Politics, Religion, and the First Amendment

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INTRODUCTION

Religion and politics have long been controversial subjects in their own right. In recent years, however, the relationship between the two, and in particular, the role religious convictions should play in political decisions, has generated significant debate.1 Much of this debate, specifically in the media and certain academic circles, is over the role, if any, of religion in the politics of a secular state.2 At the same time,

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2. For arguments that religious convictions should largely or completely be excluded from politics, see for example, Suzanna Sherry, Enlightening the Religion Clauses, 7 J. CONTEMP. L. ISSUES 473 (1996); Robert Audi, The Place of Religious Argument in a Free and Democratic Society, 30 SAN DIEGO L. REV. 677 (1993); Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. CHI. L. REV. 195 (1992). For arguments that religious convictions may legitimately form the basis for political decision making, see for example, Smith, supra note 1; Douglas Laycock, Freedom of Speech that is both Religious and Political, 29 U.C. DAVIS L. REV. 793 (1996).

Two of the leading contributors to this discussion, Kent Greenawalt and Michael Perry, have taken positions that would sometimes permit, yet sometimes exclude, religious convictions from the political arena. Greenawalt has argued that religious convictions should generally not be relied on in politics, but would permit an exception when secular reasoning fails to provide a clear answer. See Kent Greenawalt, Religious Convictions and Political Choice: Some Further Thoughts, 39 DePaul L. REV. 1019, 1020-36 (1990). Perry instead believes reliance on religious convictions is appropriate, but would require that there also be a plausible secular reason to support the position. Thus, it would be wrong to rely on religious beliefs where a supporting secular rationale was lacking. See Perry, RELIGION IN POLITICS, supra note 1, at 72-76.
religious people have put forth a renewed effort towards understanding and clarifying the political implications of their faith in modern America.³

Although a variety of factors have led to the current focus on the issues surrounding law and religion, there is little doubt that a primary impetus was the emergence of the so-called religious right in the 1980s. The sudden appearance of the religious right, highlighted by conservative politics, clear Biblical references, and the personalities of Jerry Falwell and Pat Robertson, caught many by surprise. For many Americans, particularly those on the left, this outspoken political engagement by religious adherents violated the long-respected principle of separation of church and state. For this segment of society, religion, though a valued part of our culture, is best kept private and, in particular, away from politics.⁴

Despite these perceptions, and contrary to some contemporary thinking, religion and politics have an interwoven and long-standing tradition in American history. As recently noted by historian George Marsden, during the American colonial period it was assumed that religion and politics were inseparable.⁵ This assumption was true not only of the early Puritan efforts to create a religiously grounded society,⁶ but also of the later colonial experience, characterized by increased religious diversity and tolerance. Groups such as the Quakers and Baptists, strongly committed to the separation of church and state and religious tolerance, nevertheless viewed religion relevant to political reflection.⁷ As religious diversity increased during this formative


6. See John Witte, Jr., How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism, 39 Emory L. J. 41 (1990) (discussing the Puritan effort to create a religious society in early colonial America).

7. See, Thomas G. Sanders, Protestant Concepts of Church and State: Historical Backgrounds and Approaches for the Future 146-51, 193-202 (1964) (discussing the early Quaker and Baptist understanding of church-state relations in America).
period, leading to greater tolerance for other sects, there was no question that religious beliefs could continue to inform and provide the basis for moral and concomitant political thought.8

Our nation's history, since its independence and adoption of a constitutional structure, has continued to be one of frequent interaction of religion and politics. To be sure, the Constitution clearly rejected any established religion similar to the European model and established what is best understood as a secular state. However, this separation of church and state has never been understood as prohibiting religious convictions from entering the public square and informing the body politic on an equal basis with other belief systems. Rather, since this country's founding, religious convictions have frequently played an important role in American politics. This idea was clearly illustrated in America's most significant political/social movements, such as abolition, temperance, and civil rights.9 In addition, religious groups have often had a significant impact in shaping the thought and direction of America's political parties, particularly in the Nineteenth


Indeed, a number of scholars have argued that both the abolition and civil rights movements, perhaps the two most significant political/social movements in our nation's history, were predominantly religious in nature. See, e.g., Forte, supra at 575 ("[a]ll major social betterment movements of the nineteenth century, including radical abolitionism, arose from . . . theological doctrines"); Morris, supra at 84 ("[t]he black church functioned as the institutional center of the modern civil rights movement"). Scholars have also noted the significant role religious values played in other political/social movements, including women's suffrage, see Noll, supra note 8, at 184-85, immigration reform, see Gaffney, supra at 1175-88, and various peace movements, see Reichley, supra at 250-54.
and early Twentieth Centuries. Although less overt, religious groups have continued to assert political influence throughout this century, often through various types of social activism.

Such examples can only touch the surface of the role that religion has played in American politics. Religion's most significant impact will always be as a source of ethical and moral norms for religious people who find expression in their political choices. Such a statement is not meant to suggest that religion is the singular or primary political force in our nation's history, nor is it meant to suggest that the United States is in some way a Christian nation. Our political history reflects numerous themes apart from religious convictions, and even some that would seek to disassociate themselves from religious influence.

There is little doubt, however, that throughout our nation's history religious convictions have played a direct role in the political process. This fact should not be terribly surprising, since politics fundamentally engages ethical and moral reflection. For the devout, such moral and ethical norms primarily flow from religious beliefs. Certainly, not all religious convictions should find expression in politics and few religious adherents would advocate such a position. However, to the extent that political participation necessitates some ethical/moral reflection, resorting to religious norms in order to supply the ethical/moral content is quite natural, and even inevitable.

Notwithstanding the historical relationship of religion and politics, a number of leading political and legal theorists in recent years have argued that religious values should be largely, or altogether, removed from political decision making. This argument has typically pro-


11. See Martin E. Marty, The Twentieth Century: Protestants and Others, in Religion and American Politics: From the Colonial Period to the 1980s 322 (Mark A. Noll ed., 1990) (tracing the stages of religious political involvement in the Twentieth Century); Fowler, supra note 9 at 77-82 (discussing the political activism of liberal Protestants in the Twentieth Century); Peggy L. Shriver, Table Manners: Sitting Around the Public Table at 86-87, in The Power of Religious Publics: Staking Claims in American Society 85, 86-87 (William H. Swatos, Jr. & James K. Wellman, Jr. eds., 1999) (describing the extensive political agendas of mainline denominations in the 1990s, as distinctly liberal in nature).

ceed not on the basis of constitutional concerns per se, but in terms of defining good citizenship in a liberal-democratic society. Although articulating their concerns in various ways, most commentators have argued that equal respect for the rights of others requires that their liberty be constrained only for reasons that are understandable or accessible. Since religious norms are largely "inaccessible" to those outside the faith, they are an improper basis for political choice, at least when individual liberty is constrained.

In making this argument, the majority of "exclusionists" concede that there is no constitutional barrier to bringing religious arguments into politics, thus limiting actual constitutional violations to the relatively rare instance where legislation is solely motivated by religious concerns. However, constitutional rhetoric is often brought into the analysis by appealing to separation of church and state, and to principles which are arguably reflected in the Establishment Clause. This has included arguments that the balance found in the First Amendment implicitly requires a privatized faith under the Establishment Clause as well as more general to the separation of church and state in order to bolster the exclusionist position. Despite conceding that in most instances bringing religious values into politics does not violate the Constitution, arguments related to the constitutionality of such a relationship have often been suggested.

This article will not address the more general exclusionist position that a number of others have done quite successfully. To succinctly summarize the critique of the exclusionist position, an increasing number of scholars have shown at least three significant problems. First is the difficulty, if not near impossibility, of severing religious values for

1020-23 (arguing that religious values should be considered only when secular values fail to provide the answer). It should be noted that although most privatization arguments have been made specifically against religion as such, many are not directed solely against religion but would apply to any comprehensive belief system. Most significantly, John Rawls has argued that political decisions be made on the basis of "public reason," which includes generally acceptable premises within society and therefore would preclude a resort to comprehensive philosophies or belief systems not based on commonly shared societal premises. Although Rawls does not single out religious values for exclusion, his position is generally seen as having its greatest impact on religious beliefs and his views have therefore been frequently included in the politics and religion debate. For critiques of his position, see Perry, Religion in Politics, supra note 1, at 54-61; Smith, supra note 1, at 1575-1610.

13. See Rawls, supra note 12, at 215-20; Audi, supra note 2, at 687-97; Sullivan, supra note 2, at 197; Greene, supra note 1, at 1613; Solum, supra note 12, at 1092-95.

14. See Sullivan, supra note 2, at 197 n. 9. But see Green, supra note 1, at 1624 (stating that to be valid "the law’s dominant express purpose must be secular, and any expressly religious purpose for the law must be no more than ancillary and not itself dominant").

15. See Sullivan, supra note 2, at 165-66; Greene, supra note 1, at 1614-33; Sherry, supra note 2, at 482-95; Teitel, supra note 4, at 747-48, 766-67, 817-21.
the devout because religious identity forms one's very self.\textsuperscript{16} Second, rather than being neutral, as it purports to be, the exclusionist position operates from a biased starting point, resulting in an unequal respect for, and disenfranchisement of, the religious adherent.\textsuperscript{17} Third, and most importantly, significant commentary has shown that religious values are epistemologically no different than other political values, thus negating the heart of the exclusionist position.\textsuperscript{18}

Rather, this article will examine some of the constitutional issues surrounding the religion-in-politics debate that have been studied to a lesser degree. Examination of the constitutional issues serves two purposes. First, the examination aids in clarifying what limits might constitutionally exist, particularly with respect to the Establishment Clause, on religious values in politics. Second, an examination of the constitutional issues further illuminates and buttresses the rationales which recognize the legitimacy of religious beliefs in politics. In particular, the "equal access" focus of First Amendment analysis lends support to the legitimacy of religious values in the public square.

Briefly stated, the thesis of this article is that our constitutional structure established a secular state that is neutral towards religion. In this sense, religious values should be viewed on the same level as any other value in terms of their political voice. Thus, religious norms should have entry into politics on the same basis as any other ethical/moral belief system, and, for that reason, religious norms may also be used as the basis for our laws. Not only is religious influence constitutionally permitted under any reasonable understanding of the Establishment Clause, but it is largely required under the First


\textsuperscript{17} See, e.g., \textsc{Perry}, \textit{Love and Power}, supra note 1, at 8-16; \textsc{Smith}, supra note 1 at 1601-02; Steven D. \textsc{Smith}, \textit{Separation and the "Secular": Reconstructing the Disestablishment Decision}, 67 Tex. L. Rev. 955, 1008-11 (1989).


Even some scholars who believe that religious convictions should be partially or completely precluded from politics acknowledge that religious values are epistemologically no different from other belief systems. See \textsc{Audi}, supra note 2, at 697-98; William P. \textsc{Marshall}, \textit{The Other Side of Religion}, 44 Hastings L. J. 843, 845-47 (1993); see also, \textsc{Sullivan}, supra note 2, at 200-01 (stating that the "culture of liberal democracy" might be a "belief system comparable to a religious faith in the way it structures knowledge," but arguing it is nevertheless distinct from religion for political purposes).
Amendment's free speech provision. As a practical matter, religion as a source of political reflection also reflects what has been the American political experience from our nation's founding through current times.

Part I of the article will examine the perceived relation of religion and politics at the nation's founding, focusing on two issues: the role religion played in America's political vision at the time, and the nature of church-state separation anticipated by the First Amendment.19 This part will not attempt to resolve the numerous questions revolving around both of these issues. Rather, Part I will simply examine the issue of religion and politics. On such a basis, this article will argue that religion, though not the dominant vision, was certainly one of several significant voices contributing to the political vision of our nation's founding.20 More importantly, despite the near impossibility of discerning the clear original intent of the First Amendment's religion clauses, the historical context of the clauses and the rationales for their adoption indicate that they were in no way intended to banish religion from political life.

Part II will examine the Supreme Court's First Amendment jurisprudence and the manner in which the Court speaks to the propriety of religious beliefs informing political choice.21 In particular, Part II will examine the relationship of the Free Speech and Establishment Clauses in current First Amendment jurisprudence.22 This approach will illustrate that although Establishment Clause jurisprudence remains in a state of flux, it is increasingly moving toward a neutrality standard. However, when free speech issues are at stake, which is certainly the case with political debate and decision, there is no doubt that the Court has firmly established a neutrality approach. A neutral treatment fits within the Court's longstanding free speech doctrine, and leads to the inclusion of religious speech on the same basis as any other value. This section will conclude by showing how this approach finds support in some of the underlying First Amendment values often identified by the Court and commentators.23

Finally, Part III will discuss under what circumstances, if any, religiously motivated legislation violates the Establishment Clause.24 Part III will note that although current Establishment Clause analysis re-
quires that there be some secular purpose to support legislation, the Supreme Court has applied this test in a highly deferential manner.\textsuperscript{25} This is particularly true outside the context of coercive religious acts in public schools, where the Court typically maintains that there need only be a plausible secular purpose, which is nearly always found. This article will then provide four reasons why a highly deferential approach should continue, and advocates the abandonment of the secular purpose requirement in more conventional political settings. Such an approach would treat religious influences as irrelevant in analyzing the validity of legislation. This position is more consistent with the neutrality principles found in the First Amendment.

I. Religion and Politics at the Founding

There are few areas of political and legal historical scholarship that remain more controversial than the political basis for the American Revolution, the founding of our country, and the subsequent constitutional order that emerged. This fact becomes more than readily apparent when religion's role is considered. This section will examine religion and politics from two perspectives. First, this section will very briefly consider the role religion played in the political foundation of our country, focusing on the manner in which religion related to politics in the political climate leading up to the Constitution. Second, this section will examine the resulting relationship of church and state as put forth in the Constitution, and in particular, the First Amendment.

A. Religion's Role in America's Founding

In recent years, one of the most contested areas of political philosophy and legal history concerns the ideological basis and inspiration for our nation's founding. For a number of years, the dominant theory was a natural rights/liberalism perspective, which anchored our founding in Enlightenment rationalism. This theory particularly relied upon the philosophy of John Locke.\textsuperscript{26} Under this philosophy, our founders

\textsuperscript{25} See infra notes 294-338 and accompanying text.

\textsuperscript{26} A number of commentators have noted that a natural rights/Lockean understanding of our founding ideology was dominant until the 1960s. See, e.g., Steven M. Dworetz, The Unvarnished Doctrine: Locke, Liberalism and the American Revolution 4-6 (1990); Michael W. McConnell, Tradition and Constitutionalism Before the Constitution, 1998 U. ILL. L. REV. 173, 173-76. Several prominent early works advocating a natural rights/Lockean ideology are Charles S. Corwin, The "Higher Law" Background of American Constitutional Law (1929); Carl Becker, The Declaration of Independence: A Study in the History of Political Ideas (Vintage ed., 1958). See also, Clinton Rossiter, The Political Thought of the American Revolution, 68-70 (1963) (suggesting Locke was "the most popular source of Revolutionary ideas," but not the nearly exclusive source as previously thought).
viewed the struggle with England as an assertion of natural rights grounded in the liberalism of Lockean political theory. However, during the last several decades, this theory has been significantly replaced by several interrelated theories under the rubric of the “republican synthesis.”

First, there has been a strong resurgence of republicanism regarding our nation’s founding, with a growing number of scholars suggesting that classical republican thought, rather than natural rights, formed the principal ideological basis of our founding.\(^{27}\) Tracing the origins of republicanism through Machiavelli and back to the classical philosophy of Plato and Aristotle, these perspectives stress civic virtue and community, rather than the individualism of natural rights.\(^{28}\)

Another recognized influence that is frequently discussed as part of the “republican synthesis,” but is also considered separately, associates the impetus of our founding with Old Whig constitutionalism.\(^{29}\) From this perspective, the colonies’ struggles with Great Britain are grounded in the earlier English resistance against the Stuart Monarchs, which culminated in the Glorious Revolution of 1688-1689. This movement, which predated the liberal thinking of natural rights, focused its resistance on the claim that the monarchy was limited solely by the “ancient constitution,” comprised of custom and other sources. A significant amount of recent scholarship characterizes the American resistance as reflecting the same emphasis on the unconstitutional nature of Britain’s actions,\(^{30}\) frequently recognizing Whig thought as consistent with republican values.\(^{31}\)

Yet another theory focuses on the contribution and role of religious thought to our founding. As noted by historian Ruth Bloch, a signifi-

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\(^{27}\) Two leading works advancing the argument that “classical republicanism” influences the ideological basis of our founding are J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (1975); Gordon S. Wood, The Creation of the American Republic 1776-1787 (2nd ed. 1998); see also, Bernard Bailyn, The Ideological Origins of the American Revolution 26 (1967) (suggesting the classics were an important source, but were more illustrative than determinative of thought).

\(^{28}\) See, e.g., Wood, supra note 27, at 46-90.

\(^{29}\) Id. at 3-45.

\(^{30}\) See e.g., Wood, supra note 27, at 10-17; Bailyn, supra note 27, at 34-35; Michael W. McConnell, Tradition and Constitutionalism Before the Constitution, 1998 U. ILL. L. REV.173, 176-77.

\(^{31}\) See, e.g., Wood, supra note 27, at 49 (“[t]o the radical Whigs, rooted in the Commonwealth of the seventeenth century, the perfect government was always republican”); Noll, supra note 5, at 37 (Whig thought a type of republicanism).
While the notion that religious dogma was intertwined within the movement is no longer in doubt, significant debate remains over the precise role that religion played in the founding of America. In particular, to what extent did religion shape the underlying ideology of the movement, or merely acted as a vehicle for other ideologies, or a combination of both.

Under one view, Protestant ideology was the primary shaper of the political thought behind our founding and subsequent constitutional order. This view has taken several forms, but most commonly focuses on the continuity between our Puritan origins and this nation’s resulting constitutional order. A few scholars have asserted that a “strong continuity” exists between Puritan political thought and the political thought surrounding the critical 1776-1791 period. Specifically, these scholars emphasize the similarity between covenant and compact, reflected in both early Puritan writings and the Constitution. A number of other scholars have advanced what has been described as a “secularized continuity,” in which the ideological basis of the founding draws from, but is a secular version of Protestant Puritan thought.


