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Ian C. Bartrum

University of Nevada, Las Vegas – William S. Boyd School of Law

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PARADISE LOST: GOOD NEWS, CHARITABLE CHOICE, AND THE STATE OF RELIGIOUS FREEDOM

*"I give not Heav'n for lost. From this descent Celestial virtues
rising, will appear more glorious and more dread than from no
fall."*

John Milton*

INTRODUCTION

The United States Constitution's two religion clauses prohibit Congress from passing laws that establish religion or restrict its free exercise.¹ This Note argues that James Madison and Thomas Jefferson worked to include this language in the Constitution because of their belief that citizens' religious duties were more fundamental than their civic duties. It argues that they intended the Constitution's religion clauses to form a simple dialectic: the government may not force citizens to renounce their religious duties by compelling them to support another faith, nor may it pass laws that act coercively to restrict their religious beliefs and practices. This dialectic ensures a complete separation between church and state, which the rhetoric at the time of the Constitution's adoption clearly reflects.²

The Supreme Court, however, has recently adopted jurisprudence that stands in stark contrast with the Establishment Clause's original import. In *Good News Club v. Milford Central School*, the Court held that the government cannot discriminate against religious groups when allocating certain types of state funds.³ This Note contends that *Good News Club* is the latest in a long line of decisions that have slowly undermined the Constitution's limits on establishment such that what once stood for the idea of strict separation now promises something like equal inclusion. This jurisprudence sets the Constitution's two religious clauses at odds with each other by funding one group's free exercise of religion at the expense of the taxpayers' establishment rights not to see their money spent to advance blasphemous causes. Although this conflict has gone largely unnoticed, the

* John Milton, *Paradise Lost*, Book II, reprinted in 32 GREAT BOOKS OF THE WESTERN WORLD 111 (H.C. Beeching ed., Encyclopedia Britannica, Inc. 1952) (1667).

1. U.S. CONST. amend. I.

2. See THOMAS JEFFERSON, *Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in the State of Connecticut*, in THOMAS JEFFERSON: WRITINGS 510 (Merrill D. Peterson ed., 1984) (1802) [hereinafter JEFFERSON, *Letter*] (stating that the Establishment Clause built "a wall of separation between church and state," and that "religion is a matter which lies solely between man and his God that he owes account to none other for his faith or his worship").

3. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001). Specifically, the Court held: 1) Milford Central School's exclusion of the Good News Club from a limited public forum constituted "impermissible viewpoint discrimination" in violation of the Free Speech Clause, and 2) this exclusion could not be defended on Establishment grounds. *Id.*

recent controversy over the hiring practices provision of the Charitable Choice Act of 2001 has turned the issue into a national controversy.

The Charitable Choice Act of 2001 expands the charitable choice provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act).⁴ These provisions allow religious charities to compete for federal social service funds.⁵ The provisions retain the groups' exemption from the employment practices provision of the 1964 Civil Rights Act, which allows religious groups to discriminate when hiring.⁶ This issue has sparked intense national debate and left Congress in a position where no matter how it decides to proceed, religious freedom will be violated. If it prohibits groups from discriminating, Congress will be restricting their free exercise. If it allows groups to discriminate, Congress will be authorizing taxpayer funding of religious practices that many Americans find abhorrent. Both possibilities run counter to Madison and Jefferson's ideas about religious freedom. The Court's recent jurisprudence, however, seems to compel the government to give equal consideration to all religious groups when distributing social service funds.⁷ The controversy over Charitable Choice has finally brought national attention to longstanding flaws in Establishment Clause jurisprudence.

Part I examines the philosophical history of religious freedom in America. Part II discusses Establishment Clause jurisprudence over the last half-century, and points out a series of departures from the original import of religious freedom. Finally, Part III examines the Charitable Choice Act of 2001 and concludes that the controversy over discriminatory hiring practices brings national attention to the real problems associated with the Court's establishment jurisprudence.

4. Compare Charitable Choice Act of 2001, H.R. 7, 107th Cong. § 1991 (2001) (requiring that "the government shall consider, on the same basis as other nongovernmental organizations, religious organizations to provide the assistance under the program"), with Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 104, 42 U.S.C. § 604a (2000) ("The purpose of this section is to allow States to contract with religious organizations . . . on the same basis as any other nongovernmental provider . . .").

5. H.R. 7 § 1991(c)(1).

6. *Id.* § 1991(e). See Civil Rights Act of 1964 § 702, 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2) (2000) ("This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion.").

7. *Good News Club*, 533 U.S. at 112.

I. AMERICAN INSIGHT: THE ROLE OF RELIGION IN PARTICIPATORY DEMOCRACY

During his 1831 visit to America, Alexis de Tocqueville was astonished to find the spirit of organized religion and that of individual freedom “intimately linked together in joint reign over the same land.”⁸ He came to believe that this novel situation resulted from a profound and uniquely American political innovation—the strict separation of church from state.⁹ Tocqueville was among the first commentators to observe that this innovation was likely to become one of America’s greatest contributions to democratic political philosophy.¹⁰ Thus, any modern comment on the interaction of our religious and political institutions must begin with an examination of the historical and philosophical roots of our most fundamental constitutional freedom: the freedom of conscience.

This part describes what the Constitution’s framers meant when they wrote religious freedom into the First Amendment.¹¹ In doing so, it examines the historical and philosophical context that generated the American ideal of a “wall of separation between church and state.”¹² It argues that the colonial experience made Americans particularly receptive to the ideas of Enlightenment philosophers such as John Locke; that Thomas Jefferson and James Madison expanded on Locke’s ideas and came to believe that, because individual moral autonomy is integral to self-government, religious freedom is the most fundamental freedom in a participatory democracy. For the health of both the church and the state, no citizen should be made to choose between their duty to God and their duty to the government. Finally, this part concludes that the framers believed the greatest danger to this conception of religious liberty was the possibility that the state might establish one church, to the detriment of all others, by using funds raised through coercive taxation.

A. Religion in the Colonies

From its early history, American culture has reflected the myriad religious beliefs of its diverse citizenry. Certainly, John Winthrop’s vision of a shining “city on a hill” dominated the early colonization of New England, but Puritan Separatist hegemony was short lived, even in the

8. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272, 731 (George Lawrence trans., Harper & Row 1st ed. 1966) (1835).

9. *Id.* at 272.

10. *Id.* at 273–76.

11. U.S. CONST. amend. I.

12. JEFFERSON, *Letter*, *supra* note 2, at 510.

northeast.¹³ Just ten years after the creation of the Massachusetts Bay Colony, Roger Williams and his followers fled Puritan persecution and established the Rhode Island colony, where Williams was the first to write religious freedom into law.¹⁴ Within fifty years, William Penn established the Quaker colony of Pennsylvania and actively recruited religious dissenters from across Europe.¹⁵ Pennsylvania law embodied the Quaker belief in complete religious freedom and the colony attracted Mennonites, Amish, Moravians, and Baptists from both England and the Continent.¹⁶

Religious diversity was even more evident in the mid-Atlantic and southern colonies. Virginia and Maryland offered tax support to the Church of England through much of the seventeenth century. It is clear that religion played an important, though not overly coercive, role in colonial life there.¹⁷ However, estimates suggest that less than one in fifteen southern colonists were church members.¹⁸ This indifferent religious practice stood in stark contrast with the devout colonial culture in the northeast. Thus, it seems clear that the early American colonies, taken as a whole, formed a diverse religious community.

All this is not to say that early America was a tolerant place to live by modern standards. It is certainly true that each colony had its own laws and that no colony, except Pennsylvania, recognized religious freedom as Thomas Jefferson would describe it in 1786.¹⁹ In fact, several of the original colonial governments represented firmly established religions.²⁰ The existence of such diverse religious communities side by side in a new land, however, does help to explain the emergence of the novel political philosophy that our forefathers enshrined in the First Amendment to the Constitution. This unique colonial history made Americans particularly open to Enlightenment Era political philosophy regarding the place of religion in a democratic state.

13. John Winthrop, *A Modell of Christian Charity* (1630), quoted in GEORGE B. TINDALL & DAVID E. SHI, *AMERICA: A NARRATIVE HISTORY* 34 (W.W. Norton & Co. 4th ed. 1997) (1984). Winthrop delivered this sermon on board the *Arabella*, bound for the Puritan colony at Massachusetts Bay. *Id.* He hoped the colony would serve as an example to the world of a truly godly community. *Id.*

14. *Id.* at 35–36.

15. *Id.* at 47.

16. *Id.*

17. *Id.* at 68.

18. *Id.*

19. See THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, in THOMAS JEFFERSON: WRITINGS 346 (Merrill D. Peterson ed., 1984) (1784) [hereinafter JEFFERSON, *Bill*] (“[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves or abhors, is sinful and tyrannical.”).

20. JOHN T. NOONAN, *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 82 (1998).

B. John Locke: "A Letter Concerning Toleration"

As with much of American democratic philosophy, the seeds of religious freedom appear in the writings of John Locke. In his seminal work, *A Letter Concerning Toleration*, Locke outlined the essential rationale for the separation of church and state.²¹ Locke gave three reasons why "the care of souls cannot belong to the civil magistrate."²² These reasons present the rationale behind the common secular and sectarian arguments supporting the Establishment Clause. First, Locke argued that God never gave any person the authority to control another's soul and that no person can cede that power to another.²³ Second, Locke argued that the state only has the power to control an individual's physical life and actions.²⁴ It cannot affect one's inward thoughts or spirit, which are the essence of religious faith and practice.²⁵ Finally, Locke argued that even if the state forces the individual to act in accordance with the dictates of some religion, it could not affect true salvation which flows from uncoerced moral or religious choices.²⁶ Locke's philosophy would find fertile soil in the minds of American colonists such as Jefferson and Madison, who used his ideas as the cornerstone for the final clause of the Virginia Declaration of Rights and later the First Amendment to the Constitution.²⁷ Therefore, it is important to explore each of these reasons in more detail.

Locke first argued for the separation of church and state because God never granted any individual the authority to control the religious beliefs or practices of another. He wrote, "it appears not that God has ever given any such authority to one man over another as to compel anyone to his religion."²⁸ Nor did Locke believe that an individual could cede this authority to another.²⁹ He wrote, "no man can so far abandon the care of his own salvation as blindly to leave to the choice of any other . . . what faith or worship he shall embrace."³⁰ Thus, no earthly government has the power to enforce God's will on its subjects. This rationale leans heavily on Locke's own Christian biases, but it does state the most common sectarian

21. See John Locke, *A Letter Concerning Toleration*, reprinted in 35 GREAT BOOKS OF THE WESTERN WORLD 1 (Charles L. Sherman ed., Encyclopedia Britannica, Inc. 1952) (1689).

22. *Id.* at 3-4.

23. *Id.* at 3.

24. *Id.*

25. *Id.*

26. *Id.* at 4.

27. See THE VIRGINIA DECLARATION OF RIGHTS art. 16, reprinted in LANCE BANNING, JEFFERSON AND MADISON: THREE CONVERSATIONS FROM THE FOUNDING 107-09 (Madison House 1995) (1776); see also U.S. CONST. amend. I.

