth of the program and the benefit the money gives religious institutions. Thus, in a statewide or national program, 8.2 million

⁴³⁵ This would be similar to the situations in *Witters* and *Zobrest*. See, e.g., *Zobrest*, 509 U.S. at 10 (stating that benefits distributed under IDEA are constitutional because they are available “without regard to the ‘sectarian-non-sectarian, or public-nonpublic nature’ of the school the child attends”). Of course, the wide scope of the programs in those cases made any funding that did flow to religious institutions more diffuse. Thus, the amount of funds that might flow to religious institutions would be less substantial than in a tuition voucher program like the one in *Zelman*. Even if the level of aid was more substantial, however, the wide range of both non-sectarian and sectarian options available in those programs would support the defense.

dollars split among hundreds or thousands of participating religious entities would not be a substantial sum, but that same amount would be substantial when applied to fewer than fifty private schools in one city. The benefits allegedly garnered by the high school in *Zobrest* and the university in *Witters* were not substantial even if one considers the other students who used the funds at religious schools under the relevant programs.⁴³⁶

Another aspect is tied to the substantiality of the funding for the religious institutions themselves. There is a huge difference in substantiality between a program which may enable a few disabled individuals to attend a religiously affiliated university or a religious high school (not even on a full tuition subsidy)⁴³⁷ and a program that pays full tuition for many students at a given religious school or schools.⁴³⁸ The latter program substantially facilitates the religious institution in its mission, but the former simply provides an incidental benefit to the religious institution in a context where program beneficiaries have a wide range of choices. To use Douglas Laycock's terminology, the former program does not significantly encourage or discourage religion, but the latter encourages religion.⁴³⁹

E. GOVERNMENT DISPLAY OF RELIGIOUS SYMBOLS

Justices have used a variety of tests to evaluate government displays of religious symbols, including the *Lemon* test (perhaps now the *Lemon/Agostini* test), the Endorsement test, and an apparent version of the "tradition" test.⁴⁴⁰ This has led to some highly

⁴³⁶ Unlike the program in *Zelman*, the programs involved in *Zobrest* and *Witters* were large programs with a wide geographic scope that included numerous schools, both sectarian and nonsectarian. See generally *Zobrest*, 509 U.S. at 1; *Witters*, 474 U.S. at 481.

⁴³⁷ See generally *Zobrest*, 509 U.S. at 1; *Witters*, 474 U.S. at 481.

⁴³⁸ See generally *Zelman*, 536 U.S. at 639.

⁴³⁹ See Laycock, *supra* note 3, at 1001-02. It is worth noting that, as a general matter, state programs that provide tuition support for college students would not violate the facilitation test because the range of choices available would include all public and private colleges within the state, thus enabling the private choice defense. Additionally, the amounts flowing to religious institutions under most such programs would be more akin to the situation in *Witters* and *Zobrest* than that in *Zelman*, although it might be greater than in the former cases.

⁴⁴⁰ The various opinions in *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *County of*

criticized decisions by the Court.⁴⁴¹ Under the facilitation test, any government display of a religious symbol that gives special attention or recognition to a religious holiday or religion substantially facilitates religion because, through such expression, government gives the specified religion or religion in general a special place in the public conscience. The effect of such a display inherently has a significant religious component.⁴⁴² Of course, what counts as a religious symbol is highly relevant here, as is whether it gives special attention or recognition to a religious holiday or religion generally.

The latter point is easier to address. The situation presented in *Lynch v. Donnelly*⁴⁴³ is an easy one to analyze under the facilitation test. The creche at issue in *Lynch* is inherently a religious symbol, and to a non-Christian as well as to devout Christians, a few plastic reindeer and other plastic figures—most of which reflect the Christmas holiday—cannot adequately (if at all) dilute the special recognition given to Christmas and the birth of Jesus which that holiday celebrates.⁴⁴⁴ Christmas, whether celebrated in its commercialized form or as the religious holiday it is, is simply not a holiday celebrated by many non-Christians. Thus, the government display of a creche during the Christmas season, regardless of the placement of that religious symbol, inherently gives special attention and recognition to the holiday and beliefs of a single religion, and in doing so, it substantially facilitates religion.

The special attention or recognition requirement would not be met, however, by a religious painting in a museum because in such a setting the recognition given to religion is reduced by the context of the display. Religion is not substantially facilitated. Yet if the

Allegheny v. ACLU, 492 U.S. 573 (1989) demonstrate the variety of approaches Justices have used to analyze government displays of religious symbols.