33. I borrow the terms “strong continuity” and “secular continuity” from Michael Zuckert, supra note 26, at 118-21.

34. See Andrew C. McLoughlin, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1932); Perry Miller, From the Covenant to the Revival, in 1 RELIGION IN AMERICAN LIFE 322 (James Ward Smith & A. Leland Jamison eds., 1961). For a recent argument that Reformed-Protestant thinking was the primary ideological basis for the American Revolution and founding, see Barry A. Shain, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT (1994).

35. The “secularized continuity” theory can take several forms, but essentially it emphasizes continuity between Puritan thought, either English or American, and the structure of our Constitution. For example, Edmund Morgan has asserted that many of the Puritan ideas about government find expression in our founding ideology. However, these ideas went through significant transformation in the Eighteenth Century and took a more secular form. See Introduction, PURITAN POLITICAL IDEAS 1558-1794 xiii-xlvi (Edmond S. Morgan ed., 1965). Donald Lutz emphasizes the continuity between American compacts and covenants, early state constitutions, and our final Federal Constitution. Donald Lutz, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 67-69 (1988). More generally, Lutz also recognizes a number of other influences on the Constitution. Id. at 11. John Witte has also recently emphasized what might be called a “secularized continuity,” suggesting that our Constitution traces its origins to early American Puritan thought and political documents. See Witte, supra note 6, at 62-64. For a discussion and critique of the “secularized continuity” theory, see Zuckert, supra note 26, at 118-47.
From this perspective, Puritan political thought, in particular the idea of covenant and separation of powers, is the genesis of political ideology, an ideology that was later modified by other traditions.36

Both the "strong continuity" and "secularized continuity" theories view Protestant political thinking as having a significant, even dominant impact on the eventual political thought at the time of our nation's founding. This vision of Protestant theology as the cornerstone of our founding has been subject to substantial challenge, with several concerns being raised. The first concern is the clear existence of other forces, most notably the Lockean, Whig, and republican ideologies mentioned above, which undercut the view that Puritan thought was dominant. Second, Protestant theory must contend with the commonly acknowledged Deist philosophy that was followed by many of the founding fathers. Although this is not necessarily inconsistent with the "secularized continuity" theory, as a practical matter, it is difficult to conceive a dominant Protestant or Puritan vision for America's founding when so few of the founders adhered to such beliefs.37

For these reasons, most scholars have rejected Protestant political thought as the primary impetus for the Revolution and founding and have typically adopted one of the above mentioned theories. However, in doing so, most recent approaches have recognized religion as, if not dominant, at least providing some contribution to the developing ideology. Some scholars have viewed religion as being one of several equal contributions to American political thought. For example, Donald Lutz's recent review of the ideological basis of our founding states that "the American constitutional tradition derives . . . much of its form and content from" the early Protestant sects, which were "modified" and "enriched" by the other traditions.38

Others view Protestant political thought as subservient to one of the other theories, but nevertheless making an important contribution. For example, Bernard Bailyn's The Ideological Origins of the Ameri-

36. See Lutz, supra note 35, at 23-49 (discussing the similarities between early compacts and later constitutional development).

37. See Thomas L. Pangle, The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of John Locke 21-22 (1988) (rejecting the argument advanced by some that founding fathers such as "Franklin, Madison, Jefferson, Wilson and Hamilton" were primarily influenced by Christian tradition); John M. Murrin, Religion and Politics in America from the First Settlements to the Civil War, in Religion and American Politics from the Colonial Period to the 1980's 19, 29-33 (Mark A. Noll ed., 1990) (discussing how most founding fathers claimed to be Christian in some way, but very few held traditional or orthodox Christian beliefs).

38. See Lutz, supra note 35, at 7.
can Revolution, recognizes "the political and social theories of New England Puritanism, and particularly . . . the ideas associated with covenant theology" as one source of ideas influencing the Revolutionary Generation.39 Although Bailyn is certainly secular in his own understanding of our founding, he nevertheless recognizes Puritan thought as "a major source of ideas and attitudes" that emerged from the political literature of the time.40

Others also note the significant, if secondary, role played by religion in our founding ideology. Thomas Pangle rejects what he characterize as a frequently offered thesis that the founding ideology was a continuation of Calvinistic political thought.41 Nevertheless, he concedes the "powerful grip" Calvinism had on the American populace, and argues that the better perspective was to recognize "in the new republic[,] a dialogue, or even a somewhat hidden debate, between a more rationalist and freethinking minority and a more pious majority."42 More recently, Michael Zuckert, though asserting the dominance of Lockean natural rights theory, maintains that the best understanding of the founding ideology acknowledges that it was an amalgamation that included Protestant theology as one of several significant contributing factors.43

Thus, even among those who do not recognize Protestant theology as the dominant ideological basis for our founding, there remains a widespread recognition that it was one of several contributing ideologies. On a more instrumental level, it is clear that religion, and specifically Protestant thought, became deeply interconnected with the movement to advance the Revolution and its underlying political theories. A large and growing body of scholarship has documented the central role that religion played in pushing for revolution, while acting as an intermediary between other ideologies and the more general populace.44 In the words of Ruth Bloch, this resulted in "an interpene-

39. See Bailyn, supra note 27, at 32-33.
40. Id.
41. See Pangle, supra note 37, at 21-22.
42. Id.
43. See Zuckert, supra note 26, at 25.
44. Major scholarly treatments of the role of religion in the Revolution include, Patricia U. Bonomi, Under the Cope of Heaven: Religion, Society and Politics in Colonial America (1986); Bloch, Visionary Republic, supra note 32, at 22-93; Hatch, supra note 32; Heimert, supra note 32, at 413-509; Sandoz, supra note 32; Shain, supra note 34. A number of other works, not entirely focused on the role of religion during this country's founding, have nevertheless discussed its significant impact. See, e.g., Wood, supra note 27, at 114-18; Lutz, supra note 35, at 140-42; Bailyn, supra note 27, at 32; Noll, One Nation, supra note 5, at 43-51; Dworetz, supra note 26 at 134-83; Rossiter, supra note 26, at 7-13.
tration of religious and secular themes" that was the basis for much of the emerging political ideology.

The instrumental role that religion played in our founding can be observed in several ways. First, it is well documented that the clergy, particularly in New England, but also in the middle and southern colonies, played a pervasive and sometimes critical role in advocating resistance and revolution. Sermons remained a central part of colonial life and their focus was increasingly political in the years leading up to the founding. This was true not only of the growing body of liberal/rationalist clergy emerging in New England, but also of clergy adhering to traditional Calvinist thought. Scholars such as Bernard Bailyn, Patricia Bonomi, and Donald Lutz have noted the prominent role of the reprinted "political sermon" on the political atmosphere leading up to the founding. According to one account, reprinted sermons constituted eighty percent of the political literature during the 1770s.

These sermons not only provided Biblical support for resistance, but to a large degree served as a vehicle for carrying other political ideas to a Protestant population. For example, recent studies have shown the significant extent to which the New England clergy popularized the thinking of John Locke. Some scholars believe that the popularization of natural rights theories by clergy was at the expense

As of 1990, historian Ruth Bloch characterized the recognition of religion in the ideology of the Revolution as follows:

Most historians now acknowledge the interpenetration of religious and secular themes in the ideology of the Revolution. So much scholarship of the last twenty years has documented the religious symbolism of the Revolutionary movement that the debate over the importance of religion is less over the existence and pervasiveness of this language than over its intellectual and social role.

Bloch, Religion and Ideological Change, supra note 32, at 45.

45. Bloch, Religion and Ideological Change, supra note 32, at 45.

46. See, e.g., Bonomi, supra note 44, at 199-216; Bloch, Visionary Republic, supra note 32, at 53; Heimert, supra note 32, at 413-509; Rossiter, supra note 26, at 7-13; Lutz, supra note 35, at 140-42; Dworetz, supra note 26, at 182-83.

47. Heimert, supra note 32, at 413-509; Rossiter, supra note 26, at 13.

48. See Bailyn, supra note 27, at 5-9.

49. See Bonomi, supra note 44, at 199-216.

50. See Lutz, supra note 35, at 140-42.

51. Id.

52. Id (noting the frequency of Biblical citations in printed political sermons).

53. See Dworetz, supra note 26. Dworetz surveyed a number of sermons by New England clergy in the years immediately proceeding the Revolution. On that basis he noted the significant role played by the clergy in advancing Lockean ideas, stating that "the ministers conveyed the Lockean message, regularly and with great moral authority, to their congregations, by whom they were taken very seriously indeed." Id. at 32. He later states that "by the time of the Stamp Act, every churchgoing New Englander took for granted . . . the political theory that would . . . be used to justify the Revolution itself . . . ." Id. at 182.
of Puritan and Calvinistic thought, suggesting that Enlightenment philosophy replaced Calvinist theology as the primary focus of clergy. Although this trend was probably true with some clergy, other historians have noted that political sermons continued to emphasize the traditional themes of God's covenant with his people, God's judgment, and the authority of scripture, as central elements of preaching. Clergy frequently brought these religious theories to bear in resistance to Great Britain. Thus, while serving as a vehicle for Enlightenment political philosophy, political sermons often integrated broader Calvinist themes into America's early political struggle.

Whereas substantial evidence exists that clergy promoted revolutionary fervor, often incorporating and promoting Lockean and republican ideology in the process, the various political theories at times also appealed to and built upon religious values. To an extent this occurrence was pragmatic, since the religious ideology of the population was still largely Calvinistic. For example, Thomas Pangle, though rejecting the idea that the founders were primarily influenced by Christian traditions and theology, nevertheless states that it is "indisputable" that leaders such as Franklin, Madison, Jefferson, Wilson, and Hamilton were not only influenced in important respects by Christianity, but "were compelled to speak and accommodate themselves to a Christian citizenry."

Similarly, the general population's acceptance of various political ideologies was often based on their compatibility with religion. Although disagreement exists as to how Locke's Puritan beliefs affected his political thought, it is clear that American advocates of Lockean

54. See, e.g., PANGLE, supra note 27, at 22-24.
55. See, e.g., NOLL, ONE NATION, supra note 5, at 41-44; Bloch, Religion and Ideological Change, supra note 32, at 45-51; HATCH, supra note 32, at 55-71. The continuing centrality of Calvinist theology and scriptural authority is also supported by Donald Lutz's survey of political literature of the era, which showed, among other things, a heavy reliance on scriptural citations in clergy political sermons. See Lutz supra note 35, at 140. Further support is also found in Steven Dworetz's recent in-depth study of Locke's thought during the Revolutionary era, including the significant role the clergy played in its advancement. According to Dworetz, the clergy incorporated and advanced Lockean political themes in large part because of "shared religious preoccupations" and "theological commitments," from which Locke and the minister derived essentially similar ideas about civil government ..." Dworetz, supra note 26, at 135-36. This "common theistic ground" included belief in both natural and revealed law, with Dworetz emphasizing the clergy's heavy reliance on scripture in developing their political thought. Id. at 138-48.
56. See PANGLE, supra note 27, at 21. See also, Bloch, Visionary Republic, supra note 32, at 53 ("[o]n the level of popular culture, especially, religion deeply informed political ideology").
57. Recently two proponents of a dominant Lockean influence in the ideology leading to our founding have disagreed regarding the extent to which Locke himself was influenced by theistic norms in the development of his political thought. Steven Dworetz argues at some length that Locke's thought was grounded in Christian theism, blending both natural law and Biblical reve-
natural rights frequently resorted to religious grounds as a reason for accepting the theory.\textsuperscript{58} One of several grounds for Whig Constitutionalism was divine law,\textsuperscript{59} in which the rights being violated were seen as being instituted by God. Certainly, the republican emphasis on the virtuous community was acceptable to some due to their Christian beliefs.\textsuperscript{60} Gordon Wood, widely recognized as one of the fathers of the "republican synthesis," summarizes the manner in which religious values blended with, and supported political thought in the formative era:

The traditional covenant theology of Puritanism combined with the political science of the eighteenth century into an imperatively persuasive argument for revolution. Liberal rationalist sensibility blended with Calvinist Christian love to create an essentially common emphasis on the usefulness and goodness of devotion to the general welfare of the community. Religion and republicanism would work hand in hand to create frugality, honesty, self-denial, and benevolence among the people.\textsuperscript{61}

The extent that Biblical values permeated the discourse during this time is also reflected in the frequent Biblical references found within the political literature of the era. This is clearly demonstrated in a study by Donald Lutz. Professor Lutz surveyed political literature between 1760 and 1805, examining the frequency of citations to the following sources: Bible, Enlightenment, Whig, Common Law, Classical, and other.\textsuperscript{62} Although his sample included only approximately one-tenth of the sermons in print, it did include about one-third of all significant secular publications. The Lutz study found the Bible to be the most frequently cited document.\textsuperscript{63} Even without the sermons, Biblical references constituted about nine percent of the citations in the secu-

\textsuperscript{58} See Dworetz, supra note 26, at 116-34. Michael Zuckert rejects this view, stating that Locke's political theory derived largely from a rationalist perspective. See Zuckert, supra note 26, at 154-59. On a more general level, however, commentators have noted that Locke's ideas about the social contract have their origins in Puritan views on the covenanted church. See, e.g., Bloch, Religion and Ideological Change, supra note 32, at 47.

\textsuperscript{59} See McConnell, supra note 26, at 192 (stating that in Whig Constitutionalism, "rights are derived from a source that precedes positive law—whether from custom, nature, or from God").

\textsuperscript{60} See Wood, supra note 27, at 117-18 (discussing the influence of religion on political thought prior to the revolution); Noll, One Nation supra note 5, at 41-43 (discussing the numerous similarities between the republican and Christian values and the support Christianity gave to the acceptance of republicanism); Hatch, supra note 32, at 66-68 (discussing the clergy's support of republican virtues).

\textsuperscript{61} See Wood, supra note 27, at 118.

\textsuperscript{62} See Lutz, supra note 35, at 140-47.

\textsuperscript{63} See id., at 140.
lar works, approximating the same number of citations to classical references.64

The frequent synthesis and combination of religious and secular thought might frustrate those seeking to neatly categorize the development of political thought at the founding. However, this blending of thoughts and ideas did not pose a significant intellectual hurdle to most minds at the time.65 Although this description did not define each individual experience, to many people religion was a natural part of the public order, interwoven with political notions. Certainly, "religion len[t] its vocabulary" to the revolutionary movement. Moreover, as noted by Bloch, the ideology of our founding developed "within a structure largely defined by the Calvinist experiential approach to salvation and providential understanding of the collective experience of God's people on earth."66 Within this context there was a frequent overlap of language and ideas, as many Americans viewed the struggle in both religious and secular terms. Professor Bloch further states that "[b]y the mid-1770's, . . . religion was so deeply intertwined with the Revolutionary political ideology that it seems virtually impossible to distinguish [between] them."67

In sum, there is substantial evidence that religion and politics were closely intertwined at our nation's founding. Although some scholars view religion as providing the dominant ideological basis for our founding, it is more likely that religion was one of several contributing ideological bases, although probably not a dominant factor. However, an important interplay between religion and politics was taken for granted, with religion providing the population with much of the motivation for revolution. Religion also served as a conduit for political thought and provided a substantive foundation upon which to build a nation.

More importantly, there is no evidence that religion was disconnected from politics or relegated to a private role at our founding. To the contrary, religion was closely related to politics on various levels,

64. See id.
65. See McConnell, supra note 26, at 192-95 (arguing that a combination of nature, divine law, custom, and common law all contributed to the pre-Revolutionary ideology of the colonists).
66. See Bloch, Religion and Ideological Change, supra note 32, at 47. Patricia Bonomi makes a similar point, stating "[t]he sights and sounds of today's cities are not primarily symbolic of religion. But in eighteenth-century America—in city, village, and countryside—the idiom of religion penetrated all discourse, underlay all thought, marked all observances, gave meaning to every public and private crisis." Bonomi, supra note 44, at 3. See also, Steven D. Smith, The Rise and Fall of Religious Freedom in Constitutional Discourse, 140 U. Pa. L. Rev. 149, 157 (1991) (asserting that "the founding generation was deeply and pervasively influenced by Protestant thought and practice").
67. See Bloch, Religion and Ideological Change, supra note 32, at 50.
providing ideological support, lending its vocabulary, and providing a central motivational force. Not only did religion support and blend with political thought, it was political thought. It is abundantly clear that religion had a significant political dimension during this time. Religion’s effect on politics was broadly accepted by the populace, recognized by our country’s leaders, and played a central role in establishing our nation.68

B. The Constitutional Separation of Church and State

It is clear that the Federal Constitution created a secular government. Some commentators have gone so far as to label it a “Godless Constitution,” including both those who applaud,69 as well as those who lament such a result.70 In one sense, this is an accurate description, since the Constitution makes no mention of God, specifically precludes the use of religious oaths of office, and prohibits “laws respecting an establishment of religion.”71 The secular form is more apparent when viewed in contrast to early documents and state constitutions, which almost inevitably included references to God.72

68. Upon a thorough examination of the role of religion in the Revolution and Founding, historian Patricia Bonomi provides this summary:

Religious doctrine and rhetoric, then, contributed in a fundamental way to the coming of the American Revolution and to its final success. In an age of political moderation, when many colonials hesitated at the brink of civil war, patriotic clergymen told their congregations that failure to oppose British tyranny would be an offense in the sight of Heaven. Where political theory advised caution, religious doctrine demanded action. By turning colonial resistance into a righteous cause, and by crying the message to all ranks in all parts of the colonies, ministers did the work of secular radicalism and did it better: they resolved doubts, overcame inertia, fired the heart, and exalted the soul.

BONOMI, supra note 44, at 216.

69. See KRAMNICK, supra note 4.

70. See Harry S. Stout, Rhetoric and Reality in the Early Republic: The Case of the Federalist Clergy, in RELIGION AND AMERICAN POLITICS, supra note 37, at 62-63 (discussing the July 4, 1812 oration wherein Timothy Dwight, a Federalist clergyman, lamented the absence of God in the Constitution).