28. Locke, *supra* note 21, at 3.

29. *Id.*

30. *Id.*

argument for religious freedom. Simply stated, his argument holds that no individual or government can speak for God, and therefore people are responsible for performing their religious duties as each one sees fit.³¹ The government cannot relieve individuals of their religious burdens and duties, and therefore cannot compel them to act in a way inconsistent with their beliefs.³²

Locke's second argument for the separation of church and state asserts that the government has no control over the inner thoughts and beliefs of the individual.³³ While the state can force people to act in many different ways, it cannot "change the inward judgement that they have framed of things."³⁴ Thus, the state is not equipped to perform the persuasive or educational functions of the church.³⁵ This is the most common secular rationale supporting the Establishment Clause today. That is, established religion corrupts the state by turning its attention away from the proper task of governing human conduct and towards the improper task of trying to shape human beliefs.³⁶

Locke's final argument is perhaps the most subtle, but also the most important because it states the substantive individual freedom that is at stake. His argument holds that even if the state could succeed in shaping individuals' moral and religious beliefs, such a practice would rob citizens of the opportunity for genuine moral reflection and growth.³⁷ In Locke's words, even if laws "were capable to convince and change men's minds, yet would not that help at all to the salvation of their souls."³⁸ In other words, even if an individual makes a morally responsible choice, that choice is not truly theirs if it is coerced by the state. Thus, such a "moral" choice does not bestow its real reward—spiritual fulfillment and growth—because the individual really had no choice at all.³⁹ Here, Locke hearkens back to Aristotle's argument that a coercive moral state treats citizens as children,

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *See id.*

Neither the profession of any articles of faith, nor the conformity to any outward form of worship, . . . can be available to the salvation of souls, unless the truth of the one and the acceptableness of the other unto God be thoroughly believed by those that so profess and practise [sic] . . . penalties are no way capable to produce such belief.

Id.

38. *Id.* at 4.

39. *Id.*

and that any truly moral activity must be pursued *for its own sake*.⁴⁰ In a participatory democracy each individual must be free to reap the spiritual benefits of freely made moral decisions.⁴¹ Established religion eviscerates this freedom by dictating the exact parameters of moral conduct. In effect, it eliminates the space that is necessary for individual moral reflection and growth.⁴² This important rationale underlying the Establishment Clause is perhaps the one most widely ignored or forgotten in modern America.

These three arguments influenced Madison and Jefferson as they confronted the problems of establishing democratic governments among the diverse religious community that was colonial America.⁴³ Thus, Locke's ideas afford great insight into the meaning of the language of the First Amendment.

C. Madison and Jefferson: Crafting Religious Freedom in Virginia and the United States.

John Locke was not alone in advocating religious freedom. In the years following his essay, other political philosophers pressed the same arguments in several influential works.⁴⁴ Notably, the French political philosophers Montesquieu and Rousseau carried Locke's thoughts forward.⁴⁵ It is clear, however that Madison and Jefferson leaned heavily on Locke's ideas when articulating America's conception of religious liberty.⁴⁶ This conception finds its clearest expression in two seminal documents from the period of the nation's founding. The first is Jefferson's *Virginia Statute of Religious Freedom*, which the Virginia House of Delegates enacted in 1785.⁴⁷ The second is Madison's *Memorial and Remonstrance Against Religious Assessments*, which he authored in

40. V. J. MCGILL, *THE IDEA OF HAPPINESS* 13–15 (Mortimer J. Adler ed., 1967).

41. See Locke, *supra* note 21, at 4–5. “I may have liberty at the same time to join myself to that society in which I am persuaded those things are to be found which are necessary to the salvation of my soul.” *Id.* at 5.

42. *Id.*

43. See BANNING, *supra* note 27, at 103–09. “Madison’s amendment . . . [made] America the great exemplar of a total freedom of opinion, absolute equality for various denominations, . . . and the complete withdrawal of the state from its traditional involvement in this sphere.” *Id.* at 104.

44. Charles de Montesquieu, *The Spirit of the Laws*, Book XIX, reprinted in 38 GREAT BOOKS OF THE WESTERN WORLD 1, 135 (Thomas Nugent trans., Encyclopedia Britannica, Inc. 1952) (1748); Jean Jacques Rousseau, *The Social Contract*, Book I, Chap. 8, reprinted in 38 GREAT BOOKS OF THE WESTERN WORLD 387, 435 (G.D.H. Cole trans., Encyclopedia Britannica, Inc. 1952) (1748).

45. See Rousseau, *supra* note 44, at 438–39 (arguing that citizens are free to hold their own opinions, and the State “has no authority in the other [spiritual] world”).

46. See BANNING, *supra* note 27, at 103–09.

47. THOMAS JEFFERSON, *Virginia Statute of Religious Freedom*, in THOMAS JEFFERSON: WORD FOR WORD 55–57 (Maureen Harrison & Steve Gilbert eds., 1993) (1779) [hereinafter JEFFERSON, *Statute*]; MARTIN MEYERS, *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 6 (Marvin Meyers ed., 1981).

response to a bill aimed at paying Christian teachers with taxpayer monies.⁴⁸ Though Jefferson's ideas were typically more radical than Madison's, they shared a core philosophy built largely on Locke's third argument discussed above. Both men believed that the state cannot coerce true faith, and thus each individual must be responsible for their own duties to God.⁴⁹ This idea of *a priori* religious *duty*, as opposed to our modern conception of free religious *choice*, is central to their thought.⁵⁰ With this in mind, Madison and Jefferson argued that every citizen in a democracy must reserve their ultimate loyalty for God.⁵¹ This freedom of conscience is the essence of a true democracy, and separates popular government from totalitarian or tyrannical regimes that seek only conformity.⁵²

It is also clear that both men viewed governmental establishment of religion as the most serious threat to religious freedom. Additionally, they both viewed the use of tax money to aid sectarian institutions as the most dangerous form of this establishment.⁵³ The possibility that political leaders might espouse a particular religion in their public discourse was of less concern, as evidenced by the frequent reliance on Christian principles and language in their writings.⁵⁴ An examination of Jefferson's statute and Madison's remonstrance reveals that the essential intention of the constitutional provision Madison created was to prohibit the use of coercive taxation to further sectarian institutions.

1. Virginia Statute of Religious Freedom

Thomas Jefferson wrote the *Virginia Statute of Religious Freedom* in 1779, and the Virginia House of Delegates enacted it in 1785.⁵⁵ The statute consists of two sections: the first outlines the philosophical reasons for the law, and the second states the law itself.⁵⁶ The first section presents three essential arguments based largely on Locke's ideas, favoring religious

48. James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 6–7 (Marvin Meyer ed., 1981) (1785) [hereinafter *Madison, Memorial*].

49. JEFFERSON, *Statute*, *supra* note 47, at 55; see Madison, *Memorial*, *supra* note 48, at 7 (“[T]he duty which we owe to our creator . . . can be directed only by reason and conviction, not by force or violence.” (citing VIRGINIA DECLARATION OF RIGHTS, art. 16)).

50. MICHAEL SANDEL, *DEMOCRACY’S DISCONTENT*, 63 (1996).

51. Madison, *Memorial*, *supra* note 48, at 13; JEFFERSON, *Statute*, *supra* note 47, at 55.

52. Madison, *Memorial*, *supra* note 48, at 8; JEFFERSON, *Statute*, *supra* note 47, at 55–56.

53. Madison, *Memorial*, *supra* note 48, at 6; JEFFERSON, *Statute*, *supra* note 47, at 55.

54. Madison, *Memorial*, *supra* note 48, at 7; JEFFERSON, *Statute*, *supra* note 47, at 55.

55. JEFFERSON, *Statute*, *supra* note 47, at 55; MEYERS, *supra* note 47, at 6.

56. JEFFERSON, *Statute*, *supra* note 47, at 55–57.

freedom.⁵⁷ The second section dictates three means by which these freedoms are to be protected.⁵⁸

The first section of the statute states three reasons why Jefferson believed that religious liberty was essential to democratic government. First, Jefferson argued that lawmakers are not competent to evaluate religious truth.⁵⁹ Second, he argued that true religion does not need state support, and, in fact, state sponsorship often corrupts a church.⁶⁰ Third, he contended that it is tyrannical to force a person to make contributions to a faith, or even a pastor, other than his own.⁶¹ These arguments were based on Locke's ideas and Jefferson's belief that religious freedom is a natural right, which the government has no authority to invade.⁶² He felt strongly that the government should protect the free exercise of religion so long as it does not infringe upon another's liberty. He once wrote that the worship of "twenty gods, or no god . . . neither picks my pocket nor breaks my leg."⁶³ Implicit in this statement, however, is his specific concern that the state might use its taxation powers to pick citizens' pockets in aid of a particular church. This concern led directly to the specific provisions in the second section of his statute.⁶⁴

The second section of the statute restricts Virginia's actions in three specific ways. First, it states, "no man shall be compelled to frequent or support any religious worship."⁶⁵ Second, it promises that, "all men shall be free to profess, and by argument to maintain, their opinions in matters of religion."⁶⁶ Finally, it ensures that an individual's religious beliefs "shall in nowise diminish, enlarge, or affect their civil capacities."⁶⁷ These provisions act to advance the philosophies that Jefferson enunciated in the first section of the statute. It is worth noting that the first provision of the act addresses the dangers of state establishment of religion in general, as well as the evils of using tax dollars to support the church. Naturally, these possibilities threatened Jefferson's conception of religious liberty.

57. *Id.* at 55–56.

58. *Id.* at 56–57.

59. *Id.* at 55.

60. *Id.* at 56.

61. *Id.* at 55.

62. Compare Locke, *supra* note 21, at 4 (stating that the magistrate might use laws and punishment to change individuals' minds, but that ultimately this world has no bearing on the "salvation of souls"), with JEFFERSON, *Statute*, *supra* note 47, at 55–56 (arguing that religion is corrupted when an individual is forced to contribute money and to externally profess agreement with a set of beliefs contrary to his or her own persuasion).

63. THOMAS JEFFERSON, *Notes on the State of Virginia*, in THOMAS JEFFERSON: WRITINGS 285 (Merrill D. Peterson ed., 1984) (1781) [hereinafter JEFFERSON, *Notes*].

64. JEFFERSON, *Statute*, *supra* note 47, at 56–57.

65. *Id.* at 56.

66. *Id.* at 56–57.

67. *Id.* at 57.

The seeds of the First Amendment to the Constitution are found in Jefferson's statute. Jefferson established a thesis and antithesis of the dialectic of American religious liberty; that is, the state may not impede upon the free exercise of religion, nor may it work to establish one faith over another. While these two positions may not seem on the surface to conflict, it has become increasingly clear in modern America that the government must walk a delicate line to uphold both ideals.⁶⁸

2. Memorial and Remonstrance

Madison expressed his ideas on religious freedom in a pamphlet entitled *Memorial and Remonstrance Against Religious Assessments*.⁶⁹ He wrote this pamphlet in response to a bill that Patrick Henry introduced in the 1784 Virginia Assembly aimed at countering a perceived decay in public morality.⁷⁰ Henry's proposal, entitled *A Bill Establishing a Provision for Teachers of Christian Religion*, would have used taxpayer monies to help pay Christian teachers throughout the Commonwealth.⁷¹ Madison vigorously objected to the bill and managed to get the House to postpone the debate until he could raise public resistance to the idea.⁷² Madison used the time to write and distribute his pamphlet, which led to the bill's defeat and the enactment of Jefferson's statute of religious freedom in 1785.⁷³ Madison's remonstrance adopted the structure of the *Declaration of Independence* in offering an enumerated list of grievances he had with the proposed legislation.⁷⁴ The heart of Madison's philosophy reflects Lockean ideals and regards free religious worship as a duty that each individual owes to God. From this premise, Madison argued that any state action that works to impede or compel a particular form of worship violates a holy prerogative.⁷⁵ Therefore, it is important to evaluate Madison's pamphlet by following the reasoning from his general premise to his particular conclusions.

Madison's understanding of religious freedom was slightly more sophisticated and less radical than Jefferson's. It centered on his understanding of religious exercise as an *a priori* duty that individuals are

68. See discussion *infra* Part II.A-B.

69. Madison, *Memorial*, *supra* note 48, at 6-13.

70. *Id.* at 6.