⁴⁴¹ The decisions in *Allegheny* and *Lynch* have been highly criticized. See, e.g., Daan Braveman, *The Establishment Clause and the Course of Religious Neutrality*, 45 MD. L. REV. 352, 353-54 (1986) (criticizing Court's decision in *Lynch*); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 126-27 (1992) (criticizing decisions in both cases and suggesting that results of cases are "the worst of all possible outcomes").

⁴⁴² See Braveman, *supra* note 441, at 368-69 (criticizing *Lynch* Court's plurality opinion finding creche to be historical object).

⁴⁴³ 465 U.S. 668 (1984).

⁴⁴⁴ See Braveman, *supra* note 441, at 368-74 (criticizing *Lynch* opinion).

same painting were hung (not as part of a larger exhibit) in the main hall of the state capitol building the situation might be different.⁴⁴⁵

The symbol question determines how far this analysis would go. After all, a Christmas tree is also a symbol of Christmas. Yet a Christmas tree is not a cross, or for that matter, a creche. The facilitation test would consider anything that is associated with a specific religion or religions a religious symbol. Thus, a Christmas tree, which is associated only with the Christian holiday of Christmas, cannot be considered non-Christian just because that holiday has taken on a commercial aspect as well. The fact that "official announcements" of Congress have declared Christmas a national holiday⁴⁴⁶ would lend no extra support to a government entity that wants to put up the tree because Congress' announcements in this regard would themselves be unconstitutional under the facilitation test. What would be acceptable under that test, by contrast, would be Congress' closing of all nonessential government operations because of the likelihood and administrative reality that many people will likely take the day off. Finally, a Menorah is also a religious symbol for purposes of the facilitation test.⁴⁴⁷

Does this mean that the President publicly lighting the White House Christmas tree violates the facilitation test? The short

⁴⁴⁵ Questions about why that painting was chosen would also be relevant—thus reintroducing a limited purpose analysis (to determine if the decision was made to favor a particular faith or religion generally). For example, consider the difference between a mural of the Ten Commandments exhibited as part of a broader display of art in a public art museum and the actions of the former Chief Justice of the Alabama Supreme Court. Justice Moore, who is known as the "Ten Commandments" judge, snuck a large stone engraving of the Ten Commandments into the Supreme Court building in the middle of the night without consulting his fellow justices. The large stone monument was displayed prominently in the courthouse, and the chief justice refused to allow other displays to receive similarly prominent attention. Manuel Roig-Franzia, *Biblical Display in Court Rejected*, CHI. TRIB., Nov. 19, 2002, at 10. The monument was removed pursuant to a federal court order, and Justice Moore was removed from office by Alabama's Court of the Judiciary. *Ten Commandments Judge Removed From Office*, CNN.COM, Nov. 14, 2003, at <http://www.cnn.com/2003/LAW/11/13/moore.tencommandments/index.html>.

⁴⁴⁶ *Lynch*, 465 U.S. at 676.

⁴⁴⁷ *County of Allegheny v. ACLU*, 492 U.S. 573, 633-34 (1989) (O'Connor, J., concurring in part and concurring in judgment); *id.* at 643 (Brennan, J., concurring in part and dissenting in part).

answer is yes. According to the Court, a Christmas tree is not a symbol of a purely religious holiday but rather of a nationally-recognized holiday with religious meaning (for some) and roots.⁴⁴⁸ These decisions have been soundly criticized both because of the Court's characterization of the holiday and because of its characterization of the symbols of that holiday.⁴⁴⁹ If a Christmas tree could function as a secular symbol, it is more likely that those who practice other faiths would be willing to have one. Yet if one is a devout Jew, Muslim, Hindu, or other non-Christian, one is unlikely to have a Christmas tree because Christmas is not a Jewish, Muslim, Hindu, or Buddhist holiday, nor is it considered a secular celebration by many Atheists. The irony that it is called a Christmas (or Christ's Mass) tree rather than a winter tree or holiday tree, seemed lost on the Court in *Allegheny*.⁴⁵⁰ As for the Presidential lighting of the White House Christmas tree, it consists of the leader of the nation formally lighting a symbol that represents a major holiday of the dominant religion in the nation. This gives special attention or recognition to that holiday in a significant way. Imagine what would happen if a non-Christian President refused to have or light the White House Christmas tree. Of course, while the presidential lighting of the tree violates the facilitation test, it is a battle one might wisely abstain from engaging in.⁴⁵¹

The point here is that the government should not be in the business of posting religious symbols.⁴⁵² Doing so calls special attention to, or gives special recognition of, a religious holiday or a specific religion or religions. Unlike the endorsement test, however, the facilitation test rejects the notion that government posting of a

⁴⁴⁸ *Allegheny*, 492 U.S. at 616.