71. U.S. CONST., amend. 1.

72. Early colonial documents, in the form of political covenants, charters, political compacts, and early constitutions, were often distinctly religious. Not only was God often invoked, but the structure of the documents themselves were often strongly influenced by covenant theology. See generally, LUTZ, supra note 35, at 13-49. By the time of the Revolution, state constitutions had been modified and revised along more secular lines, though arguably still reflecting, in the minds of some, their Puritan origins. Even in more secularized versions, however, documents and state constitutions in the 1770s and 1780s still retained frequent references to God and even degrees of religious identity. Most obvious is the Declaration of Independence, which makes several references to a deity. In addition, many state constitutions retained references to God, including statements suggesting religious preferences or tests. See, e.g., Del. DECLARATION OF RTS., 1776, §§ 2 & 3, reprinted in THE COMPLETE BILL OF RIGHTS: THE DEBATES, SOURCES, AND ORIGINS at 15 (Neil H. Cogan ed., 1997) (asserting “unalienable right to worship Almighty God,” and that those citizens “professing the Christian religion” should have certain rights); Mass. Const. 1776,
The absence of any such reference in the Federal Constitution might be fairly interpreted as an intentional effort to "secularize" the document.

To characterize the Constitution as secular, however, is simply to recognize that it establishes no formal relationship with, or preference for, religion. As noted by many commentators, the basic constitutional structure, consisting of separation of powers and federalism, is very compatible with both Protestant and Catholic theology.\(^7\) The extent that Calvinistic sources might have influenced this structure is subject to debate. Nevertheless, notions of separation of powers and federalism are typically seen as consistent with the prevailing Calvinistic theology during the founding. This idea is particularly true with regard to the concepts of separation of powers and checks and balances, which are viewed as an appropriate response to the fallen human condition.\(^7\) More broadly, the republican structure of the Constitution neutralizes the threat of tyrannical selfish "power[,] while at the same time allowing citizens the freedom to fulfill more positive human desires,"\(^7\) a structure that is very compatible with a Calvinistic view of the world.

More importantly, the "secular" structure of the Constitution does not suggest that religion or religious ideas were intended to have a disfavored status relative to other potential influences. The Constitution's relative silence on religion, with the exception of the First Amendment and the ban on religious oaths, is best interpreted as creating a context of neutrality, in which religious values were to compete on an equal footing with all other values. Rather than giving religion a preferred status relative to other societal values, the Constitution put religion on the same level as all other possible influences and values.

The ban on religious tests as a qualification for office found in Article VI is certainly consistent with such a religiously neutral understanding of the Constitution. The ban in no way precludes religion from the public realm. Rather, the ban simply prohibits religious be-

\(^{73}\) See, e.g., Witte, supra note 6, at 44-63; Noll, One Nation, supra note 5, at 68-70. See also, Introduction, Religious Origins of the American Revolution 1-8 (Page Smith ed., 1976) (arguing that the "theoretical foundation of the . . . Federal Constitution" was based on political thought originating in the Protestant Reformation).

\(^{74}\) See, e.g., Witte, supra note 6, at 58-64 (discussing the various checks on the power of those in political office as a safeguard against tyranny).

\(^{75}\) Noll, One Nation, supra note 5, at 69.
liefs from being a requirement for a potential officeholder. The clear purpose of this ban was to preclude the practice of giving preference to religion found at times in colonial America. Thus, the provision was to equalize the relative positions of religion and nonreligion. Current efforts to preclude religious values from the political landscape arguably violate the spirit of the religious test ban by suggesting a reverse test of sorts, a preclusion of religion as opposed to adherence. This concept runs contrary to the true purpose of the ban on religious tests that political participation be made without reference to religious belief or affiliation.

The primary focus of any constitutional inquiry into the issue of religion and politics must focus on the First Amendment's religion clauses, and more specifically, whether these clauses were intended to preclude religion from politics. Not surprisingly, there is substantial disagreement over the original purpose of these clauses, and in particular, the extent to which they were intended to separate the functions of church and state. Notwithstanding the uncertainty with regards to these issues, there is little reason to believe that the religion clauses were intended to exclude religion from the public square. Rather, the history leading up to and surrounding the adoption of the First Amendment suggests that the religion clauses were ratified in order to avoid compelled religious worship and financial support for churches. There is no evidence suggesting that the religion clauses were intended to preclude religion from politics.

The historical context during the adoption of the religion clauses indicates that the primary concerns addressed by the Establishment Clause were the establishment of a federal church, compelled worship, and financial support of religion. As often noted, the colonies had a long history with various established churches, which in turn led to a tension with religious toleration. When the Bill of Rights was adopted, anywhere from seven to all thirteen states, depending on the definition, had some type of established church. At the earliest

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76. Article VI, clause 3 of the Constitution provides "... but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI, cl. 3.

77. Commentators have frequently noted that the primary church-state concern in the years leading up to the ratification of the First Amendment to the Federal Constitution was financial support for churches. See, Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 198 (1986).

78. For a discussion of the colonial experience with established churches, see Curry, supra note 77, at 1-77; Leonard W. Levy, The Establishment Clause: Religion and the First Amendment 1-26 (1994).

79. Scholars differ widely in the manner in which they count the number of established churches, depending on how the term "established church" or "establishment" is defined. For
stages of colonial development, establishment included a litany of church-state connections, such as voting restrictions and compulsory church attendance. However, by the time the Constitution was ratified, the concept of establishment was limited to various forms of financial support for churches, religious tests for office, and official state recognition of religion.

This longstanding, and to some degree continuing, focus on the financial support of religion has often been viewed as the impetus for the religion clauses. The Supreme Court, and many historians, have looked to the debate regarding religious assessments in Virginia in 1786, in particular Madison’s Memorial and Remonstrance Against Religious Assessments, as providing some evidence of the principles underlying the Establishment Clause. Madison’s Remonstrance, written in opposition to a proposed assessment to support churches in Virginia, was directed toward government financial support of religion and the harm it posed to the liberty of conscience and the free exercise of religion. Subsequently, this document gave rise to the Virginia Bill for Establishing Religious Freedom, which similarly focused on financial support, asserting “[t]hat no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever . . .”

The exact meaning that should be given to Madison’s Remonstrance remains open to some debate, including whether it opposed any financial aid, or only that aid preferential to certain sects. Today,

example, five states at the time of the Bill of Rights continued to provide financial support for churches, six gave official recognition to particular denominations, and five required assent to Biblical inspiration. Moreover, all but two (Virginia and Rhode Island) still had religious tests for office. See generally, Anson Stokes and Leo Pfeffer, Church and State in the United States 78-82 (1964) (detailing the array of church-state contacts that existed at the time of the drafting of the Federal Constitution); Akhil Reed Amar, Some Notes on the Establishment Clause, 2 Roger Williams L. Rev. 1, 2 (1996) (noting the different state positions). Gerard Bradley states that “each of the thirteen original states generously aided and promoted religion and should therefore, according to [Leonard] Levy’s methodology, be called establishment regimes.” Gerard V. Bradley, Church-State Relationships in America 13 (1987).

80. See Levy, supra note 78, at 1-5.
81. See generally, Curry, supra note 77, at 134-92.
84. See Bill for Religious Freedom 1786, reprinted in Cogan, supra note 72, at 52.
the more significant inquiry is how to apply these concerns in the era of large government and the administrative state. However, it is clear that to the extent the Virginia assessment debate illuminates the religion clauses, and there is some question whether it does, it indicates that the Remonstrance was aimed at government contributions to support religious practices, and in no way suggests that religiously informed morals and values are inappropriate to politics.

To the extent that other states addressed church-state issues in the years immediately proceeding the Constitution, they also focused on compelled worship and on state sponsored financial support for churches. Historian Leonard Levy has noted that the Revolution provided an opportunity for the individual states to revisit their constitutions. In many instances, the states used the occasion to address aid to churches or only preferential aid). More generally, there has been a debate over the years whether the Establishment Clause is meant to preclude financial aid to religion in general, or only aid that prefers some religions over others. For arguments that only preferential aid is prohibited, see Michael J. Malbin, Religion and Politics: The Intention of the First Amendment (1978); Bradley, supra note 79. For arguments rejecting such a view, arguing that the Establishment Clause is not limited to only preferentialist aid, see Levy, supra note 78, at 112-45; Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986). The Supreme Court itself, however, in Everson, clearly rejected the view that the Establishment Clause only prohibits preferential aid. 330 U.S. at 15-16.


87. The historical context in which the Remonstrance was written, and Madison's opposition to a general assessment for the financial support of churches, clearly indicate that the Remonstrance was directed to the issue of state financial support of religion. Indeed, the title is Memorial and Remonstrance Against Religious Assessments, further indicating its specific focus. The Remonstrance itself is divided into fifteen short arguments against assessments, none of which reasonably can be interpreted as suggesting religious values should be banned from politics. Although most of the arguments focus on the ill effects assessments would have on religion itself and liberty of conscience, several also allude to the problems religious establishments can inflict on government. These include supporting tyranny and government's use of religion to subvert liberty. In discussing ill effects of religion on civil authority, however, Madison was clearly referring to state established churches, state clergy and the intolerance that can result from such a scheme (see argument number eight in particular). The Remonstrance does not in any way suggest the impropriety of religiously informed political judgments. See Madison, supra note 83, at 298-304. Indeed, when Madison was confronted with the issue of whether clergy should be eligible for public office, he strongly opposed attempts to ban them in Virginia, arguing that a ban would constitute an infringement of their civil liberties. See infra notes 109-115 and accompanying text.
“pent-up” concerns over forced establishments of religion. In fact, between 1776 and 1784, almost every state adopted a new constitution, and in most cases provisions were added which were aimed at eliminating or reducing church establishments. These provisions took various forms, with some states prohibiting establishments altogether while other state constitutions maintained a form of establishment but lessened its rigidity. To the extent specific concerns were addressed, however, they consistently revolved around the dual concerns of compelled financial support and compelled worship.

The fact that these dual concerns were the impetus behind anti-establishment provisions is seen in several states which most severely limited establishments. For example, the Pennsylvania Constitution of 1776 provided that, “no man ought to or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will or consent . . .” Provisions in New Jersey, North Carolina, and Vermont similarly prohibited compelled worship and financial support of churches. Several other states, though recognizing an es-

88. See Levy, supra note 78, at 27. Both Levy and Thomas Curry persuasively suggest that the changes taking place in state establishment clauses in the years preceding the drafting of the federal Constitution provide evidence of the church-state concerns animating the First Amendment. See id.; Curry, supra note 77, at 134.

89. For a general discussion of the changes that occurred during this time, see Levy, supra note 78, at 27-78.

90. See PA. CONST. 1776 ch. 1, § 11, reprinted in Cogan, supra note 72, at 31.

91. Section XVIII of the New Jersey Constitution of 1776 provided:

That no person ever within this Colony be deprived of the inestimable Privilege of worshiping Almighty God in a Manner agreeable to the Dictates of his own Conscience; nor under any Pretense whatsoever compelled to attend any Place of Worship contrary to his own Faith and Judgment; nor shall any Person within this Colony ever be obligated to pay tithes, taxes or any other Rates, for the Purpose of building or repairing any Church or Churches, Place or Places of Worship, or for the Maintenance of any Minister or Ministry, contrary to what he believes to be Right, or has deliberately or voluntarily engaged himself to perform.

Reprinted in Cogan, supra note 65, at 25.

92. Section XXIV of the North Carolina Constitution of 1776 provided:

That there shall be no Establishment of any one Religious Church in this State in Preference to any other; neither shall any Person, on any Pretense whatsoever, be compelled to attend any Place of Worship contrary to his own Faith or Judgment; nor be obliged to pay for the purchase of any Glebe, or the building of any House of Worship, or for the Maintenance of any building or house or worship, or for the Maintenance of any Minister or Ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform . . .

Reprinted in Cogan, supra note 72, at 30-31.

93. Chapter 1, section 3 of the Vermont Constitution of 1777 provides in part: “no Man ought or of Right can be compelled to attend any religious Worship, or erect, or support any Place of Worship, or maintain any Minister contrary to the Dictates of his Conscience . . .” Reprinted in Cogan, supra note 72, at 41.
tablished church or permitting financial support, made changes directed toward compelled worship and financial support of churches. The Maryland Declaration of Rights stated that no person shall be "compelled to frequent or maintain, or contribute . . . [t]o any particular place of worship, or any particular ministry . . . ." However, the Maryland Constitution allowed the legislature to levy a general tax for the support of religion, granting each person the power to decide where the money would go. South Carolina and Georgia had similar provisions, which prohibited compelled worship or financial support of churches, but permitted, with consent, taxation for one's own professed religion.

These state constitutional provisions enacted in the years immediately proceeding the Federal Constitution arguably provide the best insights into the church-state concerns which eventually animated the First Amendment. While permitting varying degrees of continued religious establishment, state constitutions reflect a definite trend toward eliminating or loosening perceived establishments of religion. To the extent that particular concerns were identified, however, they consistently addressed the dual problems of compelled worship and financial support of churches and ministry. This is the one consistent theme that emerges in most state constitutional provisions enacted at this time, and strongly suggests that any emerging opposition to established churches involved these matters. Even these concerns were not universally shared, since some states continued previously established practices of financial support to churches. However, the opposition that was emerging during this period was directed to financial support and compelled worship. Madison's Remonstrance expressed the same concerns, thereby further confirming the centrality of those ideas in the formative period leading up to the Federal Establishment Clause.

95. See Md. Declaration Rts. of 1776, § 33-4, reprinted in Cogan, supra note 72, at 17-18.
97. For example, both Massachusetts and Connecticut continued state financial support of established churches. See Levy, supra note 78, at 29-49.
98. This analysis is also shared by two recent and well-received books examining the history of the Establishment Clause: Thomas Curry's The First Freedoms: Church and State in America to the Passage of the First Amendment and Leonard Levy's The Establishment Clause: Religion and The First Amendment. Although disagreeing on several fundamental issues, they both view concerns about state financial support of churches as the dominant issue during this time. Curry asserts that "during the revolutionary period, the only serious church-state conflicts had to do" with "non-preferential state support" of religion. See Curry, supra note 77, at 198. Although Curry concluded that no consensus was reached on the issue, concerns about financial support of churches animated the debate immediately preceding the framing of the Constitution. Simi-
It was in the context of church-state events, with dual concerns regarding financial support and compelled worship, that the First Amendment was proposed and adopted. The Bill of Rights, beginning with the First Amendment, was established to secure the ratification of several states. Although most federalists did not consider a Bill of Rights necessary, they nevertheless supported its adoption to quiet those who used its absence as a reason to oppose ratification. This later group likely included those who used the issue as a reason to oppose the Constitution, and others who were sincerely concerned about protection of basic rights, including religious freedom.

The limited information available about the perceived need for the religion clauses on the part of some states, and on the actual discussions at the convention drafting the provisions, offer little to support the argument that they were intended to exclude religion from politics. Scholars have noted that state debates over the need for a Bill of Rights involved surprisingly little discussion regarding an Establishment Clause. Moreover, the discussion that occurred tended to be of a general nature. To the extent that reasons were identified, the drafters focused on concerns that a national government might be used to limit rights of conscience, concerns about the establishment of a national church, and concerns about giving preference to any one religion.

There was no recorded discussion which even remotely suggested a separation of religion from politics.

99. See Curry, supra note 77, at 193-95. It is also important to note that what is now our First Amendment was originally proposed as the Third Amendment. It became the First Amendment when the original first two amendments failed to be ratified. See Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 8-19 (1998).

100. See Curry, supra note 77, at 194; Levy supra note 78, at 81-83.

101. See Curry, supra note 77, at 194-95.

102. See Curry, supra note 77, at 194-98. Curry states that in state debates over the need to add a Bill of Rights to the federal Constitution, "commentators . . . failed to address the question of religious freedom at great length or in detail." Id. at 195. Comments concerning establishments of religion were of a general nature and quite limited. To the extent such comments were made, they addressed concerns over establishing a national religion and in particular concerns of preferring one religion over others. Curry notes that this focus on avoiding preferences of one religion over others stands in contrast to debates in the states over their own establishments. These debates did not concern "exclusive state preferences for a single religion, but [rather] proposals for non-preferential state support of many religious groups." Id. at 197-98. Leonard Levy has similarly noted that although much was said in the states of the need for a Bill of Rights, extremely little was said about the meaning to be given to specific rights. Levy, supra note 71, at 84-85. This was particularly true of the subject of religion and establishment, which "was rarely mentioned at all and then only briefly." Id. at 85. Levy then spends eight pages...
Similarly, the Annals of Congress, which summarized the House discussions in drafting and adopting the First Amendment, offer no evidence of concerns about religion and politics. The original wording of what has become our modern day religion clauses stated as follows: "[T]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any matter, or on any pretext, infringed."\(^{103}\) In the limited information on the debate of this initial proposal or subsequent revisions, there is no evidence that religious intrusion into politics was a concern.\(^{104}\) The brief recorded discussions in the House provide little insight into the rationales supporting the First Amendment's adoption. The discussions involved are brief, unfocused, and rather ambiguous in nature.\(^{105}\) Whatever one makes of these discussions, there is absolutely no hint that religion in politics was a concern.

Similarly, there is nothing in the limited Senate record that suggests concerns about religious influences on politics. The Senate proceedings were completely secret, and as a result, there exists only a record of motions and votes recorded in the Senate Journal, and limited newspaper accounts.\(^{106}\) This background provides little grounds for analysis, but the little information that has survived fails to support the idea that the Establishment Clause was designed to preclude religion as a basis for political decision making. The Senate debate, as discerned through a comparison of defeated and accepted motions, reflects a clash between those who would prohibit any government support of religion, and those who would prohibit only preferential aid. Although there was no clear winner in the Senate, the final word-

surveying the little that was said about establishment concerns in the state debates over the need for a Bill of Rights. The statements were all of a general nature, with a number directed to concerns of preferring one religion or another. There is no evidence in any of the statements, however, about the need to exclude religion from politics. See id. at 86-93.