71. SANDEL, *supra* note 50, at 56-57.

72. MEYERS, *supra* note 47, at 6.

73. *Id.*; JEFFERSON, *Statute*, *supra* note 47, at 55.

74. THE DECLARATION OF INDEPENDENCE (U.S. 1776), available in THOMAS JEFFERSON: WRITINGS 19 (Merrill D. Peterson ed., 1984) (1781); Madison, *Memorial*, *supra* note 48, at 6-13.

75. Madison, *Memorial*, *supra* note 48, at 7, 13.

either born with or acquire by revelation.⁷⁶ Thus, to Madison, state action that impedes free religious exercise, either directly or by requiring a citizen to contribute to a church other than his own, is more an affront to God than it is to the individuals.⁷⁷ This profound formulation of the inalienable right to free religious exercise stands in marked contrast with the modern perception that the First Amendment protects the right to make our own religious “choices.”⁷⁸ Moreover, for Madison, individuals enter their civic and social lives already burdened with a number of religious duties.⁷⁹ Individuals cannot renounce these duties, and thus, when they enter into a social contract with the state, they must reserve their ultimate loyalty for God.⁸⁰ This is the essence of Madison’s first grievance. He wrote, “every man who becomes a member of any particular Civil Society, [must] do it with a saving of his allegiance to the Universal Sovereign.”⁸¹ For Madison, the primary purpose of religious freedom is to ensure that citizens are not forced to choose between their duties to God and their duties to the state.

Madison started from this premise and presented several conclusions about the inherent dangers of state-sponsored religion. He viewed the use of taxpayer money as the most pernicious form of state-sponsored establishment. First, he argued, as did Jefferson and Locke, that the state is not competent to make religious judgments, calling such practice “an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world”⁸² Second, he argued that religion cannot be an engine of civil or social policy, as this is “an unhallowed perversion of the means of salvation.”⁸³ This argument was borrowed from Locke’s third point.⁸⁴ Madison used a slippery slope argument to illustrate the dangers of government taxation for religious purposes. He asked, “who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?”⁸⁵

76. For a thorough discussion of the idea that citizens are “encumbered selves,” see SANDEL, *supra* note 50, at 65–71.

77. See Madison, *Memorial*, *supra* note 48, at 13 (calling the bill establishing a provision for teachers of the Christian religion an “affront [to] his holy prerogative”).

78. See SANDEL, *supra* note 50, at 65–71. “Government . . . must be neutral in matters of religious theory, doctrine, and practice The First Amendment mandates government neutrality. . . .” *Id.* at 55–56.

79. *Id.*

80. Madison, *Memorial*, *supra* note 48, at 7.

81. *Id.*

82. *Id.* at 9.

83. *Id.*

84. See *supra* Part I.A.

85. Madison, *Memorial*, *supra* note 48, at 8.

Thus, the use of tax money to further sectarian causes was the primary form of establishment that Madison found objectionable.

Finally, Madison restated Locke and Jefferson's theses, concluding that a true church does not require state assistance, and a just government does not require the assistance of the church to support its legitimacy.⁸⁶ He drew these conclusions from his general premise about the nature of religion and religious duties and his ideas about the nature of democratic government. Madison believed that any religion worth its salt has no need for state support. He wrote, "every page of [the Bible] disavows a dependence on the powers of this world [Establishment fosters] a suspicion that [a church's] friends are too conscious of its fallacies, to trust it to its own merits."⁸⁷ Further, he believed that a legitimate state does not need to lean on any religion, writing: "[r]ulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure [and] perpetuate it, needs them not."⁸⁸ In fact, he went on to state that liberty is best served by a state that, "neither invad[es] the equal rights of any Sect, nor suffer[s] any Sect to invade those of another."⁸⁹ Madison agreed with Locke and Jefferson in finding that legal separation works to the benefit of both church and state.

It seems that Madison, like Locke and Jefferson before him, believed that the strict separation of church and state is the single most important safeguard of free religious exercise in a democratic government. His argument starts with the general premise that individuals enter political life with pre-existing religious duties, which the state may not impede. He concluded that established religion presents the greatest threat to individual religious freedom. Thus, like Jefferson, he saw a simple dialectic at the heart of American religious liberty. On the one hand, the state must permit individuals the freedom to exercise their religious duties in whatever ways they find necessary. On the other, the state must not allow the exercise of one particular religion to become established in the law, as this infringes on the rights of other groups.⁹⁰ The primary form of establishment Madison warned against is the use of tax money to further a particular church.⁹¹ He, like Jefferson, was much less concerned about the kind of establishment that results when political leaders give voice to their own beliefs in the

86. *Id.* at 10.

87. *Id.* at 9.

88. *Id.* at 10.

89. *Id.*

90. *Id.* at 8.

91. *Id.* at 8–10.

course of public duty. Again, this is clear from the heavy use of Christian ideology in Madison's own writing.⁹²

Finally, it must be noted that Jefferson and Madison were not the only men with ideas about religious liberty in the late eighteenth century. It is clear from the notes, debates, and revisions that occurred during the drafting of the First Amendment that some members of the Continental Congress had very different ideas about the meaning of religious liberty.⁹³ In fact, some delegates probably believed that the language of the first clause of the amendment—"Congress shall make no law respecting an establishment of religion"⁹⁴—actually forbade the federal government from interfering with state governments that *did* embody an established church.⁹⁵ What is apparent, however, is that Madison and Jefferson shared a vision of religious freedom, descended from Locke, which was consistent with the ideas at the heart of the nation's founding. Religious freedom was, for these men, a natural right equivalent to those enumerated in the *Declaration of Independence*.⁹⁶ They believed that the use of tax money to fund a particular religion posed the greatest potential threat to this important freedom and thus erected the Establishment Clause as guardian of a fundamental right. It is this tradition, and not the splintered legislative history, that should inform our modern understanding of what the First Amendment—particularly the Establishment Clause—meant at the time Madison worked for its adoption.

II. RECENT SUPREME COURT CASES

The Establishment Clause emerged from the Virginia tradition of religious freedom, which sought to maintain a strict "wall of separation between church and state."⁹⁷ The clause prohibits Congress from restricting the free exercise of religion. To this end, it also specifically prohibits Congress from acting in support of any religion.⁹⁸ Madison, in particular, argued against the use of coercive taxation to support religious institutions because he believed this practice would have forced some citizens to spend their money in aid of institutions they may have found blasphemous.⁹⁹

92. *Id.*

93. For a thorough discussion of the First Amendment's adoption, see NOONAN, *supra* note 20, at 78–86.

94. U.S. CONST. amend. I.

95. NOONAN, *supra* note 20, at 82. New Hampshire and South Carolina were examples of state governments that embodied an established church. *Id.*

96. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

97. JEFFERSON, *Letter*, *supra* note 2, at 510.

98. U.S. CONST. amend. I.

99. Madison, *Memorial*, *supra* note 48, at 7.

Government action of this kind forces citizens to choose between their duty to the state (taxes) and their duty to God (not to support false ideologies). Thus, Madison believed that when Congress spends citizens' tax dollars it must carefully discriminate against organized religious groups. It is startling, then, to read the Supreme Court's language in *Good News Club v. Milford Central School* striking down a public school's resource allocation policy that "discriminated against [a group] because of its religious viewpoint."¹⁰⁰ This result is at odds with the original meaning of the First Amendment, and thus requires further exploration.

This part examines the Court's Establishment Clause jurisprudence over the last half-century, with a particular focus on the last fifteen years. It concludes that the convoluted state of modern religious freedom is a result of the problematic and malleable 'neutrality' doctrine. This part traces the development of the 'neutrality' doctrine and argues that the Court's recent opinion in *Good News Club* has set the stage for precisely the kind of interaction between religion and the state that Madison worked so hard to avoid.

This doctrine, which attempts to ensure constitutional neutrality on virtually all moral questions, ultimately leads the Court to categorize religion as simply another form of speech deserving limited protection under the First Amendment.¹⁰¹ This view reduces the sacred to the secular, and eventually tangles the Court in a conflict of free expression and Establishment Clause jurisprudence that Madison could never have imagined.

A. The Emergence of Neutrality

Although the doctrine of neutrality is now well established in constitutional jurisprudence, it is not an old principle.¹⁰² Perhaps grown from seeds Justices Holmes planted in his famous dissents during the progressive era,¹⁰³ the doctrine did not enjoy consistent application until the religion cases of approximately the last fifty years.¹⁰⁴ It was not until 1940 that the Court held the Fourteenth Amendment incorporated the Establishment Clause and made it applicable to the states.¹⁰⁵ Before 1940,

100. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001).

101. *Id.* at 111-12.

102. See discussion *infra* Part II.A.1.

103. See, e.g., *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (suggesting that the Constitution is neutral among competing ideologies, and observing, "a constitution is not intended to embody a particular economic theory") (Holmes, J., dissenting).

104. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 24 (1947) (advocating that a "strict and lofty neutrality" towards religion has become a staple in free exercise jurisprudence).

105. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

the Court rarely considered Establishment Clause cases.¹⁰⁶ Since 1947, however, the Court's opinions are rife with reference to the need for government neutrality towards religion.¹⁰⁷ The Court has, it seems, tried to guard Jefferson's wall of separation with the rule that "the Government must pursue a course of complete neutrality toward religion."¹⁰⁸ In recent years, this doctrine has evolved as part of two distinct lines of Establishment Clause cases.¹⁰⁹ The first line involves the permissibility of religious speech in publicly funded institutions.¹¹⁰ The second line, which is of most concern here, involves the use of government money to aid religious groups.¹¹¹

1. Cases Involving Religious Speech in Public Institutions

Two cases set the stage for the development of Establishment Clause jurisprudence pertaining to religious speech in public institutions. In a 1962 case, *Engel v. Vitale*, the Court invalidated a New York public school policy that required students to read the Regents' Prayer at the start of each day.¹¹² The Court held that recitation of the prayer might offend some students' religious views. The Court found the practice unconstitutional, even if the schools did not require the offended students to read along with the prayer.¹¹³ A year later, in *Abington School District v. Schempp*, the Court offered a similar rationale for its holding that Bible readings and recitation of the Lord's Prayer in Pennsylvania public schools violated the Establishment Clause.¹¹⁴ These cases set the parameters for later decisions regarding religious speech in several important ways.

Perhaps these cases' most important legacy is the Court's refusal to view these issues as matters affecting the free exercise of religion.¹¹⁵ Rather, the Court addressed these problems under the Establishment

106. Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 788-89 (2001) (stating that prior to incorporation there were few relevant cases because "few federal activities implicated . . . [the] Establishment Clause . . . and the sort of civil libertarian interest groups that might litigate such issues either did not exist or did not focus on Religion Clause questions").

107. SANDEL, *supra* note 50, at 56.

108. *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

109. For a complete discussion of these two spheres of Establishment Clause jurisprudence, see generally Lupu, *supra* note 106, at 771-79.

110. *Id.*

111. *Id.*

112. *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

113. *Id.* at 423-24.

114. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963).

115. See *Engel*, 370 U.S. at 430-31 (holding that the Establishment Clause, not the Free Exercise Clause, is implicated by a law dictating any official prayer, even though recitation of the prayer was not mandatory and the law did not act directly to coerce non-observant individuals).