⁴⁴⁹ See *supra* note 441 and accompanying text.

⁴⁵⁰ *Allegheny*, 492 U.S. at 581.

⁴⁵¹ It is important to note that a particular government action may violate the Establishment Clause, yet it may be unwise to challenge that action because it may do more damage than good to the cause of protecting against government establishments when the likely public response to the challenge is weighed against the benefits of bringing the claim. This may be particularly true in situations where the challenged practice is one of ceremonial deism. An example might be the recent challenge to the pledge of allegiance, where the Court had already approved exemptions in *Barnette*. See *Newdow v. U.S. Congress*, 292 F.3d 597, 612 (9th Cir. 2002) (holding school district's policy of requiring teachers to lead pledge of allegiance unconstitutional in light of 1954 amendments to the pledge statute).

⁴⁵² *Lynch v. Donnelly*, 465 U.S. 668, 725-26 (1984) (Brennan, J., dissenting).

religious symbol in situations like those in *Lynch* or *Allegheny* can ever be constitutional, because by their very nature, such postings reinforce the religion(s) whose symbols are posted. This is not meant to minimize the potential conclusion, under the endorsement test, that the posting of such symbols may reinforce those whose faith is favored or alienate those whose faith is left out.⁴⁵³ It simply acknowledges that such feelings are the likely by-product of government engaging in actions that support a specific religion or religions. It is the support that violates the facilitation test, not the response of those who view the support (most likely judges attempting to apply the perspective of a hypothetical reasonable observer),⁴⁵⁴ to the extent the two can be detached.

One final note here. This section does not address the private posting of religious symbols on government property when that property is a traditional or limited public forum. That issue would be dealt with under the facilitation test in a manner consistent with the equal access situations addressed in the next section.

F. EQUAL ACCESS

If organized school prayer is the activity most obviously prohibited under the facilitation test, equal access to generally available government fora is the situation most obviously allowed: in fact, it is mandated. When government opens a forum to general access by a variety of groups, it cannot keep religious groups from accessing that forum. To do so would discourage religion by putting religious groups at a disadvantage when compared to other non-government affiliated groups.⁴⁵⁵ So long as a forum really is open to all groups which are able to use that forum, consistent with

⁴⁵³ *Allegheny*, 492 U.S. at 597-98, 601-02, 605, 612-13; *id.* at 625-27 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 650-51 (Stevens, J., concurring in part and dissenting in part).

⁴⁵⁴ See March D. Coleman, Comment, *The Angel Tree Project*, 58 U. PITT. L. REV. 475, 505 (1997) ("Reasoned elaboration does little to ensure consistency under a standard governed by the 'reasonable observer;' one judge may see an endorsement when another judge sees neutrality.").

⁴⁵⁵ See *Good News Club v. Milford*, 533 U.S. 98, 108-109, 118-20 (2001) (stating content or viewpoint discrimination, or both, occurs when religious groups are denied access to public or limited public forums).

reasonable and generally applicable use guidelines, allowing a religious group to meet there does not substantially facilitate religion as compared to non-religion. In fact, denying the religious group equal access puts that group at a disadvantage when compared to other groups.⁴⁵⁶ The same would be true of equal access to a public forum for expressive purposes.⁴⁵⁷

This is something of a balancing act. One could argue that opening such fora to religious groups does give them a substantial benefit, even if it does not do so in a fashion that is disproportionate to non-religious groups.⁴⁵⁸ Yet this benefit, which probably would not meet the substantiality test in many situations, must be balanced against the discouragement that would occur if such groups were denied access on an equal basis.⁴⁵⁹ When these concerns are balanced, providing equal access is more consistent with the facilitation test than denying access. Still, if a government entity administered an access policy in a manner that favored religion over non-religion, or a specific religion over others, that policy would be unconstitutional as applied.