103. See Curry, supra note 77, at 199 (quoting and discussing Madison's original proposal).

104. For a substantial analysis of the debates over the First Amendment found in the Annals, see Curry, supra note 77, at 198-209; Malbin, supra note 85 at 3-13. Neither Curry, nor Malbin indicate that there was any concern expressed over religion in politics, nor was there any discussion regarding the First Amendment preclusion of religion from politics. See also, Edward McGlynn Gaffney, Jr., Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy, 24 St. Louis U. L. J. 205, 215-16 (1980) (stating that the Annals contain no indication that the Founders were concerned about political divisiveness along religious lines).

105. See 1 Annals of Cong., 757-59 (Joseph Gales, ed., 1789) (House debate on religion clauses). The brief debate is reproduced in full in both Curry, supra note 77, at 200-02, and Levy, supra note 78, at 96-98.

106. For analysis of the Senate deliberations, see Curry, supra note 77, at 206-07 and Levy, supra note 78, at 102-04.
ing that emerged from a joint House-Senate conference committee appears to be reflective of a more general prohibition. In any event, there is no suggestion that the amendment was to act as a bar to religious beliefs in politics.

Thus, the historical context and concerns giving rise to the First Amendment religion clauses, and the limited record surrounding their adoption, do not support exclusion of religious values from politics. Rather, the best understanding of the clauses, as reflected in the significant changes in state constitutions immediately preceding the Federal Constitution, is that they were animated by concerns over compelled worship and financial support of churches. Furthermore, the clauses were not intended to separate religion from politics. This understanding is further supported by the strong religious views of citizens at the time and the consequent political expression which embodied these views.

In the absence of any clear discussion or debate on the issue, it is hard to imagine that the First Amendment was intended to disconnect religion from public life. Rather, historians have commonly noted that the prevailing and common expectation was that government would uphold the "Protestant ethos and morality." This expectation is reflected in the common and continued practices of Sabbath laws, chaplains, and days of prayer. Whether or not such practices should be viewed as constitutional today, they evidence the common assumption that religion had a societal and public component.

One possible objection to this view, or perceived restriction on religious involvement in politics that existed at the time, were the prohibitions on clergy which barred them from holding political office. These prohibitions existed in some state constitutions and were struck down in McDaniel v. Paty. Modeled after common provisions in England, seven of the original thirteen states, and six subsequent states, adopted various prohibitions on clergy holding office.

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107. Any conclusions drawn from the sketchy House and Senate records regarding how the "non-preferentialist" debate was resolved must be cautious at best. Yet several persuasive arguments have been made that, when considered as a whole, the final wording was intended to prohibit any financial support of religion, and not just preferential support. See Lee v. Weisman, 505 U.S. 577, 612-16 (1992) (Souter, J., concurring); Levy, supra note 78, at 102-04; Laycock, supra note 85, at 875. What is significant, however, is that this focus on financial aid to religion appears to be a primary impetus behind the religion clauses, with no suggestion that they were intended to ban religion from politics.

108. See Curry, supra note 77, at 219.

109. See Curry, supra note 77, at 219; Noll, History of Christianity, supra note 8, at 145.


111. See id. at 622. As noted in McDaniel, all but two of those states had abandoned the prohibitions by the end of the Nineteenth Century. Id. at 625.
prohibitions might understandably be viewed as an attempt to drive a wedge between religion and politics, thus supporting an argument that a disassociation of religion from politics was an implicit societal understanding at the time the First Amendment was adopted.

Such an argument is problematic for several reasons. First, the apparent purpose of such provisions was not to exclude religion from politics, but rather to ensure the proper devotion of clergy to their religious calling and to avoid the undue pressure to give financial support to churches. As noted in \textit{McDaniel}, the American provisions were modeled on English provisions whose purpose was to ensure that clergy were not distracted from their calling and to avoid certain conflicts with the Crown.\textsuperscript{112} Though a precise understanding of the American provisions is uncertain, the few state provisions that specifically articulated a rationale stated that it was to ensure devotion to the clergy's higher calling.\textsuperscript{113} Although no other official reasons were given, the provisions might also have been motivated in part to avoid clergy asserting inordinate pressure to increase financial support for churches. This latter concern was a particular problem because unlike the federal structure, some states had established churches which received financial support. Therefore, to the extent that the provisions were intended to restrain political involvement, the specific fear was not that religious values would influence politics, but rather that clergy would use their office to affect the financial support their churches received.

Second, as emphasized in \textit{McDaniel}, the Federal Constitution did not adopt such a provision. Additionally, there is no evidence that such a provision was considered.\textsuperscript{114} This is not surprising, since a provision banning clergy from political office would have been in substantial tension with both the Free Exercise Clause and the ban on religious oaths. In any event, the absence of such a federal provision indicates that whatever minor restrictions were intended to apply in

\begin{footnotes}
\item[112] See id. at 622-23.
\item[113] See, e.g., N.Y. \textsc{Const.} 1777, art. \textsc{XXXIX}.

AND WHEREAS the Ministers of the Gospel are, by their Profession, dedicated to the Service of God and the Cure of Souls, and not to be diverted from the great Duties of their Function; therefore no Minister of the Gospel, or Priest of any Denomination whatsoever, shall at any Time hereafter, under any Pretense or Description whatever, be eligible to, or capable of holding any civil or military Office or Place, within this state.
Reprinted in Cogan, supra note 72, at 26.

A similar provision was contained in the South Carolina Constitution of 1778 in article XXI, reprinted in Cogan, supra note 72, at 39.
\item[114] See 435 U.S. at 623-25.
\end{footnotes}
states with such provisions, they were not present in the federal scheme.

It is also significant that Madison strenuously opposed such a prohibition when Thomas Jefferson proposed one for the Virginia Constitution. Madison viewed such a prohibition as contrary to notions of both liberty and justice. It was his belief that such prohibitions punished the religious profession, depriving them of a civil right.\(^1\) This view is significant in understanding the absence of such a provision in the Federal Constitution. Additionally, this view is supportive of the more general neutrality interpretation of the First Amendment. In particular, Madison's view suggests that religious beliefs or standing should not be a basis for political disqualification. Such a reading is consistent with a secular view of the Constitution, which neither prefers nor disqualifies religious views. Instead, such a reading allows for the competition of a multitude of ideologies on an equal basis. Even Jefferson, who originally supported disqualification provisions because he feared clergy might be elevated above other professions and therefore their views might carry inordinate weight, later changed his opinion because he realized that clergy stood on the same footing as all others.\(^2\)

Therefore, the historical setting of the Constitution and the religion clauses offer scant evidence for the exclusion of religious beliefs as a basis for political decision making. The concerns animating the Establishment Clause were those of compulsory attendance and financial support of churches, with no mention of political participation. The

\(^1\) Madison strongly opposed such a clergy disqualification provision, viewing it as a betrayal of the Constitution's "impartiality" and punishing the religious profession by deprivation of a "civil right." He stated:

Does not the exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the deprivation of a civil right? does it [not] violate another article of the plan itself which exempts religion from the cognizance of Civil power? does it not violate justice by at once taking away a right and prohibiting a compensation for it? does it not in fine violate impartiality by shutting the door [against] the Ministers of one Religion and leaving it open for those of every other.

5 WRITINGS OF JAMES MADISON 288 (Gaillard Hunt, ed. 1904) (as it appears in the original).

\(^2\) In a letter written in 1800, Jefferson suggested that his earlier concern was based on the clergy's potential to be elevated above other professions, and thus, if elected, they might "have been a very formidable engine against the civil and religious rights of man." 9 THE WORKS OF JEFFERSON 143 (Paul L. Ford ed., 1905). Jefferson further stated as follows:

Even in 1783 we doubted the stability of our recent measure for reducing them to the footing of other useful callings. It now appears that our means were effectual. The clergy here seem to have relinquished all pretensions to privilege, and to stand on a footing with lawyers, physicians, & c. They ought therefore to possess the same rights.

Id.
resulting secular state is best seen as one in which religion is neither preferred, nor prohibited.

Finally, such an understanding of religion and politics is consistent with the political vision inherent in Madison's celebrated Federalist Number 10, wherein he argues for the advantages of a well constructed union as a safeguard against the problem of political factions. Madison notes that the problem of factions can be addressed either by removing its causes, or by controlling its effects. He rejects the former as sacrificing liberty, and prescribing a cure worse than the disease. Therefore, Madison asserts that the proper solution is to be found not in removing the causes of factions, but in controlling their effects. The effects of factions are controlled through a representative government which provides several safeguards against factions. Representative government insures that views are passed through and evaluated by a select body of representatives. Moreover, the sheer size of this larger republic further decreases the likelihood that one faction will dominate the entire population.

Significantly, Madison mentions religion several times as a source that might give rise to political factions. Although this cannot be

117. See The Federalist No. 10, at 77-84 (James Madison) (Clinton Rossiter ed., 1961). Madison defined a faction as “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse or passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate rights of the community.” Id. at 78.

118. Regarding the inadvisability of removing the causes of factions, Madison concluded as follows:

There are two methods of removing the causes of factions: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed.... The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government.

Id.

119. See id. at 80.

120. See id. at 82-84.

121. Madison suggested that factions have their “latent causes... sown in the nature of man” and that we “see them everywhere brought into different degrees of activity.” He then elaborates on several sources: “A zeal for different opinions concerning religion, concerning government, and many other points, as well as speculation of practice; an attachment to different leaders ambitiously contending for pre-eminence and power...” Id. at 79. Importantly, he does not see these sources, including religion, as the most common source of factions. Rather,
interpreted as a clear statement by Madison regarding the propriety of religion in politics, it demonstrates that Madison assumed that religion would be involved in politics. The solutions to problems associated with religion or any other source lie not in removing that source, since such action would infringe on liberty, but rather in the political structure that Madison proposed and was subsequently adopted. Federalist No. 10, therefore, seems to implicitly endorse Madison’s earlier position opposing a ban on members of the clergy holding office, suggesting instead that religion should be treated the same as any other source of political values, neither preferred nor punished.122

In sum, there is little reason to view the Constitution in general, and the adoption of the First Amendment in particular, as evidencing an intent to separate religious views from the political process. The resulting constitutional structure is best seen as neither preferring nor punishing religious views. Moreover, despite the ambiguity surrounding many Establishment Clause issues, there is nothing in the context

“the most common and durable source of factions has been the verious and unequal distribution of property.” Id.

122. For a more extensive argument that the principles in Federalist No. 10 support equal access of religious convictions to the political arena, see Smith, supra note 1, at 1612-26. Professor Christopher Eisgruber has also written at length about the problem of religious factions and Madison’s proposed solution in Federalist No. 10. See Christopher Eisgruber, Madison’s Wager: Religious Liberty in the Constitutional Order, 89 Nw. U.L. Rev. 347, 369-77 (1995). Eisgruber believes there is a constitutional commitment to public deliberation and reason, and partly for that reason religious factions are particularly problematic, since they “represent[] a challenge to reason’s authority.” Id. at 360-69. However, Eisgruber asserts that the constitutional response to that challenge is not trying to preclude religion from politics through Establishment Clause doctrine, but rather a structural response found in the Constitution to control the problem of religious factions. This includes the controls provided by a large and diverse republic identified by Madison in Federalist No. 10, and “commercialism that diminishes religious intensity[] [and] public schools that habituate students to secular discussion.” Id. at 381-86, 408. He concludes that those devices have been “so successful that the principal task of [constitutional] doctrine is to see that religion is treated no differently than anything else.” Id. at 409.

Professor Ruti Teitel, however, has argued that the problems of religious factions discussed in Federalist No. 10 buttress the argument for excluding religion from politics. In particular, she argues that Madison was concerned about the problems posed by religious factions, and that Federalist No. 10 reflected a “preconstitutional view that religion should remain separate from public life.” See Teitel, supra note 4, at 818-20. Although Madison was certainly concerned about religious factions, there are several problems with Teitel’s position. First, Federalist No. 10 does not treat religion as unique, but includes it as one of several types of factions that might pose problems. Indeed, Madison did not consider religious factions the most problematic, arguing that it was the “verious and unequal distribution of property” that was “the most common and durable source of factions.” Federalist No. 10, supra note 117, at 79. Second, and most important, the solution proposed was not to limit political participation, which Madison considered a restraint on liberty and a cure worse than a disease, but rather to employ a republican form of national government. Id. at 78. Finally, the preconstitutional condition was not one in which religion was relegated to a private sphere, but instead one in which religion was actively involved in the political life of the nation. See part 1A, supra.
of the First Amendment’s adoption or discussions that suggests it was intended to eliminate religion as a source of political decision making. Rather, the Establishment Clause was directed to concerns about compelled worship and financial support of churches. Similarly, the secular structure of the Constitution is best seen as an effort to avoid any endorsement of, or relationship to religion, in essence placing religion in the same class as any other ideology.

As a practical matter, the founders and the general public probably gave little thought to whether religious values could form the basis for political views; there was simply an assumption that religious values often would. As noted by historian Mark Noll, none of the founders opposed resorting to religious arguments for establishing public policy. The secular state was to be neutral toward ideologies, religious or otherwise. To the extent that divisions, factions, or other problems might arise, such problems would be addressed through the structure of our representative government.

This understanding is certainly reflected in the subsequent history of our nation. Whatever the views of the founders, religion early and often inserted itself into the political affairs of our nation. As early as the Presidential election of 1800, there was substantial religious opposition by clergy and others to the election of Thomas Jefferson, who was viewed as hostile in some respects to religious interests. Religion’s involvement in American politics has remained strong ever since, finding expression in diverse ways. Most obvious are the high visibility social movements, such as abolition, temperance, and civil rights, all of which had strong religious dimensions. Recent studies have also highlighted the considerable ways religion influenced political parties and platforms, specifically in the Nineteenth Century. More importantly, the devoutly religious look to their religion for moral and ethical standards, which in turn are often reflected in the political choices they make. This idea, of course, is difficult to measure, though several relatively recent studies suggest that religion, combined with ethnicity, was the major predictor of voting patterns in this country until at least the 1930s.

123. See Noll, History of Christianity, supra note 8, at 148.
124. See Noll, One Nation, supra note 5, at 75-89 (discussing religious opposition to Jefferson in 1800 presidential election).
125. See supra note 9.
126. See Howe, supra note 10, at 150-80 (examining the significant influence of Evangelical thought on Whig politics);
127. See Robert P. Swierenga, Ethnoreligious Political Behavior in the Mid-Nineteenth Century: Voting, Values, Cultures, in Religion in American Politics, supra note 11, at 146, 147 (summarizing the evidence that “religion was the salient factor in Nineteenth Century voting
The long and substantial involvement of religion in politics in our nation's history does not in and of itself legitimize it as a practice. This commingling of interests suggests, however, that our political experience has reflected the picture presented at our founding, in which religious values were not intended to be excluded from the political arena. The next section of this article will examine how this is also consistent with the jurisprudence of the First Amendment, as reflected in both the Establishment and Free Speech Clauses.

II. THE FIRST AMENDMENT: ESTABLISHMENT AND SPEECH

As noted earlier, few scholars today would argue that the use of religious beliefs in politics constitutes an actual violation of the Establishment Clause. In fact, many scholars concerned about religion's involvement in politics have noted that any attempt to exclude religious input would in fact violate the free speech of religious proponents. Despite this recognition, Establishment Clause concerns remain strong among those who wish to exclude religion from politics. Proponents of this view argue that the principles underlying the religion clauses suggest that religion should be excluded or greatly limited in politics. Moreover, these same proponents occasionally assert that particular laws are infirm because of their religious input. These advocates have even found support in isolated statements by Supreme Court Justices, most notably Justice Stevens.

An analysis of whether faith-informed politics raise Establishment Clause concerns involves two closely related, yet distinct issues. The first issue involves the legitimacy of religious adherents' reliance upon religion in making political decisions. The second issue concerns the validity of legislation that was motivated in whole or in part by religious beliefs. Douglas Laycock has identified these questions as "issues of inputs and outputs." This section will examine the first issue, which goes to the heart of the religion and politics debate. As noted by other scholars, this issue includes dual establishment and speech behavior and noting that recent research has shown religion "the key variable in voting behavior until at least the Great Depression").

128. See, e.g., Sullivan, supra note 2, at 196.
129. See supra note 15.
131. See Laycock, supra note 2, at 795.
concerns, both of which will be examined here. Section III will examine the issue of outputs.\textsuperscript{132}

\section{A. Establishment Clause Jurisprudence}

Modern Establishment Clause jurisprudence found its genesis in the Supreme Court's 1947 decision in \textit{Everson v. Board of Education}.\textsuperscript{133} During the half-century since \textit{Everson}, the Court has struggled to establish a consistent and coherent approach to resolving church-state issues. Even more difficult have been scholarly attempts to make sense out of the Court's Establishment Clause analysis. Despite significant disagreements over the results, most commentators agree in their lament over the Court's often incomprehensible and inconsistently applied set of principles.\textsuperscript{134}

Recent scholarly attempts at understanding the Supreme Court's treatment of the clauses emphasize two separate theories underlying many of the Court's decisions, separationism and neutrality.\textsuperscript{135} Arguably, these concepts find their origins in \textit{Everson}. In \textit{Everson}, the Court considered the validity of reimbursing parents of parochial school students for transportation costs.\textsuperscript{136} The Court, referring to Jefferson's letter to the Danbury Baptists, emphasized that there was to be a wall of separation between church and state, which the Court declared was to be "high and impenetrable."\textsuperscript{137} Despite this language, the Court upheld the reimbursement of transportation costs. The

\begin{itemize}
  \item \textsuperscript{132} See infra notes 278-337 and accompanying text.
  \item \textsuperscript{133} 330 U.S. 1 (1947).
  \item \textsuperscript{134} Many commentators have criticized the Court's Establishment Clause analysis, and in particular, the \textit{Lemon} test. See Jesse Choper, \textit{The Establishment Clause and Aid to Parochial Schools - An Update}, 75 CAL. L. REV. 5 (1987); William Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 S. CAL. L. REV. 495 (1986); Mark Tushnet, Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses, 27 WM. & MARY L. REV. 997 (1986). Steven Smith has noted that dissatisfaction with Establishment Clause results unites almost everyone on both sides of the issue, stating "[i]n a rare and remarkable way, the Supreme Court's establishment clause jurisprudence has unified critical opinion: people who disagree about nearly everything else in the law agree that establishment doctrine is seriously, perhaps distinctively, defective." Smith, supra note 1, at 956.
  \item \textsuperscript{135} For an elaboration upon the theories of separationism and neutrality, see Dhananjai Shirakumar, Neutrality and the Religion Clauses, 33 HARV. C. R. - C. L. REV. 505 (1998); Carl H. Esbeck, \textit{A Constitutional Case For Governmental Cooperation with Faith-Based Social Service Providers}, 46 EMORY L. J. 1 (1997); John H. Garvey, What's Next After Separationism?, 46 EMORY L. REV. 75 (1997); Ira C. Lupu, \textit{The Lingering Death of Separationism}, 62 GEO. WASH. L. REV. 230 (1994). Douglas Laycock, however, has criticized the distinction between separationism and neutrality theories, suggesting that the Court has never seen the two in conflict. Laycock instead suggests that the two competing theories in the context of government aid are the "no-aid" theory and the "nondiscrimination" theory. See Laycock, supra note 98 at 46.
  \item \textsuperscript{136} 330 U.S. at 3.
  \item \textsuperscript{137} Id. at 16, 18.
\end{itemize}
Court did not find a violation of the Establishment Clause because the reimbursement program did not favor or prefer religion; rather, it provided benefits equal to that given to public school students. The Court stated that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers." Thus, despite the rhetoric of separation in \textit{Everson}, the Court in essence applied a neutrality standard.  