Clause.¹¹⁶ In *Schempp*, the Court found that under the Free Exercise Clause a challenger must show that some governmental coercion restricts his or her religious practice and observed that the Establishment Clause requires no such showing.¹¹⁷ Thus, the simple act of reading a prayer in a public school works to establish religion, even if particular students may opt out of the exercise.¹¹⁸ This is true even when the reading is non-denominational, as the Court found that any religious speech might offend non-Christians, atheists, or even secular students.¹¹⁹ Thus, the Court firmly established that, in order for the government to remain neutral in matters of religion, it must not require students to recite any religious materials in school.¹²⁰

For several years, the Court limited its holdings in *Engel* and *Schempp* to situations where a school policy required students to participate actively in religious exercise. By 1980, however, the Court had expanded the neutrality doctrine to invalidate passive religious speech in public institutions, such as posting the Ten Commandments on a school wall.¹²¹ This principle eventually led the Court to strike down a school policy that adopted a moment of silence for meditation or voluntary prayer.¹²² In 2000, the Court took this reasoning to its logical extreme and held that even a voluntary student-led prayer before a high school football game violated the Establishment Clause.¹²³ In the context of public schooling, the Court has made it clear that neutrality demands the virtual absence of religious speech.

The Court has been more reluctant to extend the neutrality principle outside the public school setting,¹²⁴ but recently neutrality has triumphed in other contexts.¹²⁵ The brand of neutrality the Court applies outside the

116. *Id.*

117. *Schempp*, 374 U.S. at 222–23.

118. *Id.* at 223.

119. There is very little discussion in *Engel* suggesting that a total ban on religious speech actually tends to establish a secular, or anti-religious, viewpoint. *Engel*, 370 U.S. at 421. However, Justice Stewart's dissent in *Schempp* does address this highly problematic aspect of the neutrality doctrine. *Schempp*, 374 U.S. at 313 (Stewart, J., dissenting). Justice Black's pointed concurrence in *Epperson v. Arkansas* also addresses this issue. *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968) (Black, J., concurring).

120. See *Engel*, 370 U.S. at 430–31. "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause . . ." *Id.* at 430.

121. *Stone v. Graham*, 449 U.S. 39, 42–43 (1980).

122. *Wallace v. Jaffree*, 472 U.S. 38, 60–61 (1985). Again, this case exposes a weakness of the neutrality doctrine, as the prohibition of school-sponsored moments of silence tends to establish a secular viewpoint. See *id.*

123. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000).

124. See, e.g., *Marsh v. Chambers*, 463 U.S. 786 (1983) (upholding Nebraska's practice of beginning legislative session with a prayer).

125. See *Allegheny County v. Greater Pittsburg ACLU*, 492 U.S. 573, 579 (1989) (holding that a crèche display in a county courthouse violates the establishment clause).

schoolhouse, however, is very different from its educational jurisprudence. In *Allegheny County v. Greater Pittsburgh ACLU*, the Court held that a crèche displayed outside the Allegheny County courthouse in Pittsburgh violated the Establishment Clause.¹²⁶ This case marked the first time the Court has upheld an Establishment Clause challenge outside the school setting. The case also employed a rationale that modified the neutrality doctrine in a very problematic way.

The *Allegheny* case was the first time a majority of the Court adopted the analytical framework that it currently utilizes when applying the neutrality doctrine.¹²⁷ This framework looks for government activity that has “the effect of endorsing or disapproving religious beliefs.”¹²⁸ Thus, the current Court finds itself evaluating the religious meaning and content of various types of state-sponsored religious speech.¹²⁹ Not only is this judicial evaluation exactly the kind of usurpation that Locke, Jefferson, and Madison found abhorrent, it also establishes the Court as the final arbiter of what is ‘neutral’ for purposes of the neutrality doctrine.¹³⁰ The neutrality doctrine, as it applies in publicly funded contexts outside of schools, does not require the total absence of religious speech.¹³¹ It merely requires that five Justices agree that the speech does not constitute state endorsement of religion.¹³²

The recent line of cases that deals with state-sponsored religious speech illustrates some of the real problems with the neutrality doctrine. On the one hand, the Court has imposed an almost total ban on religious speech in public schools, even though this may work to establish an anti-religious perspective.¹³³ On the other hand, the Court has appointed itself the final judge of religious content in determining which types of religious speech constitute state endorsement of a particular faith.¹³⁴ The second issue, descended from *Allegheny*, is highly problematic because it runs counter to

126. *Id.*

127. *See id.* This framework, first outlined in Justice O'Connor's concurrence in *Lynch v. Donnelly*, looks for government actions or speech that work to endorse a particular religion. *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring).

128. *Allegheny*, 492 U.S. at 597.

129. *See id.* at 582–87. Here the Court engaged in a lengthy analysis of Jewish religious rituals and their meanings as part of the justices' analysis regarding whether a menorah outside the courthouse works to establish Judaism. *Id.*

130. Locke, *supra* note 21, at 4; JEFFERSON, *Statute*, *supra* note 47, at 55–56; Madison, *Memorial*, *supra* note 48, at 9. Recall that all three men believed that the state was not competent to make religious judgments. Madison, in fact, called this an “arrogant pretension.” *Id.* at 9.

131. *Allegheny*, 492 U.S. at 597. The Court did not find that another display containing a Christmas tree and menorah violated the Establishment Clause because the display did not endorse a particular religion. *Id.*

132. *Id.*

133. *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968) (Black, J., concurring).

134. *Allegheny*, 492 U.S. at 597.

the original import of the Establishment Clause.¹³⁵ Fortunately, the Court has not decided many cases addressing religious speech outside the school setting. Moreover, the current Justices have generally not allowed their personal ideas about religion to enter into the public school speech cases. Instead, they have simply enforced a strict brand of neutrality that essentially banishes all religious speech from school-sponsored activities.¹³⁶ The Court has not been so restrained, however, in its decisions addressing government aid to religious institutions.

2. Cases Involving Government Aid to Religious Institutions

The neutrality doctrine has followed a twisted path through the last fifty years of the Court's Establishment Clause jurisprudence regarding government sponsorship of sectarian groups. A half-century ago the Court was fairly permissive of laws that provided some state aid to religious institutions.¹³⁷ In the 1970s, however, the Burger Court tightened the constitutional screws on state sponsorship of religious schools.¹³⁸ In the last fifteen years, the Rehnquist Court has again relaxed the standards it uses when applying the Establishment Clause.¹³⁹ It is important to understand the evolution of the Court's reasoning on this aspect of the Establishment Clause because this line of cases set the stage for the *Good News Club* decision.¹⁴⁰

The first of these cases was *Everson v. Board of Education*, which upheld a program that reimbursed parents for the cost of transporting their children to both private religious schools and public schools.¹⁴¹ A sharply divided Court found that the program provided minimal incidental benefits to religious schools, and it did so in a neutral manner.¹⁴² The majority found the program was constitutional because the money flowed to parents, not religious schools, and thus the law did not advance any religion.¹⁴³

135. See *supra* Part I.C.

136. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (invalidating voluntary student-led prayers at high school football games).

137. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 17 (1946) (authorizing school districts to provide transportation reimbursements for parents of children who attended private religious schools); *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1968) (upholding a program that loaned public school textbooks to private religious schools).

138. See *Lemon v. Kurtzman*, 403 U.S. 602, 611–25 (1971) (invalidating programs that excessively entangle the church and state).

139. See *Agostini v. Felton*, 521 U.S. 203, 234 (1997) (reducing the *Lemon* test to factors in the Court's determination as to whether a program advances religion).

140. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001).

141. *Everson*, 330 U.S. at 17–18.

142. *Id.*

143. *Id.* at 18.

Justices Rutledge and Jackson each wrote strong dissents, arguing that any aid to religious groups violates the original import of the Establishment Clause—even if it is incidental and indirect.¹⁴⁴ It is worth noting that the majority and dissenting opinions all suggested that direct aid to a religious group would be unconstitutional, and that each opinion used Madison's *Memorial and Remonstrance* as the appropriate backdrop for Establishment Clause jurisprudence.¹⁴⁵ Further, when the *Everson* majority stated that, “[n]o 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 . . .,” the Court came as close to upholding Madison's Establishment views as it ever has.¹⁴⁶

One year later, the Court invalidated a program that provided religious instruction for students on public school grounds.¹⁴⁷ The facts of *McCullum v. Board of Education* closely echo objections that Madison expressed.¹⁴⁸ In 1968, however, the Court extended the *Everson* rationale to uphold a program that allowed public schools to loan textbooks to students attending private religious schools.¹⁴⁹ In *Board of Education v. Allen*, the Court approved this used book program even though it clearly resulted in direct and substantial aid to religious schools.¹⁵⁰ The decision seemed to signal a gradual relaxation of Establishment Clause jurisprudence in the realm of government money, but the Court again reversed course just a few years later.

In 1971, the Court rendered a decision that would become the seminal case in modern Establishment Clause jurisprudence pertaining to government aid.¹⁵¹ In *Lemon v. Kurtzman*, the Court considered the constitutionality of Rhode Island and Pennsylvania statutes providing aid to private school teachers who taught secular subjects, even at religious schools.¹⁵² In his opinion, Chief Justice Burger formulated a detailed test for determining when state aid to sectarian institutions violates the Establishment Clause.¹⁵³ Before upholding a state aid program, the Court must make three findings: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither

144. *Id.* at 18–34 (Jackson, J., & Rutledge, J., dissenting).

145. *See id.* at 12–13, 26–27, 31–33 (Jackson, J., dissenting & Rutledge, J., dissenting).

146. *Id.* at 16.

147. *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

148. *See supra* Part I.C. In *McCullum* a public school board permitted religious educators to come into the school for religious instruction. *McCullum*, 333 U.S. at 205.

149. *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1967).

150. *Id.*

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

152. *Id.* at 606–07.

153. *Id.* at 612–13.

advances nor inhibits religion[;] . . . finally, the statute must not foster 'an excessive entanglement with religion.'"¹⁵⁴ The Court held that both statutory schemes failed to satisfy the third prong of this test.¹⁵⁵ It is important to recognize that the second prong of the *Lemon* test, requiring a determination as to what activities may advance or inhibit religion, asks the Court to make religious judgments contrary to Madison's admonitions.¹⁵⁶

Nonetheless, for the next twenty-five years the Court looked primarily to the *Lemon* test when considering Establishment Clause cases involving government funds.¹⁵⁷ In applying the test, the Court rarely lingered over the first prong, as virtually all state aid programs have some secular purpose.¹⁵⁸ That is just as well, as Madison considered this justification for establishment irrelevant.¹⁵⁹ Generally, the *Lemon* test ensnared state aid programs between its last two prongs. The Court would either find that a program advanced an institution's religious mission or that government oversight to guard against such advancement would "excessively entangle" church and state.¹⁶⁰ For the next ten years, the Burger Court regularly invalidated state aid programs using the *Lemon* test.¹⁶¹ The Court's analysis under the second prong, however, has evolved over time, particularly under the Rehnquist Court.

In the 1980s, the second prong of the *Lemon* test, sometimes referred to as the "effects analysis,"¹⁶² provided fertile ground for reform-minded Justices to erode the Burger Court's strict wall of money separation.¹⁶³ Through a line of cases, the Court began to recognize that the principle of

154. *Id.* (quoting *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968); *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)).

155. *Id.* at 614.

156. Compare *id.* at 612 (requiring the Court to determine if the primary effect of a program is advancing or inhibiting religion as a means of determining if the program offends the Establishment Clause), with Madison, *Memorial*, *supra* note 48, at 9 (arguing that the Court is not competent to evaluate religious truth, nor may it use religion to dictate policy).

157. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 218–22 (1997) (discussing several cases where the Supreme Court applied the *Lemon* test). Decided in 1997, *Agostini* explicitly adopted a drastically revised version of the *Lemon* test. *Id.* at 232–34.