G. THE FREE EXERCISE CLAUSE

A detailed discussion of the Free Exercise Clause is beyond the scope of this Article. Yet, as has been seen, it is hard to avoid the Free Exercise Clause when dealing with principles such as neutrality and religious liberty. Moreover, one need not be an advocate of a totally unified approach to the religion clauses to understand that one cannot overlook Free Exercise Clause concerns when framing a test or exploring a principle under the Establishment Clause. This section will briefly address the implications of the facilitation test under the Free Exercise Clause.

⁴⁵⁶ This is consistent with aspects of the Court's approach in *Good News Club*, 533 U.S. at 98 and *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 385 (1993).

⁴⁵⁷ See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (holding private religious expression on government property does not violate Establishment Clause where it occurs in traditional public forum).

⁴⁵⁸ See *Good News Club*, 533 U.S. at 137-39 (Souter, J., dissenting).

⁴⁵⁹ *Id.* at 118-20.

As will be seen, the test need not be substantially modified to fit that context.

The major issue in the free exercise context is exemptions to generally applicable laws. To the extent that government intentionally discriminates against a specific religion or religions, the test is automatically violated because such targeting substantially discourages religion. This is generally consistent with *Church of the Lukumi Babalu Aye*.⁴⁶⁰ On the more contentious issue of exemptions to generally applicable laws, there is a tension within the facilitation test that is not all that different from that which has arisen under other religion clause tests—the tension between government action that interferes with religious practice (discouraging religion under the facilitation test), and exemptions (which might encourage religious practice under that test).

The facilitation test would mandate exemptions unless the government demonstrates a compelling government interest for not providing an exemption. Because the test is concerned with effects, the impact of a generally applicable law on religious practice would be taken seriously, since the effect of the law would be different as between the burdened religion and other religions and nonbelievers. Formal neutrality would preclude the exemption, thus discouraging the religious practice of the burdened religion.⁴⁶¹ Mandating an exemption would remove an impediment to the burdened religion and make the impact of the law more balanced between the potentially burdened religion and other religions. This is also supportable under an equality approach, but not formal equality.⁴⁶²

When exemptions are viewed in light of the burden a law places on the exempted religion, the encouragement an exemption provides is balanced against the discouragement resulting from failure to provide an exemption. When a “generally applicable law” substantially burdens a religious practice, the resulting discouragement is presumed to outweigh any encouragement. The government still has the opportunity to demonstrate a compelling

⁴⁶⁰ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

⁴⁶¹ *See generally* *Employment Div. v. Smith*, 494 U.S. 872 (1990).

⁴⁶² *See generally* Brownstein, *supra* note 13 (advocating equality); Eisgruber & Sager, *supra* note 41 (advocating equality approach).

governmental interest and may be able to do so.⁴⁶³ Needless to say, the preceding is a vastly oversimplified discussion, and it would require at least an entire article to analyze the numerous factors that are relevant to the Free Exercise Clause analysis.

V. CONCLUSION

This Article has set forth the inherent problems with the principle of neutrality in Establishment Clause cases. The principle sounds good in theory, but there is no neutral baseline from which we can gauge claims of neutrality. Thus, neutrality is an empty concept. Yet the Court has been increasingly gravitating toward neutrality, specifically formal neutrality, as the centerpiece of its Establishment Clause doctrine. While this shift has not taken place in every context to which the Establishment Clause can be applied, it has become dominant in government aid and equal access cases. This move is dangerous, not because of its results, but because the Court has gone from using neutrality as a broad and vague principle that needs other principles such as separation or accommodation in order to function, to using it as both the means and ends of Establishment Clause analysis. It is deeply troubling that the Court has placed such great weight on such weak footing.

As an alternative to the neutrality principle, this Article recommends looking beneath broad principles to narrower ones, which may be applied separately or in tandem to issues under the Establishment Clause. Relying on Douglas Laycock's concept of substantive neutrality, divorced from any claim to neutrality, this Article has proposed a test that is focused upon whether government activity facilitates or discourages religion. The test is not formalistic like the current Court's formal neutrality approach, but it is better able to address the highly complex and contextually bound issues that arise under the Establishment Clause.

⁴⁶³ This was Justice O'Connor's position in *Smith*. See *Smith*, 494 U.S. at 899-900 (O'Connor, J., concurring in the judgment) (arguing government would still have opportunities to demonstrate compelling governmental interest).