During the half-century since \textit{Everson}, these themes have played out in Establishment Clause cases. A number of recent articles have viewed separationism as the primary theoretical approach for much of this time, while giving way in recent years to neutrality. The separationism approach is perhaps best illustrated by the Court's threefold test for deciding Establishment Clause cases as set forth in \textit{Lemon v. Kurtzman}. In \textit{Lemon}, the Court synthesized Establishment Clause jurisprudence to date, and articulated the following test: "[F]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the act must not foster an excessive entanglement with religion." This test dominated Establishment Clause analysis during much of the 1970s and 1980s, and has not been formally overruled.

The \textit{Lemon} test and many of its results have often been viewed as separationist in nature. Although on occasion the Court has raised concerns about a valid secular purpose, most often it has relied on

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138. \textit{Id.} at 18.  

139. In dissent, Justice Jackson noted the tension between the majority's rhetoric of separation and its result, stating "the undertones of the opinion, advocating complete and uncompromising separation . . . seem entirely discordant with its conclusion . . . ." \textit{Id.} at 19. The answer, of course, often noted by the Court, is that the required separationism is not nearly as extreme as suggested by the language in \textit{Everson}, but rather allows a number of contacts between church and state. See Walz v. Tax Commission, 397 U.S. 664, 671-72 (1970) (noting that the required separation still permits numerous contacts, with the results of \textit{Everson} just one example); see also Lynch v. Donnelly, 465 U.S. 668, 672 (1984) ("total separation of the two is not possible"); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("total separation between church and state" not required nor possible); \textit{Nyquist}, 413 U.S. at 760 (1973) ("[i]t has never been thought either possible or desirable to enforce a regime of total separation"); Zorach v. Clauson, 343 U.S. 306, 312 (1952) (the Constitution does not require separation "in every and all respects").  


141. 403 U.S. 602 (1971).  

142. \textit{Id.} at 612-13 (citations omitted). Although in \textit{Lemon} the test was applied to statutes, it is applicable to any government action.  

the second and third prongs of the test in finding constitutional violations. This has been particularly true with regard to programs giving aid to sectarian schools. The Court has invalidated programs that provided counseling and therapy services to parochial schools, reimbursed schools for testing costs, provided remedial courses to parochial schools, and provided sectarian schools with federally funded Title I services. The Court has also used Lemon to strike down government sponsorship of religious activity such as creches, and the posting of the Ten Commandments in a public school. These decisions built on landmark cases predating Lemon where the Court held that required religious activities in public schools, such as prayer and Bible reading, violated the Establishment Clause.

Despite these results, the separationism of Lemon and its progeny is in fact limited and qualified in several respects. First, in addressing aid cases, the Court has drawn a distinction between aid that is "direct and substantial" and "indirect and incidental." The former is generally held invalid, the later valid. On that basis, the Court has upheld several aid programs involving textbooks, transportation costs, and even a state income tax deduction for parochial school expenses if such aid was simply part of a broader program benefiting

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Aguillard, 482 U.S. 578, 613 (1987) (Scalia, J., dissenting) ("[a]lmost invariably, we have discovered a secular purpose for measures challenged under the Establishment Clause, typically devoting no more than a sentence or two to the matter").


152. See Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 393 (1985) ("[t]he question in each case must be whether the effect of the proffered aid is 'direct and substantial' or 'indirect and incidental'"). See generally, Esbeck, supra note 135, at 6-10 (discussing direct/indirect distinction in aid cases and noting how the Court has consistently permitted "indirect" forms of assistance).


154. See Everson, 330 U.S. at 1.

155. See Mueller, 463 U.S. at 388.
public as well as private school children.\textsuperscript{156} The Court has also permitted a creche display under \textit{Lemon},\textsuperscript{157} as well as upholding the practice of opening legislative sessions with prayer without mentioning \textit{Lemon}.\textsuperscript{158}

Thus, rather than representing a "high and impenetrable" wall, separationism under \textit{Lemon} has been blurred and qualified, permitting a variety of church-state contacts.\textsuperscript{159} The fine line drawing that the \textit{Lemon} test requires has led a number of commentators on both sides of the Establishment Clause issue to criticize it as uncertain and inconsistent.\textsuperscript{160} However, the \textit{Lemon} test has shown that even under what is considered a separationist approach, the Court has not called for a complete separation of religion from public life.

More importantly, to the extent \textit{Lemon} reflects separationism, it has been focused on a relatively specific set of concerns in which either government sponsorship of overtly religious acts or direct aid to religious groups was involved. The Court has frequently articulated what it considers the three primary concerns behind the Establishment Clause, "sponsorship, financial support, and active involvement of the sovereign in religious activity."\textsuperscript{161} This analysis frequently invoked a litany of concerns, illustrating the idea that separationism has never been a catch-all prohibition on religious values in the public square, but rather, focuses on a specific and relatively narrow set of activities. As a practical matter, not only has the Court stated that those concerns are the most significant to its Establishment Clause jurisprudence, but its decisions have been limited to those issues.

The only possible support for the position that separationism might limit religious influence on political activity came in \textit{Lemon}, where the Court articulated a special type of entanglement problem known as the "political divisiveness" test. In this respect, the Court emphasized the potentially divisive political nature of programs involving annual appropriations to religious groups, stating that "political division along religious lines was one of the principal evils against which the

\textsuperscript{156} \textit{Id.}

\textsuperscript{157} See \textit{Lynch}, 465 U.S. at 668.


\textsuperscript{159} In a number of decisions the Court has noted that the "wall of separation" is a qualified one. See, e.g., \textit{Lemon}, 403 U.S. at 614 (stating that "total separation [is] not possible," the "wall is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship").

\textsuperscript{160} See supra note 134.

\textsuperscript{161} See \textit{Waltz}, 397 U.S. at 668; \textit{Lemon}, 403 U.S. at 612; \textit{Nyquist}, 413 U.S. at 772; \textit{Meek}, 421 U.S. at 359.
First Amendment was intended to protect.162 The Court voiced its concern that "[t]o have [s]tates or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency."163

At first glance, this language from Lemon might appear to call for separating religious influence from political decisions. However, this language is qualified in two significant respects. First, to the extent the "political divisiveness" test still exists, the Court has indicated that it cannot be the sole basis for finding an Establishment Clause violation.164 Moreover, since the mid-1970s the test has been largely ignored by the Court. On the few occasions that the "political divisiveness" test has been mentioned, the Court was merely explaining why it was inapplicable to the present case.165

Second, and more importantly, the Court in Lemon indicated that the "political divisiveness" test did not apply concern religious involvement in politics generally, but applied only to the narrow issue of annual appropriations of aid to sectarian schools. In Lemon, and Walz v. Tax Commission166 decided the previous term, the Court affirmed the right of religious groups to be politically involved, stating: "Of course, as the Court noted in Walz '[a]dherents of particular faiths and individual churches frequently take strong positions on public issues.' We could not expect otherwise, for religious values pervade the fabric of our national life."167 Thus, it was not the

162. 403 U.S. at 622.
163. Id. at 622-23.
165. The "political divisiveness" test was a factor in invalidating several aid programs in the mid-1970s, although always in concert with other concerns. See Nyquist, 413 U.S. at 795-97; Meek, 421 U.S. at 365, 372. The test was not mentioned in any 1990s decision until Agostini v. Felton, 521 U.S. 203, 233-24 (1997), where the Court summarily dismissed it as inapplicable. The "political divisiveness" test was given only scant attention in the 1980s, usually to indicate it did not apply. See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 & n.17 (1987); Lynch, 465 U.S. at 684; Mueller v. Allen, 463 U.S. 388, 403 & n.11 (1983). In Aguilar v. Felton, 473 U.S. 402, 414 (1985), the Court did imply that political divisiveness might occur from the scheme at issue, but the decision did not rest on that basis and the case was subsequently overruled in Agostini. In Larkin v. Grendel's Den, the Court also made reference to the dangers of "political divisiveness" that might occur from a scheme where the power to veto certain zoning decisions was delegated to churches, but again, did not rest the decision on that basis. 459 U.S. at 127.

In addition to being generally ignored by the Court, the "political divisiveness" test has been severely criticized by commentators. See, e.g., Laurence H. Tribe, American Const. Law 1270-84 (2nd ed. 1988); Gaffney, supra note 104, at 205; Peter M. Schotten, The Establishment Clause and Excessive Governmental -Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools. 15 Wake Forest L. Rev. 207, 221-28 (1979); see also, Nowak, supra note 144, at 1262-63 (stating that the test is "futile at best").
167. 403 U.S. at 623 (quoting Waltz, 397 U.S. at 670).
involvement of religious groups in politics that was problematic, rather, as the Court indicated, it was the “successive and very likely permanent annual appropriations that benefit relatively few religious groups.” Consequently, Lemon affirms the general right to bring religious beliefs to the public square, carving out a narrow exception for on-going political appropriations to parochial schools. Even this exception has, for all practical purposes, been ignored.

Therefore, the separationism often associated with the Lemon test is limited to rather focused concerns, and does not suggest anything inappropriate with religious values informing political decisions. The Lemon test focuses on overtly religious acts and financial aid to sectarian institutions, and even under these circumstances has permitted a number of church-state contacts. The test has not been used to suggest a broader separation of religion and public life, and most certainly concedes the inevitability of numerous contacts between the two. Lemon affirmed the pervasiveness of religious values in our national life, and the legitimacy of bringing such values into the political arena.

Moreover, the separationism of Lemon has waned considerably in recent years. First, the Lemon test, though not technically overruled, has been weakened significantly in recent years, with the Court at times ignoring it, and a majority of the Justices disavowing the test at one time or another. Second, and more significant is the Court's

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168. Id.
169. In several subsequent decisions the Court indicated that the “political divisiveness” test is limited to direct appropriations to sectarian institutions. See Lynch, 465 U.S. at 684 (stating that the “political divisiveness” test only applies in cases involving “a direct subsidy” to religious schools or institutions); Mueller, 463 U.S. at 403 n.11 (same); Tribe, supra note 165, 1229-30.
170. 403 U.S. at 623.
171. Cracks first began to appear in the Lemon test in Lynch v. Donnelly, where the Court characterized the Lemon criteria as “useful” to its inquiry, but emphasized an “unwillingness to be confined to any single test or criterion in this sensitive area.” 465 U.S. at 679. In subsequent decisions a number of justices began to express dissatisfaction with the test, often in concurring or dissenting opinions. See, e.g., Lee v. Weisman, 505 U.S. at 644 (Scalia, J., dissenting); Allegheny County v. ACLU, 492 U.S. at 655-57 (Kennedy, J., concurring in judgment in part and dissenting in part); Latter-Day Saints v. Amos, 483 U.S. at 346-49 (O'Connor, J., concurring in judgment); Wallace v. Jaffree, 472 U.S. 38, 107-13 (1987) (Rehnquist, C.J., dissenting). Indeed, in a 1993 concurrence in Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993), Justice Scalia emphasized the fact that a majority of the Justices then sitting on the Court had rejected the Lemon test in some opinion.

In the 1990s, the Lemon test was completely ignored in several important Establishment Clause decisions. See Rosenberger v. Univ. of Va., 515 U.S. 819 (1995); Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687 (1994); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993). It was given only brief attention in several others. See Agostini, 521 U.S. at 203; Lamb's Chapel, 508 U.S. at 384. A large number of commentators have noted the decreasing influence of Lemon, with some suggesting that the test has, in effect, been abandoned or rejected. See, e.g., Kent Greenawalt, Quo Vadis: The Status and Prospects of “Tests” Under the Religion
increasing reliance on neutrality as the touchstone of Establishment Clause analysis. As noted above, neutrality as an analytical device has been around since the beginning of modern Establishment Clause jurisprudence, and has often been intertwined with separationist language and analysis over the years.\textsuperscript{172} As \textit{Lemon} and separationism have waned, the Court has begun to explicitly apply a neutrality analysis to resolve Establishment Clause issues. Indeed, a growing number of scholars have suggested that neutrality has replaced separationism as the Court’s primary analytical framework for Establishment Clause cases.\textsuperscript{173}

Under a neutrality approach to the Establishment Clause, the Court does not focus on whether religion is advanced or inhibited by government acts, but rather if religion is treated in a neutral fashion relative to other groups. The Court has increasingly applied this approach in a variety of settings to resolve Establishment Clause issues. For example, in \textit{Board of Education of Kiryas Joel v. Grumet},\textsuperscript{174} the Court invalidated the drawing of school district boundaries which created a special district for Orthodox Jews, emphasizing throughout the opinion that the state had failed to treat religion neutrally.\textsuperscript{175}

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\textsuperscript{173} \textit{See Esbeck}, supra note 135, at 20-39; Shivakumar, supra note 135, at 515; Lupu, supra note 135, at 233-67; Garvey, supra note 135, at 78-83; \textit{see also}, Teitel, supra note 4, at 766-80 (suggesting that the old model of neutrality, which was compatible with separation, is being replaced by a new neutrality model which focuses on equal access to public life and therefore is in tension with separation).

\textsuperscript{174} 512 U.S. 687 (1994).

\textsuperscript{175} The Court began its analysis by stating:

A proper respect for both the Free Exercise and Establishment Clause compels the State to pursue a course of ‘neutrality’ toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents. Chapter 748, the statute creating the Kiryas Joel Village School District, departs from this constitutional command by delegating the State’s discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally.

\textit{Id.} at 696 (citations omitted). The Court continued to emphasize the need for neutrality throughout the opinion. \textit{See id.} at 696-705.
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significant has been the Court's use of a neutrality standard in school funding cases, where results have been increasingly influenced by neutrality concepts rather than separationism. For example, in Zobrest v. Catalina Foothills School District, the Court held that the provision of a sign language interpreter to accompany a deaf student at a religious school did not violate the Establishment Clause. The Court stated that the Establishment Clause is not violated "[w]hen the government offers a neutral service on the premises of a sectarian school as part of a general program."  

More importantly, in Agostini v. Felton, the Court overruled its prior decision in Aguilar v. Felton holding that providing publicly paid teachers to parochial schools to assist disabled and disadvantaged students with remedial and secular education was constitutional. The Court noted that several premises underlying the Aguilar decision had changed. For example, the assumption that the "placement of public employees on parochial school grounds . . . [creates an] impermissible . . . symbolic union between government and religion," and that "government aid that directly assists the educational function of religious schools is invalid." The Court stated that several decisions since Aguilar had rejected both positions, thus substantially changing Establishment Clause analysis in those respects. Although the Court ostensibly applied the three prong Lemon test in its analysis, it emphasized that the challenged aid was valid because "[i]t [did] not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." Not only is the second of these criteria essentially a neutrality standard, but the Court emphasized neutrality concerns in finding that the other criteria were met.

177. Id. at 10.
178. 521 U.S. at 203.
179. Id. at 235.
180. Id. at 237.
181. Id. at 223.
182. 521 U.S. at 225.
183. The Court noted that Zobrest had rejected the premise articulated in Aguilar and Ball that the presence of a public employee at a sectarian school inculcates religion in the student or "constitutes a symbolic union between government and religion." Id., at 223. The Court also noted that Witters v. Washington Dep't of Servs. for Blind, 474 U.S. 481 (1986), dispelled the idea that "all government aid that directly assists the educational function of religious schools is invalid." 521 U.S. at 225.
184. See id. at 234.
185. The Court stated as follows:

[W]e therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Estab-
These cases demonstrate the Court's recent movement toward neutrality, rather than separationism, as its primary model for Establishment Clause analysis. As significant as that change is generally, the Court has most clearly and consistently applied a neutrality standard in addressing Establishment Clause concerns when private religious speech seeks entrance into a public forum. In this type of case, which is the most analogous to concerns about religion in politics, the Court has only applied a neutrality standard in deciding Establishment Clause concerns. In a series of five decisions stretching back almost two decades, the Court has consistently held, often in difficult factual circumstances, that religious speech is to be accorded the same level of protection as other core speech, no more and no less. Decided under the rubric of the Supreme Court's public forum doctrine, the Court held in each of the cases that religious speech was to have "equal access" to public fora. The model was that of neutrality, in which religious speech was to be treated the same as other speech. The Court also held that such neutral treatment of religion did not create an Establishment Clause problem. To deny equal access would violate the free speech rights of religious adherents.

In the first of these cases, *Widmar v. Vincent*, the Court held that a public university could not prohibit a religious group from using campus facilities when the use of such facilities was extended to non-religious groups. The Court recognized religious activities as within the protection of the Free Speech Clause, and emphasized that the First Amendment prohibited discrimination on the basis of speech content. The Court specifically rejected the argument that the Establishment Clause prohibited the use of campus facilities by religious groups, noting that permitting equal access to such groups did not confer the state's imprimatur. Thus, as long as the forum had a secular purpose, providing equal access to religious speech did not violate the Establishment Clause; in fact, such equal access was mandated by the Free Speech Clause.