158. Lupu, *supra* note 106, at 795.

159. Madison, *Memorial*, *supra* note 48, at 10. Madison rejected as irrelevant the argument that religious education served the secular purpose of promoting stability. SANDEL, *supra* note 50, at 65–66.

160. Lupu, *supra* note 106, at 795.

161. See, e.g., *Meek v. Pittenger*, 421 U.S. 349, 359–72 (1975) (finding equipment and personnel loans from public to sectarian schools advanced religion and involved excessive entanglement); *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (finding monetary grants, reimbursements, and tax exemptions for indigent parents whose children attended religious schools advanced religion); *Tilton v. Richardson*, 403 U.S. 672 (1971) (finding that a twenty year limit restricting religious worship in sectarian universities may, upon expiration, have the effect of advancing religion).

162. David J. Freedman, *Wielding the Ax of Neutrality: The Constitutional Status of Charitable Choice in the Wake of Mitchell v. Helms*, 35 U. RICH. L. REV. 313, 322–23 (2001).

163. Lupu, *supra* note 106, at 802.

“private choice” could offset concerns that state aid might have the effect of advancing religion.¹⁶⁴ In *Mueller v. Allen*, the Court upheld a Minnesota scheme that provided tax deductions for parents’ educational expenses, even if their children attended parochial schools.¹⁶⁵ The majority reasoned that any aid that the statute afforded religious schools resulted from the individual parents’ private choices, not from any government directive.¹⁶⁶

Five years later, in a sign of things to come, the Court upheld a federal program offering grants to groups formed to combat teenage pregnancy.¹⁶⁷ In *Bowen v. Kendrick*, the Court considered a program that explicitly encouraged the issuance of grants to religious organizations.¹⁶⁸ Without giving much deference to earlier opinions, the Court stated that the program did not advance religion because the statute did not authorize the institutions to use the money for religious purposes.¹⁶⁹ Inexplicably, the excessive entanglement prong of the *Lemon* test received very little consideration. The Court simply found that the religious groups were not the kind of “pervasively sectarian” institutions that require close oversight.¹⁷⁰

In *Zobrest v. Catalina Foothills School District*, the Court once again used the private choice principle to uphold a federal program that provided sign language interpreters for deaf students, even if the students attended a sectarian school.¹⁷¹ As before, the Court reasoned that any benefit the program conferred on a religious school resulted from an individual’s private choice.¹⁷² The statute itself provided “no financial incentive for parents to choose a sectarian school,” and therefore did not have the effect of advancing religion.¹⁷³ The Justices saw room in the second prong of the *Lemon* test for the Court to make its own determinations about which activities and programs actually advanced religion.¹⁷⁴ Again, this kind of

164. Freedman, *supra* note 162, at 323.

165. *Mueller v. Allen*, 436 U.S. 388, 399–403 (1983).

166. *Id.* at 399. Again, it is important to note that the Court here understands religion as a “private choice” as opposed to Madison’s understanding of *a priori* religious duties. *Id.* Further, Madison specifically believed that the Establishment Clause should prevent the state from taking one person’s taxes to facilitate another person’s religious behavior. *Id.* Compare *id.* (permitting funding to reach religious schools as a result of an independent decision by the parent to choose that school), with Madison, *Memorial*, *supra* note 48, at 6–9 (arguing for a more absolute rule that tax money should never reach religious organizations regardless of the route by which it got there).

167. *Bowen v. Kendrick*, 487 U.S. 589, 593, 618–24 (1988). The Court found the federal program constitutional on its face, but remanded to determine if it was unconstitutional in application. *Id.*

168. *Id.* at 593–96.

169. *Id.* at 614.

170. *Id.* at 616.

171. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993).

172. *Id.* at 10.

173. *Id.*

174. *Id.*

interplay between church and state is one of the real dangers Madison warned against during the creation of the Establishment Clause.¹⁷⁵

The next real turning point in Establishment Clause jurisprudence came in 1997, when a majority of the Court was finally ready to explicitly alter the *Lemon* test.¹⁷⁶ In *Agostini v. Felton*, the Court overruled *Aguilar v. Felton*, an earlier decision, which invalidated a program that paid public school teachers to provide limited services to needy parochial students.¹⁷⁷ Justice O'Connor, writing for the majority, hearkened back to her concurrence in *Lynch v. Donnelly*¹⁷⁸ and explicitly stated the modern reformulation of the *Lemon* test.¹⁷⁹ Under *Agostini*, the Court addresses two questions.¹⁸⁰ First, it must determine whether the program has a secular purpose.¹⁸¹ Second, the Court must decide if the program has the effect of advancing religion, or whether it constitutes a government "endorsement of religion."¹⁸² O'Connor then deftly restates the third prong of the *Lemon* test as one of three factors the Court will consider in answering the second question.¹⁸³

These factors require the Court to determine whether a program will "result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."¹⁸⁴ Here, more than ever, the Court is asked to make religious judgments. Not only must it decide what kinds of activities constitute the advancement or endorsement of religion, but it must also make determinations about the nature of religious indoctrination.¹⁸⁵ Moreover, O'Connor reduced the significance of excessive entanglement. This was the prong of the *Lemon* test that most closely addressed Madison's real concerns in 1785.¹⁸⁶ Thus, *Agostini* marks a large step in the Court's continuing march away from Madison's understanding of the Establishment Clause's import.¹⁸⁷

175. Madison, *Memorial*, *supra* note 48, at 6-10.

176. *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

177. *See id.* at 235.

178. *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984).

179. *Agostini*, 521 U.S. at 232-36.

180. *Id.* at 222-23.

181. *Id.*

182. *Id.* at 222-23, 234. Again, Justice O'Connor borrows this language from her concurrence in *Lynch*. *Lynch*, 465 U.S. at 687-94 (O'Connor, J., concurring).

183. *Agostini*, 521 U.S. at 234.

184. *Id.*

185. *Id.*

186. *See supra* Part I.C.

187. In fact, it is noteworthy that there is very little reference to Madison and the original import of the Establishment Clause in these recent cases. This stands in stark contrast with the lengthy consideration that Madison's thoughts received in earlier establishment cases. Compare *Agostini*, 521 U.S. 203, with Madison, *Memorial*, *supra* note 48, at 6-12.

In light of *Agostini*, it is important to examine two recent government aid cases implicating the Establishment Clause before turning our attention to *Good News Club*. First, in *Mitchell v. Helms*, the Court took *Agostini* one unseemly step further.¹⁸⁸ The majority upheld a program that awarded large grants to local educational agencies, even when those agencies used the money to purchase equipment for use in sectarian schools.¹⁸⁹ In *Mitchell*, the local education agency for Jefferson Parish, Louisiana, used its grant to purchase books, VCRs, and TVs for use in public and parochial schools.¹⁹⁰ In his plurality opinion, Justice Thomas turned to the private choice principle and the venerable neutrality doctrine itself in making the creative and revolutionary argument that even direct, non-incidental aid to a sectarian school does not necessarily violate the Establishment Clause.¹⁹¹ This argument held that the government may offer direct aid to parochial schools as long as the government distributes the aid neutrally and the money ends up in the religious schools through private individuals' choices.¹⁹²

Justice Thomas hints that an aid distribution program that discriminated against a group because of its religious viewpoint might itself be unconstitutional.¹⁹³ The *Mitchell* plurality saved that holding for another day, however, and upheld the federal program under the *Agostini* test.¹⁹⁴ The plurality employed a combination of the neutrality doctrine and the private choice principle and found that the government was not responsible for any religious indoctrination that the loaned equipment might sponsor.¹⁹⁵ Further, because students will theoretically receive the same aid whether they attend a public or a parochial school, the statute does not define its beneficiaries by religion.¹⁹⁶ The Court did not address excessive entanglement because the respondents did not contest that issue.¹⁹⁷ In applying the *Agostini* factors, the Court held that the program did not

188. *Mitchell v. Helms*, 530 U.S. 793, 807–36 (2000).

189. *Id.* at 835.

190. *Id.* at 803.

191. *Id.* at 809–11.

192. *Id.* at 816–18, 830. This program distributed aid based on the number of students in a school. Thus, Justice Thomas argued that the students' private choice of schools determined the allocation of funds. *Id.* at 811, 820–21. Justice O'Connor, however, flatly (and properly) rejects this result-oriented application of the private choice principle. See *id.* at 843–44 (O'Connor, J., concurring).

193. See *id.* at 820. Justice Thomas states that neutral allocation requires that "eligibility for aid is determined in a constitutionally permissible manner." *Id.* This suggests that there may be an unconstitutional manner of determining eligibility: such as viewpoint discrimination.

194. *Id.* at 835.

195. *Id.* at 830–35.

196. *Id.* at 809–10. This finding fails to provide a satisfactory account for the fact that the aid may result in lower tuition at parochial schools, thereby providing a financial incentive for students to attend those schools.

197. *Id.* at 808.

support or advance religion, and therefore did not violate the Establishment Clause.¹⁹⁸

What is truly striking about *Mitchell*, besides Justice Thomas' startling comments characterizing Burger Era Establishment Clause jurisprudence as "born of bigotry"¹⁹⁹ and a time "the Court should regret,"²⁰⁰ is that its holding is anathema to the very core of Madison's ideas.²⁰¹ Where earlier decisions ran counter to Madison's ideas about the state's (including the Court's) competence to make religious judgments, *Mitchell* strikes at the very heart of his philosophy. That is, *Mitchell* approves the direct use of funds raised through coercive taxation to further religious teaching. For Madison, it was irrelevant and improper for the government to evaluate which activities endorsed or advanced religion; his primary concern was whether a statute might force citizens to choose between their civic duties and their duties to God.²⁰² Under *Mitchell*, public tax dollars, in the form of equipment, can go to parochial schools.²⁰³ Thus, the state may force citizens to choose between their civic duty and duty to God.

In another decision handed down just last summer, the Court upheld a public school voucher plan despite finding that at least ninety-six percent of the voucher funding ended up going to religious schools.²⁰⁴ In *Zelman v. Simmons-Harris*, several Ohio taxpayers brought a suit challenging the Ohio Pilot Scholarship program, which provides tuition aid to particular families within the Cleveland City School district.²⁰⁵ The structure of the program offers aid directly to parents according to financial need, and the parents are then free to spend the money at a public or private school of their choice.²⁰⁶ In fact, well over ninety percent of parents in the program choose to spend their state funding at private religious schools.²⁰⁷

In *Zelman*, the challengers argued that the program violated the Establishment Clause because it allowed state tax dollars to fund religious

198. *Id.* at 835.

199. *Id.* at 829.

200. *Id.* at 826.

201. Compare *id.* at 830–35 (declaring that students and parents—by selecting a religious school—choose to divert public monies to the religious school; thus, the government has not endorsed the religious school by allowing the money to end up there), with Madison, *Memorial*, *supra* note 48, at 6–12 (arguing multiple reasons why there should be a strict separation between all branches of government and religion).

202. Madison, *Memorial*, *supra* note 48, at 7.

203. See *Mitchell*, 530 U.S. at 820–23 (reasoning that while government-funded equipment *may* convey a religious message, it "does not itself inculcate a religious message"). *Id.* at 823 (emphasis added).

204. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2464 (2002).

205. *Id.* at 2463–64.

206. *Id.* at 2464.

207. *Id.*

education.²⁰⁸ In upholding the voucher program, a majority of the Court saw this case as a relatively straightforward application of the private choice principle.²⁰⁹ The Ohio program did not provide state money directly to religious schools. The money only ended up supporting religious education if individual parents chose to spend it that way.²¹⁰ Thus, the Court found that “no reasonable observer would think [this program] . . . carries with it the *imprimatur* of government endorsement.”²¹¹ The Court was, therefore, able to fit *Zelman* into the private choice line of cases alongside *Mitchell*.²¹² Again, the Court seemed to take judicial notice of what a community believed constituted government endorsement of religion as if that were a historically relevant element of the Establishment Clause.