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*Id.* at 234-35.

The Court further argued that there was no endorsement of religion, quoting language from *Witters* and stating that "[t]he mere circumstance that [an aid recipient] has chosen to use neutrally available state aid" does not convey endorsement. *Id.* at 235.

187. *Id.* at 269.
188. *Id.* at 274-75.
189. The Court succinctly summarized its decision in the following statement:
In *Widmar*, the Court took an important step toward neutrality in holding that the provision of equal access to religious speech was not a violation of the Establishment Clause. As noted by Douglas Laycock, however, *Widmar* fit rather easily into an already well-developed body of First Amendment jurisprudence concerning content discrimination. It is well established that the government cannot discriminate on the basis of speech content. Thus, once a forum is open to the general public admission cannot be denied based on the content of the speech, including speech that is religious. Further, many of those decisions involved religious speech and activity, an area that the Court has long held qualifies for full protection under the Free Speech Clause. In *Widmar*, the Court noted and relied upon this longstanding practice of providing free speech protection to religious speech.

Thus, although *Widmar* fits rather easily within the well-established First Amendment doctrine of content-neutrality, it removed any doubt that protecting religious speech does not violate the Establishment Clause. In four subsequent decisions, *Westside Board of Education v. Mergen*, *Lamb's Chapel v. Center Moriches Union Free School District*, *Capital Square Review and Advisory Board v. Pinnette*, and *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court similarly held that religious speech must be treated neutrally and accorded equal access in the public square.

Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.

Id. at 277.

190. See Laycock, supra note 98, at 62-63.
193. See *Widmar*, 454 U.S. at 269 n.6.
The first two of these cases, *Mergens* and *Lamb's Chapel*, involved a rather straightforward application of equal access principles and Establishment Clause analysis. In *Mergens*, the Court upheld the “Equal Access Act,” a Congressional statute that in effect extended the protections of *Widmar* to high school campuses.\(^\text{198}\) A majority of the Justices stressed that a neutral treatment of religious speech in the context of a broader forum did not pose Establishment Clause problems.\(^\text{199}\) Similarly, in *Lamb’s Chapel* the Court held that a church could not be denied the use of a public school building for a film series on child-rearing when the school was open to other groups. As in *Widmar*, the Court emphasized that free speech rights required that religious speech have the same access to the forum as other speech. In *Lamb’s Chapel*, the Court characterized the restriction as viewpoint discrimination, because the school permitted other perspectives on the same subject but excluded religious views.\(^\text{200}\) The Court further held that permitting the group to meet did not violate the Establishment Clause, because the requirements of *Lemon* had been met, there was no danger of endorsement, and any benefits to religion were incidental.\(^\text{201}\)

The two 1995 decisions, *Pinnette* and *Rosenberger*, provided the more difficult fact patterns of traditionally sensitive areas of Establishment Clause jurisprudence. In *Pinnette*, the Klu Klux Klan sought to display a cross in a public square, traditionally open to displays of other kinds,\(^\text{202}\) but were denied access on the basis that the display of

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\(^{198}\) 496 U.S. at 247-52 (plurality opinion, O'Connor, J.); id. at 260-62 (Kennedy, J., concurring).

\(^{199}\) No single opinion commanded a majority of the Court as to the Establishment Clause analysis in *Mergens*. Justice O’Connor’s plurality opinion for four members of the Court found no Establishment Clause violation under the *Lemon* test, applying an analysis similar to that used in *Widmar*, see 496 U.S. at 248-52. In so doing, Justice O’Connor stressed that the basic message of the Act was “one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.” Id. at 248. Justices Scalia and Kennedy found no Establishment Clause violation, although not agreeing with the focus on endorsement concerns advocated by O’Connor, also emphasized neutrality in finding no violation. See id. at 260. Justices Brennan and Marshall also concurred in the judgment, but were troubled by the possibility of endorsement under the particular facts of the case. They emphasized that the Free Speech Clause required that student religious speech be treated in a content-neutral fashion, but were concerned by the potential implied endorsement of religion, especially in light of the Court's traditional sensitivity to Establishment concerns in public elementary and secondary schools. Thus, although they found that the Act withstood Establishment Clause scrutiny, they noted a number of steps the school should take to disassociate itself from the religious group. Id. at 262-70.

\(^{200}\) *Lamb’s Chapel*, 508 U.S. at 392-94.

\(^{201}\) Id. at 394-95.

\(^{202}\) 515 U.S. at 757-69.
a cross on public property would violate the Establishment Clause.\textsuperscript{203} The Supreme Court, by a seven to two vote, found no Establishment Clause violation, with no opinion commanding a majority. Justice Scalia, joined by three other Justices, employed an analysis similar to that used in \textit{Widmar} and \textit{Lamb's Chapel}, treating the issue as one of equal access to a public forum. He noted that religious speech was fully protected under the Free Speech Clause,\textsuperscript{204} and principles of content-neutrality required that it be treated the same as other speech.\textsuperscript{205} Justice Scalia also stated that permitting the display did not violate the Establishment Clause, noting that there was no government sponsorship, any benefits to religion were incidental, and religion was treated in a neutral manner.\textsuperscript{206}

Both Justice O'Connor and Justice Souter wrote concurring opinions joined by each other and Justice Breyer, to form the majority.\textsuperscript{207} Although agreeing with aspects of Scalia's opinion, the concurring opinions also applied an "endorsement test," which had been applied in several previous cases\textsuperscript{208} to determine if there were an Establishment Clause violation.\textsuperscript{209} Under this approach, even a neutral treatment of religious speech might be invalid if, as originally formulated by Justice O'Connor, a reasonable observer would conclude that government was endorsing religion.\textsuperscript{210} Both concurring opinions concluded that under the facts of the case there was no endorsement. Justice O'Connor noted that neutral treatment helps to dissipate endorsement concerns, but also emphasized the placement of a disclaimer as a significant factor.\textsuperscript{211}

In \textit{Rosenberger}, the Court, in a narrow five to four decision, applied the neutrality principle even where direct funding of religious activity was involved.\textsuperscript{212} In \textit{Rosenberger}, a Christian student group at the University of Virginia sought funding for a newspaper that was clearly

\textsuperscript{203} Id.
\textsuperscript{204} Id. at 760-61.
\textsuperscript{205} Id. at 762-63.
\textsuperscript{206} Id. at 763-64.
\textsuperscript{207} Id. at 772-83 (opinion of O'Connor, J., joined by Souter, J., and Breyer, J.); 783-93 (opinion of Souter, J., joined by O'Connor, J., and Breyer, J.).
\textsuperscript{208} The endorsement test, long championed by Justice O'Connor, had been applied by a majority of the Court in a few prior opinions, most notably \textit{Allegheny County v. ACLU}, 492 U.S. at 573.
\textsuperscript{209} See \textit{Pinette}, 515 U.S. at 772-83; (opinion of O'Connor, J.); \textit{id.} at 783-93 (opinion of Souter, J.).
\textsuperscript{210} See \textit{id.} at 776-77 (opinion of O'Connor, J.).
\textsuperscript{211} See \textit{id.} at 782 (opinion of O'Connor, J.); \textit{id.} at 789-93 (opinion of Souter, J.).
\textsuperscript{212} \textit{Rosenberger}, 515 U.S. at 823-27.
Christian in its message. The University declined to provide the funding, stating that such direct financial support violated the Establishment Clause. As noted in Justice O'Connor's concurring opinion, the case involved the intersection of what she called two fundamental principles, the neutral treatment of religion on the one hand, and the prohibition on direct funding of religion on the other. The Court held that the Free Speech Clause required that the university provide equal funding to the Christian group, and that doing so did not violate the Establishment Clause. The Court viewed the University's refusal to fund the religious newspaper as viewpoint discrimination, and once again emphasized a neutrality approach in finding no Establishment Clause violation. The majority did, however, carefully limit its holding to the facts, noting that the manner in which funding was received made perceptions of government endorsement unlikely, a point further emphasized in a concurring opinion by Justice O'Connor.

Therefore, in *Rosenberger*, the Court did not indicate that free speech neutrality concerns will trump Establishment Clause concerns in all instances. There may be circumstances where the resulting linkage is so great as to override even a neutral scheme. *Rosenberger* demonstrates, however, the powerful concerns of free speech neutrality. As noted in the previous section, direct government funding of overtly religious activity was very much at the heart of the Establishment Clause ratification, and most certainly has been a central focus of the Court's modern Establishment Clause jurisprudence. Thus,

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213. See id.
214. See id.
215. See id. at 847 (opinion of O'Connor, J.).
216. See id. at 830-32.
217. See id.
218. See *Rosenberger*, 515 U.S. at 838-44.
219. The majority emphasized the program's neutrality, pointing out that the Christian paper was given funding on the same basis as any other student group. This distinguished it from the types of church funding issues at the time the First Amendment was ratified. The majority also noted that the money was paid directly to the printer, and that the University had disassociated itself from the speech in question. *Id.* at 841-42.
220. Justice O'Connor was even more careful in limiting the holding, emphasizing three important limitations: first, the student group was clearly independent of the University; second, the payments went to the third-party vendor and did not go directly to the group; and third, the large number and wide variety of groups that received funding made it illogical to perceive that the university endorsed any particular view. *Id.* at 849-52.
221. See, e.g., *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. at 385 ("Establishment Clause ... absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"); *Nyquist*, 413 U.S. at 772 (Establishment Clause designed to guard against "sponsorship, financial support, and active involvement of the sovereign in religious activity").
extension of the neutrality principle to a situation involving direct funding of clearly sectarian activities suggests how strong the neutrality concern is when linked with free speech considerations.

The future status of a neutrality focus in general Establishment Clause cases is yet to be seen, although there is reason to believe, as a number of commentators have suggested, that a neutrality emphasis is becoming dominant. Whatever the status of a neutrality approach in general terms, it is clear that the Court has long and consistently applied such an approach when religious speech seeks entry into a public forum, even in the face of significant Establishment Clause concerns, as in *Rosenberger*. This approach, dating back to the early public forum cases, essentially affords religious speech equal status to other speech in the realm of public debate.

The Court's emphasis on the equal status of religious speech is the best way to assess whether resorting to religious values in politics somehow violates separation of church and state. Viewed from this perspective, which is well-established in First Amendment jurisprudence, granting religious speech equal status in political debate does not pose an Establishment Clause problem. The next subsection of this article will briefly examine the free speech rationales supporting a neutral treatment of religious content in the political arena.

**B. Neutrality, Religious Speech, and Political Participation**

The Supreme Court's consistent application of a neutrality standard to protect religious speech in the public forum, even when Establishment Clause concerns are raised, is deeply rooted in free speech doctrine. The fair and equal treatment of religious speech is an approach that goes back more than six decades and was instrumental in the emergence of modern free speech jurisprudence. Moreover, the values inherent in the equal protection of religious speech are among those that strongly support full political participation.

The application of First Amendment protection to religious speech began long before *Widmar*, finding its genesis in the public forum cases of the 1930s and 1940s. These cases, often involving religious speech, involved the extent to which citizens can engage in expression or expressive activities in various public contexts. For purposes of this article, two important principles emerged from these early public forum cases that have been consistently affirmed. First, the Court made


clear that religious speech was to be afforded the same protection as any other type of speech. A substantial number of the Court’s decisions involved religious speech and activity such as proselytizing, the sale of religious literature, and preaching. The Court did not treat the religious character of the speech differently than any other speech, a position that it has consistently held in subsequent years, as indicated by *Widmar* and other more recent public forum cases.

The second principle to emerge from these cases was that speech restrictions must be content-neutral. Although the Court recognized that reasonable time, place, and manner restrictions could be placed on speech, restrictions could not discriminate based on content. On that basis, the Court struck down various licensing schemes that gave unfettered discretion to public officials because of the possibility of viewpoint discrimination. In more recent years, the Court has extended the prohibition to any content-based regulation, stating that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”

The requirement of content-neutrality that emerged from these cases has become the bedrock of First Amendment analysis. It is accurate to state that content neutrality has become the Court’s primary analytical tool in addressing the validity of restrictions on speech. Thus, although the Court has been reticent to find content-neutral restrictions overly suppressive of speech, it has frequently struck down restrictions that draw distinctions on the basis of con-

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224. See supra note 192.
226. See, e.g., Kovaes v. Cooper, 336 U.S. 921 (1949); *Schneider*, 308 U.S. at 160-61.
227. See *Poulos*, 345 U.S. at 395; *Saia*, 334 U.S. at 558; *Cantwell*, 310 U.S. at 296; *Schneider*, 308 U.S. at 147; *Lovel*, 303 U.S. at 444.
228. Mosley, 408 U.S. at 95.
230. See, Williams, supra note 229 at 617 (“growing focus on content discrimination as the central concern of the first amendment”).
These holdings have included not only situations where specific forms of speech were singled out, but also where limited speech was offered special protection. Nevertheless, the Court has made clear, with only limited exceptions, that the government is to be neutral in its treatment of speech content.

On numerous occasions, the Court has stated that the content-neutrality requirement generally applies to subject-matter as well as viewpoint discrimination, although it applies greater scrutiny to the later. The Court has noted that even subject-matter restrictions tend to distort free and open debate, and interfere with the self-realization values of the First Amendment. The Court has indicated, however, that subject-matter restrictions might be tolerated in limited situations, such as where there is a captive audience, or in a nonpublic forum. However, these are limited exceptions to the general rule prohibiting subject-matter discrimination, and would not be applicable in the context of political deliberation and debate.

On the other hand, the Court has made clear that viewpoint restrictions go to the very heart of the First Amendment, and are almost always invalid. While reinforcing this position, the Court has used the strongest language, noting that viewpoint discrimination is a par-

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232. Although the Court’s decisions in Widmar, Mergens, Lamb’s Chapel, Pinette, and Rosenberger involved discrimination against religious speech, the Court has struck down content restrictions against other types of speech as well. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Carey v. Brown, 447 U.S. at 462; Mosley, 408 U.S. at 96.


235. See Mosley, 408 U.S. at 95-96.

236. See Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding ordinance which allowed commercial, but prohibiting political, advertising on public transportation).

237. See Cornelius v. NAACP, 473 U.S. 788 (1985) (government charitable donation campaign); Perry Educ. Ass’n v. Perry Local Educators, 460 U.S. 379 (1983) (internal school mailboxes); Greer v. Spock, 424 U.S. 828 (1976) (military base). The Court’s current public forum doctrine suggests that subject matter restrictions are permissible in nontraditional and nondonated public fora, where the only requirements are that restrictions be reasonable and viewpoint neutral. See Int’l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. at 678-79. This exception to the general prohibition on subject-matter restrictions would only apply to state owned property that does not qualify as a traditional public forum and has not been generally open to public speech.

particularly "egregious form of content discrimination," and must be very closely scrutinized. Thus, even though the Court will tolerate some limited subject-matter restrictions in a nonpublic forum, such restrictions must still be viewpoint-neutral. As a practical matter, this approach means that the normally strong presumptions against any content-based restrictions are even more rigorously applied when viewpoint restrictions are involved.

As might be expected, however, the distinction between subject-matter and viewpoint discrimination is not always clear. Members of the Court, and many commentators, have often disagreed on how to characterize a particular restriction. As a general matter, subject matter restrictions concern categories of speech, for example political or religious speech. In contrast, viewpoint restrictions concern a particular view within that category. However, which category a restriction fits into is often a matter of perspective, since the Court, and many commentators often manipulate categories in one way or another.

This same uncertainty exists, to some extent, over how limits on religious values in politics should be viewed. On the one hand, excluding religious values from politics might be viewed as a subject-matter restriction, since it would apply to all religious views and not just one particular perspective. However, as indicated in both Lamb's Chapel and Rosenberger, such a restriction is more appropriately characterized as viewpoint-based. In Lamb's Chapel, the Court characterized a prohibition on a religious group's renting of a school to show a film on parenting as a viewpoint restriction, since it prohibited the religious perspective on that particular topic. Similarly, in Rosenberger, the Court characterized the restriction as viewpoint, since the university did not prohibit religion as a general topic, but only prohib-

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239. See Rosenberger, 515 U.S. at 829.
240. See Cornelius, 473 U.S. at 806.
241. As stated by Professor Rodney Smolla:

The doctrinal difference between content-based discrimination and viewpoint-based discrimination is certainly significant. Content-based discrimination normally triggers strict scrutiny (or some other form of heightened scrutiny), often resulting in the law being held unconstitutional. But laws that engage in viewpoint discrimination have even tougher going.