While *Zelman* is a largely unexciting and predictable decision given the current state of establishment jurisprudence, there is at least some glimmer of hope and recognition in Justice Stevens’ insightful dissent.²¹³ Stevens rightly observed that Justice Rehnquist devoted much of the majority opinion to a discussion of constitutionally irrelevant factual matters.²¹⁴ He correctly pointed out that the severity of the educational crisis (thus the pilot program’s ‘secular purpose’) was not relevant to the constitutional analysis.²¹⁵ Likewise, he was correct in arguing that neither the range of educational choices available to Cleveland students nor the voluntary nature of a private choice program bears on the original import of the Establishment Clause.²¹⁶ Stevens ended by observing that the Court’s Establishment jurisprudence was “profoundly misguided.”²¹⁷ For the first time in several years, it seems that someone on the Court is beginning to take notice of recent judicial encroachments on our religious freedoms. Unfortunately, Justice Stevens remains a dissenting voice on the Court, and the *Zelman* majority was happy to build on the precedent set in *Good News Club* by continuing to employ the neutrality principle towards its increasingly activist ends.²¹⁸ It is important to point out, however, that while *Zelman* is the Court’s most recent Establishment Clause decision, it is not the most disturbing or dangerous. That dubious honor must go to *Good News Club*.

208. *Id.*

209. *Id.* at 2467.

210. *Id.* at 2465–66.

211. *Id.* at 2464.

212. *See id.* at 2468 (analogizing this case to other private choice cases).

213. *Id.* at 2483 (Stevens, J., dissenting).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 2484.

218. *Id.* at 4688.

B. Good News Club v. Milford Central School

The Court's decision last year in *Good News Club v. Milford Central School* was perhaps the most significant Establishment Clause case yet decided. The Court held that a public school's decision not to allow a religious club to use its facilities after school violated the club's free speech rights.²¹⁹ In *Good News Club*, the parties agreed that the school's facility policy created a limited public forum.²²⁰ Writing for the majority, Justice Thomas reasoned that the school's decision not to allow the Good News Club to use the facilities for prayer and Bible studies "constitute[d] impermissible viewpoint discrimination."²²¹ Thomas went on to hold that, because it was the school's policy to evaluate requests for use of its facilities in a neutral manner, granting the Good News Club's request did not violate the Establishment Clause by endorsing or advancing religion.²²² Thus, with some intellectual slight of hand, the Court capped its recent state aid jurisprudence with a decision that stands in direct opposition to the original import of the Establishment Clause.²²³ In the guise of neutrality, the Court now approves the use of state funded facilities for religious worship.²²⁴ Such a policy clearly embodies Madison's fears that the state might force citizens to choose between their civic and religious duties.²²⁵

It is important to examine the Court's specific findings in *Good News Club* and to better understand the cases upon which Justice Thomas relies as this decision may have grave implications for the future of American political and religious life. The case presented a conflict between two clauses in the First Amendment—a dilemma that Madison probably never imagined. The facts set one group's First Amendment right to express its views against the state's interests in upholding the Establishment Clause.²²⁶ It is undisputed that the State restricted *Good News Club's* freedom to express its views on school grounds.²²⁷ It is also undisputed that the Establishment Clause, if it applies, provides the State with a compelling interest in circumscribing the rights of speech.²²⁸ Thus, the central question

219. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001).

220. *Id.* at 106.

221. *Id.* at 112.

222. *Id.* at 114.

223. *Compare id.* (holding that a school cannot discriminate against religious groups when allocating state-funded resources), with Madison, *Memorial*, *supra* note 48, at 6–12 (arguing multiple reasons why there should be a strict separation between all branches of government and religion).

224. *See Good News Club*, 533 U.S. at 112–13.

225. Madison, *Memorial*, *supra* note 48, at 7.

226. *Good News Club*, 533 U.S. at 102–04, 119.

227. *Id.* at 103–04.

228. *Id.* at 112.

this case presented was whether the Establishment Clause permits the state to provide facilities for religious speech and worship.²²⁹

Reverend Stephen Fournier and his wife Darlene lead the Good News Club, a Christian organization, in meetings that consist of Bible lessons, singing, Scripture memorization, and prayers.²³⁰ The club consists of children between the ages of six and twelve, whom its leaders hope to teach the “applicability of specific Bible stories to [their] daily lives.”²³¹ The club applied to the Milford Central School for permission to use its facilities after school hours.²³² The school had a policy, pursuant to state law, that made its facilities available after hours to community groups for educational, recreational, and entertainment purposes.²³³ The school also had a policy, pursuant to Establishment Clause jurisprudence, that prohibited the use of school facilities for purely religious purposes.²³⁴ Accordingly, the Milford Superintendent denied the Fourniers’ application.²³⁵

In addressing the Establishment Clause issue in this case, Justice Thomas leaned heavily on two previous decisions.²³⁶ It is interesting that he characterized these decisions, and *Good News Club* itself, as “free speech rights” cases, although they clearly involved significant departures from traditional Establishment Clause jurisprudence.²³⁷

First, Justice Thomas turned to *Lamb’s Chapel v. Center Moriches Union Free School*, in which the Court upheld a similar challenge against a school that denied an organization permission to use its facilities to show a movie that dealt with a secular subject from a religious perspective.²³⁸ In *Lamb’s Chapel*, the Court reasoned that the school would not sponsor the film, and thus there was “no realistic danger that the Community would think that the District was endorsing religion or any particular creed.”²³⁹ Thus, the Court is asked to determine which activities a community believes endorse religion.²⁴⁰ Not only is this the kind of analysis that worried Madison, it is also an inexplicable modification of the Court’s own

229. See *id.* at 102 (asking whether exclusion of the Club from Milford’s facilities is justified by Milford’s concern that permitting the Club’s activities would violate the Establishment Clause).

230. Kathleen Dolegowski, *Religious Club Files Suit After School Denies Access to Property*, LAW. J., Aug 10, 2001, at 1.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

237. *Good News Club*, 533 U.S. at 102.

238. *Lamb’s Chapel*, 508 U.S. at 387.

239. *Id.* at 395.

240. *Id.* It is not enough that the Court is involved in making its own judgments about religious activities, it must now speculate about what a community believes is religious. See *id.*

Establishment jurisprudence.²⁴¹ Nonetheless, Justice Thomas had no trouble analogizing the facts of *Good News Club* to those in *Lamb's Chapel* and thus dismissing the school's Establishment claim.²⁴²

The second case Justice Thomas relied on was *Widmar v. Vincent*, in which the Court upheld a free speech challenge against the University of Missouri for denying a religious group permission to conduct meetings in school facilities.²⁴³ In that case the Court held that because the University opened its forum to many other groups, there was little danger that people would think that the school's policy endorsed or advanced religion.²⁴⁴ Again, this is a significant modification of *Lemon's* second prong as the Court must now evaluate popular opinion about which activities advance religion rather than making that dubious evaluation on their own.²⁴⁵ Moreover, for Madison this determination was irrelevant; what was significant was whether tax-funded resources supported religious teaching or worship.²⁴⁶ Once again, Justice Thomas found that *Widmar* supported the proposition that the state may not discriminate against religious viewpoints in a limited public forum.²⁴⁷

Justice Thomas gave five specific reasons for dismissing Milford's Establishment Clause defense, none of which find refuge in that clause's original meaning.²⁴⁸ First, he pointed to the neutrality doctrine as applied in *Mitchell*. He stated that "[b]ecause allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."²⁴⁹ Clearly, this is not the same neutrality doctrine that

241. Compare *id.* (inferring that the Court should make a decision of whether there is a "realistic danger" that the public will think a given government action is an endorsement of religion), with Madison, *Memorial*, *supra* note 48, at 9 (arguing that judges are not competent to make decisions regarding religious truth nor should they employ religion in deciding civil policy), and *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (requiring the Court to determine if a statute has the primary effect of "advancing or inhibiting" religion).

242. *Good News Club*, 533 U.S. at 109. The fact that the Good News Club actually wants to worship on school grounds, instead of show a movie with a religious perspective, apparently does not bother Justice Thomas. *Id.*

243. *Widmar*, 454 U.S. at 276-77.

244. *Id.* at 274.

245. Compare *id.* (determining that the effect of giving a religious group an open forum would only have an "incidental" effect on religious endorsement), with *Lemon*, 403 U.S. at 612-13 (requiring the Court to determine if the primary effect of a program is advancing or inhibiting religion as a means of determining if the program offends the Establishment Clause).

246. Compare *Widmar*, 454 U.S. at 274-77 (determining that the effect of giving a religious group an open forum would only have an "incidental" effect on religious endorsement), with Madison, *Memorial*, *supra* note 48, at 6-12 (arguing that the Court is not competent to evaluate religious truth).

247. *Good News Club*, 533 U.S. at 112-13.

248. *Id.* at 113-18.

249. *Id.* at 114. It seems clear that Justice Thomas is confusing neutrality towards secular speech, which requires that the state not discriminate based on viewpoint, with neutrality towards religion, which requires that the state endorse no religion. See *id.*

requires the exclusion of virtually all religious speech at any school-sponsored activity.²⁵⁰ Moreover, the withholding of tax dollars from religious groups is exactly what the Establishment Clause compels Milford to ensure.²⁵¹

Second, Justice Thomas evaluated the coercive effect that the club's presence might have had on the Milford community.²⁵² He concluded that parents would still be free to choose whether or not their children attended group meetings, and that no one could reasonably believe that the group's use of school facilities constituted an endorsement of religion.²⁵³ Not only does this analysis ignore the fact that *children* may feel coerced to join the club, it also relies again on the mysterious notion that a community's opinion about what endorses religion is somehow relevant to the Establishment Clause. For that matter, Justice Thomas does not offer any explanation why reasonable people would not understand the school's actions to endorse religion.²⁵⁴

Justice Thomas' third and fourth reasons dismiss Milford's attempt to distinguish *Widmar* because young children are more impressionable than are young adults.²⁵⁵ He finds the precedent on that point unconvincing, as the cases employing that rationale involved practices that actually advanced religion.²⁵⁶ He likewise finds that small children are not compelled to attend the meetings, and they are therefore unlikely to confuse the club with a school activity or imagine that the school endorses the club's religious message.²⁵⁷ Again, impressionability has no place in Madison's philosophy, as he was only concerned about one citizen's tax dollars finding their way into a church he can not support.²⁵⁸

Justice Thomas' final reason hearkens back to one of the original criticisms of the neutrality doctrine itself, which Justices Stewart and Black first articulated.²⁵⁹ Justice Thomas contended "the danger that children

250. Compare *id.* (declaring that neutrality requires inclusion of all viewpoints, religious or otherwise), with *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that neutrality requires the absence of all religious speech, even voluntary, at school events).

251. See Madison, *Memorial*, *supra* note 48, at 8 (reasoning that any authority who forces religious beliefs upon another is a "[t]yrant").

252. *Good News Club*, 533 U.S. at 115.

253. *Id.*

254. *Id.*

255. *Id.* at 115-17.