SMOLLA, supra note 191, at § 3.26 (citations omitted).
242. See, e.g., Cornelius, 473 U.S. at 812-13 (refusing to decide whether the exclusion of some form of a federal employee charity drive was necessarily viewpoint based); id. at 832 (Blackmun, J., dissenting) (characterizing exclusion as viewpoint based).
243. See Williams, supra note 229 at 655.
244. See Lamb's Chapel, 508 U.S. at 393-95.
ited "[journalistic efforts with religious editorial viewpoints."\textsuperscript{245}

Thus, it was the religious perspective on a variety of subjects that was prohibited, which constituted a viewpoint restriction.\textsuperscript{246}

In the same way, any restriction on religious perspectives in politics must be considered a viewpoint restriction, since the religious viewpoint is being excluded as it relates to a variety of political topics. Although viewpoint restrictions are generally problematic, they are particularly dangerous in the realm of political speech, where self-governance concerns are strongest. Therefore, trying to eliminate the religious perspective wholesale, rather than having it compete with other ideas in determining our political identity, constitutes a viewpoint restriction lying at the heart of the First Amendment.\textsuperscript{247}

The Court, therefore, has consistently held that content-neutrality in general, and viewpoint neutrality in particular, are central to First Amendment jurisprudence. In establishing this principle, the Court has been particularly sensitive to the critical role played by free speech in self-governance, what might be loosely called the First Amendment's political vision. The Court has stressed the role of free speech in insuring a free and democratic society. Central to fulfilling this vision is the basic premise of content-neutrality, that the government should not regulate or distort the terms of the debate. Content

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\item \textsuperscript{245} Rosenberger, 515 U.S. at 831.
\item \textsuperscript{246} See id. at 830-31. Although all nine Justices agreed that the restriction in Lamb's Chapel constituted viewpoint discrimination, the four dissenting justices in Rosenberger characterized the restriction as subject matter based, emphasizing that it applied equally to all religions and even to agnostics and atheists. Therefore, it did not discriminate against any particular religious viewpoint. Id. at 895-96. As was noted by the majority, however, debate is not bipolar. The exclusion of multiple perspectives can just as easily constitute viewpoint discrimination as exclusion of just one. Id. at 831-32. What was problematic, therefore, was not the exclusion of religion as a general topic, but exclusion of various religious perspectives from other subjects of public debate that might occur through student publications. As noted by the Court, "[i]f the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic or social view." Id.; see also, Majorie Heins, Viewpoint Discrimination, 24 Hastings Const. L. Q. 99, 120-22 (1996) (agreeing with the Rosenberger majority that the restriction was viewpoint based).
\item \textsuperscript{247} Others have also noted that eliminating the religious perspective on public issues constitutes viewpoint discrimination. See Laycock, supra note 2, at 798-99. It should be emphasized that even if the issue is characterized as a subject-matter restriction, the content-neutrality principles still suggest that religion should have equal access in the political arena comparable to other views. As noted above, the Court has generally applied content-neutrality requirements to subject matter as well as viewpoint restrictions. Indeed, in Widmar v. Vincent, the Court apparently treated the denial of access to a religious group as a subject matter restriction, yet still found it violated the Free Speech Clause. See Widmar, 454 U.S. at 277. The few exceptions permitting subject matter restrictions all concern limited public fora, which certainly does not describe the political process.
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discrimination threatens free and open debate, critical to our well-being as a society and to self-governance, by "rais[ing] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."²⁴⁸

The importance of free and open debate to our self-governance and well-being was stressed in Police Department of Chicago v. Mosley,²⁴⁹ a leading content-neutrality case, where the Court noted:

To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed that right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate should be uninhibited, robust, and wide-open!'²⁵⁰

This concern relates to one of the oldest and most consistent theories offered over the years for the First Amendment: the marketplace of ideas. Under this theory, the First Amendment serves to permit free and open debate in the search for truth.²⁵¹ As stated in Mosley, this includes the search for our cultural and political identity. This theory of free speech has its roots in the writings of both John Milton and John Stuart Mill,²⁵² but became entrenched in American free speech jurisprudence through the judicial opinions of Oliver Wendell Holmes and Louis Brandeis. Holmes' famous dissent in Abrams v. United States²⁵³ clearly sets forth the marketplace theory, stating as follows:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be carried out. That at any rate is the theory of our Constitution.²⁵⁴

²⁴⁹ 408 U.S. 92 (1972).
²⁵⁰ Mosley, 408 U.S. at 95-96 (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964)).
²⁵¹ Id.
²⁵² See SMOLLA, supra note 191, at § 2.15.
²⁵³ 250 U.S. 616 (1919).
²⁵⁴ Id. at 630 (Holmes, J. dissenting). Justice Brandeis articulated a similar theory of free speech several years later in his concurring opinion in Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., joined by Holmes, J., concurring).
As noted by First Amendment scholar Rodney Smolla, the marketplace theory has come to inhabit "a compelling place in the American imagination, and in the jurisprudence of the U.S. Supreme Court."255 Although articulating it in various ways, the Court has frequently emphasized the idea that our system of free speech involves a system where all ideas can be tested on their own merits.256 This has been particularly relevant to efforts to discriminate on the basis of content, where the Court has frequently suggested a marketplace rationale in rejecting content discrimination. Thus, a primary reason for rejecting efforts to discriminate on the basis of content is the marketplace metaphor: ideas should stand or fall on their own merit, and not by government approval or disapproval. Although the marketplace metaphor applies to a variety of speech types, the Court has been particularly forceful in suggesting its relevance to politics and the democratic process. As was suggested in Mosley, the building of our "politics and culture" requires a "profound national commitment to the principle that debate should be uninhibited, robust and wide-open."257

In recent years, the marketplace of ideas rationale for the First Amendment has lost some favor with academics, and with several scholars who question its worth as a legitimate First Amendment value.258 However, other scholars continue to recognize the theory as

255. Smolla, supra note 191, at § 2:15.
256. See, e.g., Simon & Schuster, 502 U.S. at 116 (First Amendment removes government restraints on speech, "putting the decision of what views shall be voiced largely into the hands of each of us"); Leathers v. Medlock, 499 U.S. 438, 448 (1991) (stating that the danger of a tax scheme on selective media is that "it will distort the market for ideas"); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503-04 (1984) (free speech "essential to the common quest for truth"); Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) ("there is no such thing as a false idea . . . . However pernicious an opinion may seem, we depend for its correction . . . . on the competition of other ideas"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("[i]t is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail . . . ."); Sullivan, 376 U.S. at 270 (holding that the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); see also Texas v. Johnson, 491 U.S. 397, 419 (1989) (holding that the act of burning the flag was protected by the First Amendment, the Court noted that "[t]he way to preserve the flag's special role is not to punish those who feel differently . . . [but] to persuade them they are wrong.").
257. Mosley, 408 U.S. at 95-96.
258. See C. Edwin Baker, Scope of First Amendment Freedom of Speech, 25 U.C.L.A. L. Rev. 964, 974-78 (1978). Criticisms of the marketplace theory are often premised on the idea that truth will emerge from the open and free debate that the marketplace provides. However, many scholars have questioned the validity of this assertion. As noted by Professor Smolla, the marketplace theory is better understood, not as an assurance of truth, but rather as a process. He states "[f]or Holmes[,] the benefit of the marketplace was not the end but the quest, not the market's capacity to arrive at final and ultimate truth, but rather the integrity of the process. To return to his famous phrase, the value of the market was its capacity to provide 'the best of truth'." Smolla, supra note 191, at § 2.18 (emphasis in original).
at least one of several values underlying First Amendment protection. Whatever its current standing in the academic community, the Court continues to affirm the need for open debate as a central value animating First Amendment jurisprudence generally, and content-neutrality in particular. Beginning with Holmes’ dissent in Abrams, through the more recent decisions discussed in this article, the Court has consistently affirmed the marketplace rationale as an important foundation for its First Amendment jurisprudence. The primary implication of the theory is straightforward, free speech should not be restricted based on its content, and in particular, as it applies to our democratic processes.

Two other theories that have received significant support over the years are the self-governance and self-realization theories. The self-governance theory overlaps, to a considerable extent, with the marketplace of ideas, but is distinct in how it relates free speech to the political process. The theory is primarily associated with Alexander Meiklejohn who, as an early First Amendment theorist, argued that the freedom of speech is primarily grounded in the democratic process and self-governance. According to Meiklejohn, free speech is the essence of democracy and without it self-governance ceases to exist. For this reason, speech takes on special significance in the political process because it is the mechanism by which all members of society can share the truth they have found and participate in political decisions. As stated by Meiklejohn, “[i]ts purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizen of a self-governing society must deal.” Such a view requires that speech, as it relates to the political process, be completely free of content discrimination:

[T]he vital point, as stated negatively, is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. And this means that citizens . . . may not be barred because their views are thought to be false or dangerous. No plan of action shall be outlawed because someone in control thinks it is unwise, unfair, un-American . . . . And the reason for this equality of status in the field of ideas lies deep in the very foundations of the self-governing process. When men govern themselves, it is they—


261. Meiklejohn, Political Freedom, supra note 260, at 75.
and no one else—who must pass judgment upon unwisdom and unfairness and danger.262

Due to its focus on the primacy of speech for self-governance, the self-governance theory affords only limited protection to other forms of speech not related to the political process.263 For this reason, most commentators reject it as a defining First Amendment theory,264 since it limits rather than expands speech protection, and appears to be out of line with the Court’s own provision of protection to various forms of speech outside the political arena. However, there is no doubt that free speech is often viewed as particularly significant when applied to politics and the democratic process. The Supreme Court has frequently emphasized the critical role free speech plays in our political system, characterizing it as a core value at the heart of the free speech clause.265 The self-governance theory might therefore be fairly recognized as an important value supporting the right to free speech, although not the only value capable of lending such support.266

The self-governance theory would also appear to support the equal treatment of religious values in the political process, since it concerns speech centrally related to our governance. As contemplated by Meiklejohn, speech is granted near-absolute protection as it relates to the political process, no matter what its source. In this context, there is substantial convergence of the marketplace of ideas and self-governance theories. The two theories characterize attempts to exclude viewpoints from our political deliberations as a violation of the very core of free speech guarantees.267 Such concerns about exclusion would, of course, include religious values and perspectives, which are

262. MEIKLEJOHN, FREE SPEECH, supra note 260, at 26-27.
263. See Smolla supra note 191, at §2.28 (discussing the limits of self-governance theory protection).
266. See Emerson, supra note 259 at 6-9 (identifying self-governance rationales as one of four values supporting free speech).
267. See Turner Broadcasting, 512 U.S. at 641 (stating that “[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal”).
examples of the many views that share an “equality of status” in determining how we govern ourselves.

A third theory, and perhaps the leading one to gain substantial academic support in recent years, is the self-realization theory. This theory centers the value of free speech not on the search for truth, but on the value speech provides to the speaker’s autonomy, dignity, and self-fulfillment. Although this theory has been primarily advanced in academia, the Supreme Court has also alluded to similar values over the years, though perhaps in less defined terms. Thus, the Court has noted that “[t]he First Amendment serves not only the needs of the polity but also those of the human spirit - a spirit that demands self-expression.” The Court has also stated that “speaking one’s mind is a good in itself,” and emphasized that uncensored speech is necessary “to assure self-fulfillment.” The Court has not viewed these values as conflicting with the marketplace or self-governance theories, but rather as a complement. Indeed, the Court has often interwoven the various values as together supporting protection of free speech.

The self-realization value also supports reliance on religious convictions in the political process on terms equal to any other set of values. To the religious adherent, there is no set of values or beliefs more fundamental to defining one’s self than religion. Religion is not simply something one believes, but goes to defining one’s self and is inte-

268. See, e.g., MARTIN REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984); Baker, supra note 258; David Richards, Free Speech and Obscenity Law: Toward a Morality Theory of the First Amendment, 123 U. PA. L. REV. 45 (1974). See also, SMOLLA, supra note 191, at § 2.21 (stating that self-fulfillment theory has “arguably surpassed the marketplace theory as the most commonly advanced justification for freedom of speech”).


270. Bose Corp., 466 U.S. 503.

271. Mosley, 408 U.S. at 95-96.

272. See, e.g., Cohen v. California, 403 U.S. 15 (1971), wherein the Court stated:

The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id. at 26. See also, Leathers, 499 U.S. at 448-49 (quoting Cohen); Mosley, 408 U.S. at 95 (“to permit the continued building up of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed that right to express any thoughts free from government censorship”).

A number of commentators have also argued that the right to free speech is best understood as supported by multiple values. See, e.g., EMERSON, supra note 259, at 6-9; Tribe, supra note 165, at 788-89; SMOLLA, supra note 191, at § 2.39; Steven Shriffrin, Liberalism, Radicalism, and Legal Scholarship, 30 U.C.L.A. L. REV. 1103, 1197-98 (1983).
More importantly, to many people, religion is not limited to attending religious services, but rather is something that necessarily permeates all of life. Religion is the source of values, and expressing one's self necessarily involves giving expression to religion.

Any serious attempt at recognizing a self-realization value of the First Amendment, therefore, requires that religious expression be given equal protection in the political process. To require that the devout somehow sever their religious values from their political participation is asking that they cut off their basic identity from a core First Amendment activity. Not only is this action likely impossible, but it turns self-realization values on their head. If the First Amendment is designed to enhance self-realization, then people need to be able to define their expression in terms of who they are and the values that make up the core of their being. For the religious adherent, this realization necessarily means incorporating religious belief in political expression.

In sum, current free speech jurisprudence strongly supports the legitimacy of relying on religious values during the political decision making process. This naturally flows from the Court's well-established focus on content-neutrality, which requires that speech not be favored or disfavored because of its content. Moreover, any attempt to preclude religious views from political decisions is best understood as viewpoint discrimination, which has long been considered the most egregious type of free speech violation. Further, three primary values supporting free speech, the marketplace of ideas, self-governance, and self-realization, strongly indicate that religious values can legitimately serve as a basis for political decisions. Finally, not

273. For an excellent and well documented discussion of the holistic nature of religion, and its relationship to political participation, see Gedicks, supra note 16, at 432-39.
274. See Gedicks, supra note 16, at 434 (“public secularization, then, is oppressive to the believer. It requires that she divide and compartmentalize her life at the same time that her religious experiences testify that life is an indivisible and unified whole”); Audi & Wolterstorff, supra note 1, at 105 (holding that “for many religious people [i]t is their conviction that they ought to strive for wholeness, integrity, and integration, in their lives; they ought to allow the Word of God, the teachings of the Torah, the command and example of Jesus, or whatever, to shape their existence as a whole, including then, their social and political existence”).
275. See Gedicks, supra note 16, at 434 (finding that “the exclusion of religiously based arguments from politics excludes the most authentic part of a religious individual's personality from political life”).
276. For a discussion of how the self-realization and self-governance theories from the perspective of the listener support religious values in politics, see Smith, supra note 1, at 1624-33.
277. See Marshall, supra note 18, at 847 (“the epistemological attack on religion [in politics] suggests a hierarchy of beliefs that is inconsistent with First Amendment Speech Clause jurisprudence, which posits that all ideas are equal”).
only do free speech principles legitimize reliance on religious values in political decision making, but the Court has consistently stated that the neutral treatment of religious speech, as required by the First Amendment, will not be viewed as a violation of the Establishment Clause.

III. The Validity of Religiously Motivated Law

A final issue, logically following from the previous sections, is under what circumstances, if any, does religiously motivated legislation violate the Establishment Clause. The prior section focused on the validity of an individual's reliance on religious values in political decision making, showing that such a reliance violates neither the letter nor the spirit of the Establishment Clause. This section will look at whether legislation that has in fact been influenced by such motivation is in any way constitutionally infirm. As noted earlier, this issue can be viewed as a distinction between "inputs and outputs."278

Whereas few arguments have been made that religious inputs violate the Establishment Clause, arguments are occasionally offered that religiously influenced legislation violates the Establishment Clause. For the most part, these arguments have been unsuccessful. Nonetheless, they indicate the difficulty of translating "inputs into outputs." Thus, legal commentators have at times argued that laws restricting abortion or opposing gay rights violate the Establishment Clause because of their religious influence.279 The Supreme Court itself has been reluctant to make such a finding, except where traditional religious practices are involved, although Justice Stevens has articulated such a position with regard to more conventional political issues.280

Despite the longstanding and substantial engagement of religion in politics, the Court has rarely addressed the issue of whether laws influenced by religious values violate the Establishment Clause. This partly reflects the enormous difficulty of discerning the multiplicity of rationales that typically support a law. This view also illustrates, however, that as a practical matter religiously motivated political "inputs," often dispositive "inputs," do not pose Establishment Clause problems for resulting legislation. It is difficult to interpret the long-

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278. See Laycock, supra note 2, at 795.
279. See infra note 319.
280. Justice Stevens has argued in several abortion decisions that restrictions on abortion violate the Establishment Clause because they are based on theological grounds, in particular the teachings of the Catholic Church. See Casey, 505 U.S. at 914 (Stevens, J., concurring in part and dissenting in part); Webster, 492 U.S. at 560 (1989) (Stevens, J., concurring in part and dissenting in part); Thornburgh, 476 U.S. at 772-788 (Stevens, J., concurring).
standing acceptance of religious political activity and its results in any other way. Nevertheless, the Court has provided some general principles in the relatively few instances in which the issue has been raised.

As a general matter, it appears that current Establishment Clause jurisprudence requires that any government act or law serve some secular purpose. This requirement is the first prong of the Lemon tripartite test, although the requirement itself predates Lemon. Even as Lemon has waned considerably in recent years, the secular purpose requirement, by most accounts, appears to remain. Although the application of this standard has been almost entirely in the context of traditional Establishment Clause issues, such as aid to sectarian schools, religious activity in public schools, and public displays of religion, it appears applicable to any law.

However, in recognizing the need for a secular purpose, the Court has applied the requirement in a very deferential manner, particularly outside the context of mandated religious activity in public schools. Significantly, the Court has stated that a law does not violate the Establishment Clause simply because it "coincides with a particular religious belief." This holding was made clear in McGowan v. Maryland, where the Court upheld a law that required businesses to close on Sunday. The Court acknowledged that the original purpose of the law might have been religious in nature, but held that the state could legitimately now conclude that such a law furthers the "general welfare of society." Importantly, the Court emphasized that the mere fact that a law continues to coincide with religious beliefs does not make it invalid.

282. The requirement was first stated in Abington v. Schempp, 374 U.S. 203 (1963), where the Court developed the following test: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." Id. at 222. The purpose component was later applied to strike down an anti-evolution law in Epperson v. Arkansas, 393 U.S. 97, 107-09 (1968).
283. As noted in Part II of this article, the current status of the Lemon test is uncertain. In recent years, the Court has given more emphasis to a neutrality analysis than Lemon's tripartite test. The standard has not been rejected, however, and in the Court's most recent Establishment Clause case, Agostini v. Felton, 521 U.S. 203 (1997), the Court, though largely applying a neutrality standard, specifically noted that the purpose inquiry remains. Id. at 222-23.
285. Id.
286. Id. at 431.
287. Id. at 442.
288. Id.
The Court has reiterated this idea in other cases, perhaps most notably in *Harris v. McRae*,289 which involved a prohibition on use of federal medicaid funds for abortions. In *McRae*, opponents of the legislation argued that it violated the Establishment Clause because it incorporated into law the views of the Roman Catholic church on abortion.290 The Court acknowledged that the law must have a secular purpose, but found no constitutional violation, emphasizing that the amendment was supported by “traditionalist” values on abortion. Therefore, the law did not violate the Establishment Clause.291 The Court again emphasized that merely coinciding with religious beliefs did not make a law infirm.292

*McGowan* and *McRae* establish several basic points. First, the Court will apparently require a secular purpose for any legislative enactment, even when outside the traditional Establishment Clause contexts involving aid to sectarian organizations and government sponsored religious activities. Second, the mere fact that a law coincides with religious values and beliefs does not make it infirm if there is also a supporting secular purpose. Third, the Court will be very deferential in assessing a secular purpose, accepting any rational basis that might exist. Moreover, “traditional” values, which themselves might have been largely shaped by religious influences, suffice for the necessary secular purpose.