256. *Id.* In this somewhat circular argument, Justice Thomas attempts to distinguish between the religious speech cases (which employ strict neutrality) and *Good News Club*. *Id.*

257. *Id.*

258. Madison, *Memorial*, *supra* note 48, at 6-12.

259. *Good News Club*, 533 U.S. at 118. Recall that Justices Stewart and Black worried that the exclusion of religious speech at schools worked to establish an anti-religious viewpoint. *Epperson v. Arkansas*, 393 U.S. 97, 113 (Black, J., concurring); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 313 (Stewart, J., dissenting).

would misperceive the endorsement of religion is [no] greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.”²⁶⁰ This is a revival of the old concern that neutrality actually establishes a secular perspective by requiring the exclusion of all organized religion.²⁶¹ In fact, this only emphasizes the exclusionary nature of the original neutrality doctrine. More importantly, this ‘state-sponsored secularism’ argument ignores the heart of the framers’ profound insight into religious freedom.²⁶² The state is not equipped to engage in religious debate or discourse, thus its institutions *must* remain secular. It is the separate role of our cultural and social institutions to foster religious and moral discussion free of state entanglement.²⁶³ Given the original understanding of religious freedom, we cannot rightly attribute any perceived social trend towards secularism to state endorsement of that viewpoint. That is, after all, the state’s imperative.²⁶⁴ Rather, we should see this development as a failing of our social institutions to which invasive government programs, such as Charitable Choice, are probably more hindrance than help. In *Good News Club*, however, it seems that the Court has brought ‘neutrality’ around full circle. A doctrine that once required a complete separation of church and state now seems to require that the state offer total inclusion to any and all religious groups for purposes of teaching and worship.²⁶⁵

The incongruity between Madison’s understanding of the Establishment Clause and the jurisprudence that the Court has adopted in *Good News Club* is difficult to overstate. It is important to understand that this jurisprudence has evolved over time, in a series of incremental steps, to reflect the convoluted and highly problematic doctrine that the Court now endorses. The state is now free, perhaps even compelled, to supply its tax-funded resources in support of religious teaching and worship. Thus, unlike the world that Jefferson imagined, in modern America religion may employ the state to pick citizens’ pockets.²⁶⁶

260. *Good News Club*, 533 U.S. at 118.

261. *Id.*

262. Compare *id.* (deciding that the danger that children would perceive allowing a religious club to speak at school as an endorsement of religion is no greater than the danger that the students might perceive exclusion of the group as hostility to a viewpoint), with Madison Memorial, *supra* note 48, at 6–12 (arguing that judges are not competent to make these decisions).

263. See generally Madison, *Memorial*, *supra* note 48, at 6–12 (renouncing a state-sponsored bill proposed by the Virginia General Assembly because the legislation restricts independent religious reflection by relegating control over religious beliefs to a political body).

264. *Id.*

265. See *Good News Club*, 533 U.S. at 112.

266. See JEFFERSON, *Notes*, *supra* note 63, at 285. Recall that Jefferson believed that the government should protect the free exercise of religion without infringing upon the liberties of its citizens. *Id.*

Until recently, no national issue has truly exposed the Court's departure from the original purpose of the Establishment Clause. However, the recent national debates over the passage of the Charitable Choice Act of 2001 bring the real problems associated with modern Establishment Clause jurisprudence to national attention.

III. CHARITABLE CHOICE AND RELIGIOUS FREEDOM

On January 29, 2001, just nine days after taking office, President George W. Bush unveiled his plan to make faith-based charities a substantial part of his comprehensive new social services initiative.²⁶⁷ He issued an Executive Order establishing a new White House Office of Faith-Based and Community Initiatives and instructed the office to create five Centers for Faith-Based and Community Initiatives.²⁶⁸ Bush's announcement drew national attention to the Charitable Choice provision of the 1996 Welfare Reform Act, which had slipped quietly under the media's radar.²⁶⁹ The provisions of this statute present just the kind of problems that reveal the essential flaws in the Court's recent Establishment Clause jurisprudence.

Many observers agree that the Supreme Court's ruling in *Good News Club* cleared away any lingering constitutional concerns the President may have had about his proposal to expand charitable choice.²⁷⁰ Prior to *Good News Club*, proponents of the initiative leaned heavily on the rationales in *Bowen* and *Mitchell* but were wary that the latter opinion only carried a plurality of the Court.²⁷¹ *Good News Club* removed all doubt, however, as its holding "pave[d] the way for religious charities to operate social programs with a strong religious message and public dollars."²⁷² The recent public controversy over whether federally funded religious organizations can retain their exemption from the employment practices provisions of the Civil Rights Act illustrates the Court's departure from the Establishment Clause's original meaning.²⁷³

267. George W. Bush, *Foreword to Rallying the Armies of Compassion*, at <http://www.whitehouse.gov/news/reports/faithbased.html> (last visited Jan. 15, 2003).

268. *Id.*

269. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 104, 42 U.S.C. § 604a (2000); Megan Twohey, *Limelight Scorching 'Charitable Choice'?*, NAT'L J., April 28, 2001, available at 2001 WL 7182043.

270. E.g., Betsy McCaughey, *High Court Ruling Clears the Way for Bush's Faith-Based Initiatives*, INVEST. BUS. DAILY, June 15, 2001, at A20.

271. Melissa Rogers, *Setting the Court for Faith-Based Initiatives*, FULTON COUNTY. DAILY REP., April 20, 2001, at 10 (observing the shift *Mitchell* indicated in Establishment Clause jurisprudence, but noting that the rationale lacked a fifth vote).

272. McCaughey, *supra* note 270.

273. See, e.g., Valerie J. Munson, Editorial, *Strike a Balance for Charity Grants*, HARRISBURG PATRIOT, Aug. 29, 2001, at B7 (citing public controversy over hiring discrimination issue); Civil Rights Act of 1964 § 702, 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2) (2000).

The problems mentioned above are evident in legislative action taken in the House pursuant to the President's announcement. On March 29, 2001, Representative J.C. Watts of Oklahoma introduced a bill in the House of Representatives entitled, in relevant part, The Charitable Choice Act of 2001.²⁷⁴ The bill builds on the provisions that Senator John Ashcroft introduced as part of the 1996 Welfare Reform Act.²⁷⁵ The new bill includes stronger language intended "to prohibit discrimination against religious organizations on the basis of religion in the administration and distribution of government assistance."²⁷⁶ To that end, it compels federal, state, and local agencies to give religious organizations equal consideration when awarding federal funds.²⁷⁷ Moreover, to protect these organizations' religious character, the bill reemphasizes provisions of the 1996 Act by stating that funded sectarian groups may require their employees to follow particular religious practices.²⁷⁸ It also provides that the groups retain their exemption relative to employment practices in the Civil Rights Act of 1964.²⁷⁹ These provisions have made the bill highly controversial among Democrats and moderate Republicans, and, though it passed a House vote last term, it is likely to face stiff opposition in the Senate.²⁸⁰

The heated and highly publicized debate over the employment practices portion of the Charitable Choice Act of 2001 illustrates the Court's recent departures from the original meaning of the Establishment Clause. No matter which way the Senate resolves this debate, this section of the bill violates the very essence of Madison's *Memorial and Remonstrance* and creates irreconcilable inconsistencies within the Court's own jurisprudence.²⁸¹ If the state forces religious groups to abandon their beliefs to receive funding, it violates the Free Exercise Clause.²⁸² If the bill allows religious groups to maintain autonomy, then it authorizes taxpayer support for practices that millions of Americans find abhorrent, and it blatantly endorses and advances a religious perspective. Thus, while it is true that

274. Charitable Choice Act of 2001, H.R. 7, 107th Cong. § 1991 (2001).

275. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 104, 42 U.S.C. § 604a (2000).

276. H.R. 7 § 1991(b)(3).

277. *Id.* § 1991(c)(1)(A).

278. *Id.*

279. *Id.* § 1991(e); 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2).

280. Rebecca Carr & Mei-Ling Hopgood, *House Advances Bush's Faith Bill; While a Big Win for the President, His Initiative Faces an Uphill Fight in Senate*, AUSTIN AM. STATESMAN, July 20, 2001, at A1.

281. See Madison, *Memorial*, *supra* note 48, at 8. Recall that Madison believed that government figures who impressed religious beliefs upon citizens were "[t]yrants." and citizens who submitted to state-sponsored religion were "slaves." *Id.*

282. See U.S. CONST. amend. I (mandating that "Congress shall make no law . . . prohibiting the free exercise [of religion]").

Good News Club strongly suggests that the Charitable Choice Act of 2001 is constitutionally sound, the recent controversy clearly illustrates the philosophical flaws both within that opinion and much of the Court's recent establishment jurisprudence.

A. The Charitable Choice Act of 2001

The Charitable Choice Act of 2001, for the most part, restates legislation that Congress enacted over five years ago.²⁸³ In 1996, Senator John Ashcroft attached legislation to the Welfare Reform Act intended "to allow States to contract with religious organizations . . . on the same basis as any other nongovernmental [social service] provider."²⁸⁴ This statute prohibits the government from discriminating against any organization because of its religious character.²⁸⁵ It also contains several provisions safeguarding religious organizations' independence, including a continuing exemption from the employment practices provision of the Civil Rights Act.²⁸⁶ Further, the statute prohibits organizations from discriminating against their beneficiaries on the basis of religion, and it states that the organizations must not spend government funds "for sectarian worship, instruction, or proselytization."²⁸⁷ Finally, the Act states that it should not be construed to preempt any state constitutions or statutes that restrict state funding of religious organizations.²⁸⁸

Due to this final clause, many states did not offer funding to religious groups, and the charitable choice provision received little public attention.²⁸⁹ According to a General Accounting Office (GAO) report, only three percent of surveyed religious organizations received government funding for social services in 1998.²⁹⁰ The GAO attributed this lack of participation at least partly to some sectarian institutions' "theological or philosophical beliefs" about state collaboration and a "general mistrust of government."²⁹¹ In addition to illustrating the profound philosophical problems that government oversight of religion can create, the religious charities' reluctance has also kept Charitable Choice legislation fairly low

283. Compare H.R. 7 §1991, with Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 104, 42 U.S.C. § 604a (2000) (see *supra* text accompanying note 4).

284. 42 U.S.C. § 604a.

285. *Id.* § 604a(c).

286. *Id.* § 604a(d), (f).

287. *Id.* § 604a(j).

288. *Id.* § 604a(k).

289. Twohey, *supra* note 269, at 1.

290. GENERAL ACCOUNTING OFFICE REP. TO CONGRESSIONAL REQUESTERS, CHARITABLE CHOICE: OVERVIEW OF RESEARCH FINDINGS ON IMPLEMENTATION, GAO-02-337 (2002).

291. *Id.*

profile. In fact, congressional supporters have quietly attached the provision to four federal laws in the last five years.²⁹² Similarly, President Bush strongly supported the program in Texas and promised to expand the provision during his presidential campaign.²⁹³ In response to his fervent support, the House took up legislation in March of 2001 aimed at expanding and strengthening charitable choice.²⁹⁴ The only substantial changes that the Charitable Choice Act of 2001 made to the original legislation is to extend federal and state funding to nine more categories of social service.²⁹⁵ The new Act also strengthened the language prohibiting state discrimination against religious groups, and attempted to satisfy the Establishment Clause by stating that the funds are not an endorsement of religion.²⁹⁶ The bill's most significant effect, however, has been to focus national attention on a problematic piece of legislation that has escaped public scrutiny for over five years.²⁹⁷

B. The Controversy Over the Employment Practices Exemption

It is ironic that President Bush's enthusiastic support of faith-based initiatives may actually doom existing charitable choice provisions to long-term political failure.²⁹⁸ Indiana Representative Mark Souder, a longtime charitable choice proponent, commented on the political effects of the President's support: "we have to figure out some of the issues that are being raised because everyone is paying attention now. I'm afraid if we're not careful, we're going to mess up what we've already been doing."²⁹⁹ The most controversial issue has been the provision that allows religious organizations receiving federal funds to discriminate in their hiring practices.³⁰⁰ During the House debates, that provision prompted strong opposition from Democrats, and even moderate Republicans threatened to withdraw their support.³⁰¹

Washington Democratic Representative Chet Edwards called the bill "federally funded discrimination" and sees it as "a huge step backwards for

292. Twohey, *supra* note 269, at 1.

293. Press Release, Americans United for Separation of Church and State, President Bush and Faith-Based Initiatives (Jan. 29, 2001), at <http://www.au.org/press/pr12601.htm> (last visited Jan. 14, 2003).

294. Charitable Choice Act of 2001, H.R. 7, 107th Cong. § 1991 (2001).

295. *Id.* § 1991(c)(4).

296. *Id.* § 1991(c)(1)(B), (c)(3).

297. Twohey, *supra* note 269, at 1.

298. *Id.*

299. *Id.*

300. Carr, *supra* note 280, at A1.

301. *Id.*

civil rights.”³⁰² Moderate Florida Republican Mark Foley expressed concern that the bill could override state laws prohibiting discrimination based on sexual preference.³⁰³ For a time it seemed likely that the bill would fail, but on July 19, 2001, the House passed the proposal by a vote of 233–198.³⁰⁴ The issue of federal discrimination will loom large in the Senate debates.³⁰⁵

As for the public at large, a recent poll suggested that seventy-five percent of Americans support some form of charitable choice. However, that support broke down when people considered the specific provisions of such a proposal.³⁰⁶ In particular, those polled expressed opposition to the idea that federal funds might end up in the hands of religious groups outside the Judeo-Christian tradition, such as the Nation of Islam or the Church of Scientology.³⁰⁷ When asked whether the Government should allow federally funded groups to discriminate based on religion when hiring, nearly eighty percent said no.³⁰⁸

Even those within the religious community have begun to voice their concerns about the proposal.³⁰⁹ Some worry that federal funding detracts from the groups’ religious missions, while others, like evangelists Jerry Falwell and Pat Robertson, oppose government support for non-Christian groups.³¹⁰ Religious charity leader Sandra Sykes expressed her concern about the Act’s ban on proselytizing: “if there is language in the legislation [that says] not to tell people to develop a relationship with God . . . that’s not good for us.”³¹¹ These concerns present just the sort of excessive political and administrative entanglement issues that Madison and even the *Lemon* Court hoped to avoid.³¹²

Overall, it is clear that there is vigorous debate over whether to allow federally funded religious groups to discriminate when hiring. This issue illustrates the real flaws in recent Establishment Clause jurisprudence

302. *Id.*

303. *Id.*

304. *Id.*

305. *See id.* The bill “faces an uncertain future in the Senate, where legislation covering the most controversial aspects of the initiative has still not been introduced.” *Id.* As of the end of the 107th Congress, the Senate had not acted upon the Charitable Choice Act, but it most certainly return in the 108th session in light of the strong Republican majorities enjoyed in both houses and the President’s interest in the bill.

306. Twohey, *supra* note 269, at 4.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* The first concern is particularly insightful. Recall Aristotle’s (and Locke’s) belief that truly moral activity must be pursued for its own sake. MCGILL, *supra* note 40, at 13–15.

311. Lea Setegn, *Scott Attacks ‘Faith-Based Initiative,’* RICH. TIMES-DISPATCH., July 3, 2001, at B7.

312. Madison, *Memorial*, *supra* note 48, at 6–12; *Lemon v. Kurtzman*, 403 U.S. 613 (1971).

because it focuses national attention on the idea that tax dollars might fund religious practices that many Americans find objectionable.

C. The Dilemma: Free Exercise v. Establishment

President Bush's aggressive support of faith-based initiatives has drawn a highly problematic provision of charitable choice legislation into the national spotlight. Many Americans are now aware that their tax dollars may go to support religious organizations that can discriminate based on religion when hiring.³¹³ Furthermore, given the holding of *Good News Club*, which stands for the proposition that the government may not discriminate against religious viewpoints when neutrally distributing aid for secular purposes, any challenge to the Charitable Choice Act of 2001 will most likely fail.³¹⁴ Presumably, Congress' statement that the funds do not endorse religion, combined with the neutral distribution scheme, will suffice the first prong of the Court's test and prevent any reasonable person from drawing that conclusion.³¹⁵ In fact, discriminating against such groups when distributing federal money might indicate hostility towards the religious perspective.³¹⁶ Thus, the recent controversy focuses national attention, perhaps for the first time, on the real problems with recent Establishment Clause jurisprudence.

To understand how the debate over hiring practices illustrates these problems, it is helpful to first examine how a proposal that *prohibited* employment discrimination would line up with Locke, Jefferson, and Madison's understanding of religious freedom, and then make the same examination of the bill as passed. This analysis leads to the conclusion that the bill will betray the founding principles, regardless of which approach Congress takes.³¹⁷ The first proposal inhibits the free exercise of religion, while the second violates the Establishment Clause because it forces citizens to choose between their civic and religious duties.³¹⁸

A Charitable Choice provision that does not allow sectarian groups to retain their Civil Rights Act hiring exemption has a coercive effect on

313. See, e.g., Setegn, *supra* note 311, at B7 (discussing the House debate on this issue).

314. See *Good News Club v. Milford*, 533 U.S. 98, 112 (2001).

315. Compare *id.* (finding that an equal inclusive policy prevents reasonable people from believing a school endorses religion), with Charitable Choice Act of 2001, H.R. 7, 107th Cong. § 1991 (2001) (see *supra* text accompanying note 4).

316. See *Good News Club*, 533 U.S. at 106–07.

317. Compare H.R. 7 § 1991, with Madison, *Memorial*, *supra* note 48, at 6–12 (arguing that no branch of government should have any entanglement with religion).

318. See Madison, *Memorial*, *supra* note 48, at 6–12.

religious beliefs in violation of the Free Exercise Clause.³¹⁹ Such a statute violates Jefferson's early assertion that individuals' religious beliefs "shall in nowise diminish, enlarge, or affect their civil capacities."³²⁰ A law that conditions federal funding on a group's willingness to relinquish its religious beliefs or practices works to diminish its civil capacities. Moreover, if a church group accepted federal funds under such a scheme, it would be bound to violate its religious prerogatives. That scenario would engage the state in an impermissible usurpation of an institution's religious autonomy.

Conversely, the bill that passed the House allows religious groups to retain their employment practice exemption.³²¹ Under this proposal, federal tax dollars can go to groups that can discriminate based on religion when hiring.³²² The fundamental problem with this concept is that the state can now force an individual (through taxation) to contribute to a sectarian group that would not even hire him or her because of their religious beliefs.³²³ A clearer violation of the original import of religious establishment is hard to imagine. Recall Jefferson's belief that it was tyrannical to force a person to support a pastor other than his or her own.³²⁴ Similarly, Madison wrote, "who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"³²⁵ Nonetheless, the Court has held that the neutral distribution of funds eliminates any possibility that the government might be endorsing a particular religion.³²⁶ This conflict arises because the Court has found itself competent to determine which activities a community believes endorse religion and has confused the concept of *separation* with that of *equal treatment* for purposes of interpreting the Establishment Clause.³²⁷

Therefore, either version of the Charitable Choice Act of 2001 is a violation of the original understanding of religious freedom. Yet, under

319. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222–23 (1963) (stating that a violation of the Free Exercise Clause is predicated on coercion). Recall the discussion suggesting that Free Exercise claims involve state coercion. See *supra* Part II.A.1.

320. JEFFERSON, *Statute*, *supra* note 47, at 57.

321. H.R. 7 § 1991.

322. *Id.*

323. See *id.*

324. JEFFERSON, *Statute*, *supra* note 47, at 55.

325. Madison, *Memorial*, *supra* note 48, at 8.

326. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113–15 (2001) ("Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."). *Id.* at 114.

327. See *supra* Part II.B.

Good News Club, some form of federal funding for religious charities is permissible, perhaps even compulsory, in keeping with modern jurisprudence.³²⁸ This constitutional incongruity will be at the center of national attention, perhaps for the first time, when the Senate takes up the Charitable Choice Act of 2001.

CONCLUSION

The core of James Madison and Thomas Jefferson's religious philosophy is the belief that citizens have *a priori* religious duties acquired at birth or through revelation.³²⁹ These duties represent the most fundamental of human responsibilities, and therefore a just government must not force its citizens to abandon them.³³⁰ To this end, Madison and Jefferson envisioned a strict separation of church and state in American democracy.³³¹ Their ideas resulted in the simple dialectic of religious freedom incorporated in the First Amendment: the government may not establish religion nor restrict its free exercise.³³² Madison and Jefferson were particularly concerned that the government might force a person to pay taxes that would then go to support causes he or she might find blasphemous. Thus, that is the clear import of the term 'establishment' in the Constitution.³³³ This is further evidenced by the consistent rhetoric advocating a strict *separation* of church and state.³³⁴ For Madison and Jefferson, the Establishment Clause stood for the idea that the government *must* discriminate against religious groups when distributing tax dollars.³³⁵

Through a series of incremental steps, the Supreme Court's jurisprudence has come to reflect an interpretation of the Establishment Clause that is almost diametrically opposed to Madison and Jefferson's ideas.³³⁶ First, the Court found that the existence of a secular purpose was somehow relevant when considering state aid to religion, though this rationale was irrelevant to Madison.³³⁷ Second, the Court began to interpret the term 'establishment' to mean advancement or endorsement, while Madison and Jefferson understood the term to mean a commingling of the institutions of

328. *Id.*

329. *See supra* Part I.C.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *See supra* Part II.A-B.

337. *Id.*

church and state.³³⁸ In fact, both men believed that the state was incompetent to make religious judgments, such as determining which activities advance religion.³³⁹ Finally, the Court, through a series of rationalizations involving principles like ‘neutrality’ and ‘private choice,’ has determined that the government must give all religious organizations an equal chance to compete for funding.³⁴⁰ Thus, where Madison and Jefferson envision a complete separation of church and state, the Court’s jurisprudence demands compulsory state inclusion of all religions.³⁴¹ The fact that this formulation sets the Free Exercise and Establishment Clauses at odds with each other has gone largely unnoticed. The contemporary debate over certain provisions of the Charitable Choice Act of 2001 brings this conflict into the national spotlight.³⁴²

The Charitable Choice Act of 2001 is an expansion of a provision written into the 1996 Welfare Reform Act.³⁴³ That provision allows religious charities to compete for federal funds while still retaining their religious character.³⁴⁴ To protect that religious character, the organizations can maintain their current exemption to the employment practices section of the Civil Rights Act of 1964.³⁴⁵ That exemption allows religious groups to discriminate based on religious belief when hiring.³⁴⁶ President Bush’s recent support for faith-based initiatives has focused national attention on this problematic part of existing charitable choice legislation.³⁴⁷ This national controversy illustrates the flaws in the Court’s jurisprudence that set the Constitution’s religious clauses against each other.³⁴⁸ That is, if Congress forces religious groups to hire anybody, it usurps their authority and restricts their free exercise rights.³⁴⁹ If Congress allows these groups to retain their hiring exemption, then millions of taxpayers will be aware that their money is going to support religious practices with which they disagree.³⁵⁰ This represents a clear violation of the original purpose of the Establishment Clause, yet the Court’s jurisprudence compels the government to consider religious groups when distributing social service

338. *Id.*

339. *See supra* Part I.C.

340. *See* *Good News Club*, 533 U.S. 98, 112 (2001).

341. *See supra* Part II.C.

342. *See supra* Part III.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

funds.³⁵¹ This incongruity has heretofore escaped the public eye, but the recent controversy over hiring exemptions reveals the Court's departure from the objective import of the Establishment Clause.

Ian Bartrum

351. See *Good News Club*, 533 U.S. at 112 (2001).