The tone of *McGowan* and *McRae* strongly suggests that legislation will be valid as long as some secular purpose exists, although neither case creates such a test. However, in more traditional Establishment Clause settings, the Court has explicitly stated that the secular purpose requirement is satisfied as long as some secular purpose exists. Though not completely clear, the Court has for the most part taken a very deferential attitude in reviewing the secular purpose requirement, usually accepting any plausible secular rationale and not inquiring into the actual degree to which religious values might have motivated the law.293 This is particularly true where the activity,

290. *Id.* at 319.
291. *Id.* at 319-20.
292. *Id.*
293. See, e.g., Bowen v. Kendrick, 487 U.S. 589, 603 (1988); Witters, 475 U.S. at 485-86; Lynch, 273 U.S. at 680; Esbeck, *The Lemon Test: Should it be Retained, Reformulated, or Rejected?*, 4 NOTRE DAME J.L. ETHICS & PUB. POL’Y 512, 515-16 (1990). Even scholars who have concerns about religion in politics recognize the highly deferential review under the secular purpose requirement. See Sullivan, *supra* note 2, at 197 n. 9; Teitel, *supra* note 4, at 769 (stating that “[i]t is easily satisfied by the assertion of any secular legislative purpose, no matter how transparent, as long as the underlying religious purpose ‘coincides’ with the asserted secular purpose”).
though involving some religious motivation, does not facially involve a coercive religious practice.

The Court’s deferential approach to the secular purpose requirement is clearly demonstrated in a long line of cases where the Court quickly, and with very little analysis, found the existence of a legislative purpose. The Court has indicated that legislation is invalid under the secular purpose requirement only where its sole motivation is to advance religion with no secular purpose. As the Court stated in *Lynch v. Donnelly*, a statute fails the secular purpose requirement only when “there [is] no question that the statute was motivated wholly by religious considerations.” Thus, the secular purpose requirement is typically met as long as there is some secular purpose, even if religious motivation was a substantial or even dominant influence behind the action. On that basis, the Court has found, with very little discussion, a secular purpose to exist in a long line of Establishment Clause cases.

Despite this general deference in assessing whether a secular purpose exists, the Court has, in a few instances, invalidated laws on a finding of no secular purpose. In *Stone v. Graham*, the Court held that the posting of the Ten Commandments in public schools had no secular purpose, and thus violated the Establishment Clause. Similarly, in *Wallace v. Jaffree*, the Court held that a required moment of silence provision at the start of the school day was unconstitutional due to the lack of a secular purpose. Both decisions rested upon a complete lack of any secular purpose, with the Court in *Wallace* stating that a statute is invalid “if it is entirely motivated by a purpose to advance religion.” In *Wallace*, the Court found the legislative re-

294. See *Aguillard*, 482 U.S. at 613 (Scalia, J., dissenting) (describing the Court’s typical case as “almost effortlessly” finding some secular purpose).

295. 465 U.S. at 680; accord, *Bowen*, 487 U.S. at 603 (suggesting that a statute violates the secular purpose requirement only if the religious purpose is the sole motivation); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (statute fails the secular purpose requirement “if it is entirely motivated by a purpose to advance religion”).

296. *Id.* at 680.


299. *Id.* at 41.


301. *Id.* at 56-60.

302. *Id.* at 56.
cord showed numerous statements indicating the only purpose of the statute was to promote school prayer. Moreover, the state failed to present any evidence of a secular purpose. In Stone, the Court rejected the state’s rather weak attempt to establish a secular purpose by relating the Ten Commandments to the development of Western legal traditions, noting that its “pre-eminent purpose” was “plainly religious.”

The other two cases where the Court invalidated laws for lack of a secular purpose both involved perceived efforts to teach creationism in public schools. In Epperson v. Arkansas, the Court struck down a statute which prohibited the teaching of evolution in schools, stating that it was clearly designed to further the teaching of religious dogma. No purpose was offered other than teaching religious doctrine. The Court again used the secular purpose requirement in Edwards v. Aguillar to invalidate a statute that required “balanced treatment” of creation-science whenever evolution was taught. The Court stated that “[t]he pre-eminent purpose of the Louisiana statute was clearly to advance the religious viewpoint that a supernatural being created humankind.” This argument was in part reinforced by the statute’s legislative history, which the Court concluded reflected a clear intent to advance a religious perspective.

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303. The Court noted that the statute’s sponsor read into the legislative record a statement that the bill was an “effort to return voluntary prayer to the public schools, a position he reiterated before the district court.” Id. at 56-57.

304. Id. at 57.

305. Stone, 449 U.S. at 41. The state had attempted to create a secular purpose by requiring that the following inscription be placed at the bottom of each display: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western civilization and the Common Law of the United States.” Id.

306. Id. at 41-42. In stating that the posting of the Ten Commandments was “plainly religious in nature,” the Court acknowledged that the second half of the Commandments concerned “arguably secular matters, such as honoring one’s parents, killing or murder, adultery, stealing, false witness, and covetousness.” It did note, however, that the first part of the Commandments concerned more clearly religious duties: “worshiping the Lord God alone, avoiding idolatry, not using the Lord’s name in vain, and observing the Sabbath Day.” Id. Thus, even in such a core religious document as the Ten Commandments, the Court seemed to distinguish between inherently religious activities and those explainable on secular grounds.


308. Id. at 107-09.


310. Id. at 590.

311. Id. at 591-92. After reviewing the legislative record, specifically statements made by the Act’s sponsor, the Court stated that “[t]he legislative history documents that the Act’s primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety.” Id. at 592.
These four cases indicate that the Court has on occasion scrutinized the actual reasons behind a statute and been willing to invalidate legislation for lack of a secular purpose. However, these cases do little to undermine the highly deferential approach typically taken by the Court. Three of the four cases, Epperson, Stone, and Wallace, were predicated upon the absence of any secular purpose. In Wallace, the Court went so far as to articulate the standard often stated in other cases that a statute fails the secular purpose test only "if it is entirely motivated by a purpose to advance religion."\(^3\) Edwards, on the other hand, might be interpreted as mandating invalidity if the purpose is pre-eminently religious, while requiring some scrutiny into the proffered secular purposes. However, Edwards was largely based on a legislative history that clearly indicated that the statute was designed to advance religious instruction in the schools. In three of the four cases, the Court relied on a clear legislative history to establish the absence of a secular purpose, whereas in Stone, only the weakest attempt was made to provide a secular purpose.

These cases must also be qualified by the fact that they involved coercive religious acts or instruction in the context of public elementary and secondary schools, traditionally a highly sensitive Establishment Clause arena.\(^3\) That fact was emphasized in both Epperson\(^3\) and Edwards, with the Court in Edwards noting that it "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."\(^3\) Moreover, the cases each involved what the Court saw as facially overt religious practices and instruction, such as the posting of the Ten Commandments, mandated moments of silence to facilitate prayer, and instruction in creationism. To mandate such practices or instruction falls within the Establishment Clause is quite distinct from permitting religious values to inform political decisions.

Thus, it has only been in the context of mandated religious activity in public schools that the Court has invalidated government acts under the secular purpose requirement. In the overwhelming majority of cases, the Court has readily found a secular purpose to exist, even when it has otherwise held the government action unconstitu-

\(^{312}\) Wallace, 472 U.S. at 56.

\(^{313}\) The Court has frequently emphasized that there are heightened Establishment Clause concerns in the context of public elementary and secondary schools that require greater judicial vigilance. See, e.g., Lee v. Weisman, 505 U.S. at 592; Aguilar, 482 U.S. at 583-84; Mergens, 496 U.S. at 261-62 (Kennedy, J., concurring).

\(^{314}\) Epperson, 393 U.S. at 104.

\(^{315}\) Aguilar, 482 U.S. at 583-84.
tional under the Establishment Clause. The Court has been deferential to the stated purposes, and has consistently stated the standard as requiring only that there be some secular grounds for the action, declining to scrutinize whether or not the actions were predominantly religious. The fact that a law coincides with religious values, and in fact might to some degree be tied to those values, is inconsequential if there is some supporting secular purpose.

Particularly significant in this respect have been the few cases where the secular purpose rationale has been addressed in a more conventional political context. As noted earlier, the Court rejected an Establishment Clause argument in McRae v. Harris, finding that a prohibition on the use of federal funds for abortions was constitutional. The Court’s analysis assumed the need for a secular purpose, but rather quickly found such a purpose in the “traditional” views on abortion which coincided with religious views. The fact that the amendment’s sponsor, Henry Hyde, was a devout Catholic, or that the Catholic Church had taken a strong and clearly influential position against abortion did not make a difference. Moreover, the fact that the traditional position was itself undoubtedly heavily influenced by religious values apparently did not pose a problem.

There have been, of course, arguments made to more closely scrutinize the influence of religion on politics, and to find Establishment Clause violations where religion is found to have a significant impact. Although this has largely been confined to academic commentary, it has on occasion also been suggested by Justice Stevens, who several

316. See, e.g., Mueller, 463 U.S. at 394-95; Larkin, 459 U.S. at 123-24; Lemon, 403 U.S. at 603.
317. See Lynch, 465 U.S. at 680 (government action fails secular purpose requirement only when “motivated wholly by religious considerations”); Wallace, 472 U.S. at 56 (Court action fails secular purpose “if it is entirely motivated by a purpose to advance religion”).
318. 448 U.S. at 319-20.
times has argued that restrictions on the right to an abortion violate the Establishment Clause because they incorporate the teachings of the Catholic Church.320

These sentiments, though far from commanding a majority of the Court, are nonetheless troubling in several respects. Not only do such arguments require courts to discern and sort out legislative motive, a difficult task under the best of circumstances,321 but they work to undermine the free speech guarantees that protect religiously informed "inputs" into the political process. In order to take seriously the right of citizens to rely on religious convictions in the political process, a right firmly grounded in the First Amendment and long reflected in the political practices of our nation, courts must accept the validity of most laws that might result from such inputs. To protect "inputs," but disallow them if they are effective in changing law, is problematic.

This reflects the tension that exists, at least in this context, between "inputs and outputs." "Inputs," which are clearly protected under the First Amendment speech guarantees, at some point potentially become "outputs" in the form of law, which are subject to some review under the Establishment Clause. Although current law requires some secular purpose, which is arguably in tension with the idea of protected "inputs," the highly deferential manner in which the test is applied is quite protective of religious political expression. Aside from the sensitive area of coercive and overtly religious practices in public schools, where the Court has appropriately shown a modest degree of scrutiny, the Court has consistently refused to invalidate laws because of religious influence or purpose. Rather, the Court has invalidated government acts based on their actual impact, which has been limited to situations involving direct financial aid to religion, coercive and overtly religious practices, and clear religious symbolism.

Current law, therefore, requires some ostensible secular purpose for any legislation, however, the Court has applied the test in a highly deferential manner outside the context of public schools. As a practical matter, the current standard poses little impediment to religious values in the political process, since a variety of values and rationales

320. See Casey, 505 U.S. at 914 (Stevens, J., concurring in part and dissenting in part); Webster, 492 U.S. at 566-72 (Stevens, J., concurring in part and dissenting in part); Thornburgh, 476 U.S. at 778 (Stevens, J., concurring).

321. See Tribe, supra note 165, at 1280 (noting the difficulty of discerning religious motives of legislators, especially since "many legislative motives will be partly religious, and that few if any will be wholly so."); see also, Eisgruber, supra note 122, at 379-80 (discussing the difficulty of reviewing legislation for a proper secular purpose).
are inevitably intertwined in any legislation.\textsuperscript{322} Even if religious views are preeminent, the Court would uphold legislation if a plausible secular rationale for the statute exists.\textsuperscript{323}

Although the current standard is protective, it may be viewed as discounting religious speech by requiring some accompanying secular rationale. An alternative approach suggested by several commentators would focus on the legislative impact, rather than the motivation behind the legislation.\textsuperscript{324} This approach would invalidate laws which mandate or coerce overtly religious acts, such as worship, Bible reading, or prayer. However, such a test would not invalidate legislation simply because it was informed by religious values. The focus would not be on the motivational source, but rather on the activity itself, with restrictions being limited to inherently religious activity.\textsuperscript{325}

In theory, eliminating the secular purpose inquiry and focusing only on the impact of a law would be a significant change. In reality, however, such an approach would reflect little change from current practice.\textsuperscript{326} As noted above, the Court's highly deferential approach to the secular purpose requirement has, in most contexts, resulted in an essentially similar approach. The one exception would be the Court's

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\item See Tribe, supra note 165, at 1280 (noting that legislation is often partly supported by religious motives, and rarely, if ever, wholly supported by such motives).
\item See Lynch, 465 U.S. at 680.
\item See Smith, supra note 1, at 1634-39; Laycock, supra note 2, at 811-12; see also, Esbeck, supra note 135 at 37-38 & n.147 (suggesting a distinction between "inherently religious" activity, such as "worship, religious teaching, prayer, proselytizing, or devotional Bible reading," which the government cannot support under the Establishment Clause, and mere overlap between "statutory purpose and religious belief," which is permitted); Jesse H. Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. REV. 673, 686 (1980) (religious purpose alone should not constitute an Establishment Clause violation, rather government action taken for a religious purpose that is "likely to result in coercing, compromising or influencing religious beliefs"). For a rejection of this position, see Perry, Religion in Politics, supra note 1 at 35-36; Greene, supra note 1, at 1629-30.
\item See Stone, 449 U.S. at 41-42 (drawing a distinction between those portions of the Ten Commandments which concerned "arguably secular matters," such as the prohibitions on murder, adultery, false witness, theft, and covetousness, and those which were inherently religious, such as the commands to worship, avoid idolatry, not use the Lord's name in vain, and keeping the Sabbath).
\item In fact, professor Richard Myers has suggested that this is precisely what the Court does. After reviewing the secular purposes cases, Myers states as follows:

The cases in which the Court has relied on the absence of a secular purpose differ from [religious political activity] because of the Court's perception of the subject matter of the legislation. If it views the legislation as inherently religious, such as requiring the teachings of creationism, posting of the Ten Commandments, or prayer in the public schools, then the Court will occasionally invoke the secular purpose prong of the Lemon test. The Court's principal concern in these contexts is not religious motivations, as such, but the character of the legislation.

\end{enumerate}
\end{footnotesize}
concern about religious motivation in the highly sensitive area of elementary and secondary public schools. To limit inquiries into purpose and motivation to the public school context, and defer in more conventional political contexts recognizes the fact that religious values are simply one ground upon which to decide public issues.\footnote{327}

There are several distinct advantages to continuing a highly deferential approach in evaluating the secular purpose requirement, or even abandoning it altogether in more conventional political settings. First, a deferential approach avoids the potential disenfranchisement of religious adherents that might occur if a less deferential approach were taken. Political choice inevitably involves ethical/moral reflection. For the devout, the basis for such reflection is religion. For many people, it is impossible to sever the religious component from one’s identity and values.\footnote{328} To scrutinize laws for religious influences would in effect disenfranchise a significant portion of the population from the political process.\footnote{329}

Second, a deferential approach to legislative religious purpose is more consistent with treating religious views in a neutral and equal manner to other political perspectives. As noted previously, the

\footnote{327. Similarly, it may be argued that religiously motivated actions have a secular dimension when they address “worldly” matters. Professor Steven Smith makes this point quite forcefully in discussing two different concepts of “secular,” which he labels the “exclusionary” and the “inclusive.” The “exclusionary” concept defines secular by what it excludes, that is, anything religious. Thus, the secular is only what cannot be considered religious, a problematic conception when religious values permeate almost all dimensions of life. The “inclusive” defines secular by what it encompasses, with “secular beliefs, values, practices, or facts [being] those that pertain to the affairs of this world or life.” Professor Smith concludes as follows:

There is a vast set of beliefs, values, and practices that occur within and are plainly relevant to terrestrial concerns but are nonetheless “religious” in the sense they are central to institutions and belief systems generally regarded as religious. Religions have commonly shown intense concern for the temporal matters, including concern for the poor, earthly justice and virtue, and political liberation. Without denying the religious character of such beliefs, values, and practices, a positive or inclusive understanding of the term secular would also treat them as secular, because they are pertinent to worldly concerns.

Smith, supra note 17, at 1000-01. This approach would also limit Establishment Clause concerns to inherently religious activities, recognizing that when religious values are brought to more conventional political settings they are serving a secular as well as a religious function.

328. See Gedicks, supra note 16, at 432-39; Audi & Wolterstorff, supra note 1, at 105.

329. See Michael Scaperlanda, Who is my Neighbor? An Essay on Immigrants, Welfare Reform, and the Constitution, 29 CONN. L. REV. 1587, 1616 (1997) (prohibiting religion in politics would disenfranchise religious believers); Idelman, supra note 1, at 358-59 (removing religion from politics and public square would disenfranchise religious citizens and result in their alienation); Smith, supra note 17, at 999 (“[b]ecause citizens who hold deeply religious world views that pervade their value systems and underlie their political perspectives would be incapable of complying with the secularism requirement, courts might effectively exclude them from participating in the political process altogether”).}
Court has long stated that religious views should be treated equally to others, neither favored nor disfavored. This concept of neutrality, which is at the heart of Establishment Clause jurisprudence, especially with respect to concerns of free speech, is undermined if religious motivation is a disqualifying factor in legislation. Such an approach would constitute indirect viewpoint discrimination by subjecting the religious perspective on a host of political issues to a disability not placed on any other perspective.\textsuperscript{330}

Third, to scrutinize legislation for religious motivation would conflict with the values animating the right to free speech, such as the marketplace of ideas and self-realization. This idea is particularly true with regard to the role free speech plays in self-governance. The Court has frequently affirmed such a concept by requiring that citizens be free to express their views without restraint in the political arena.\textsuperscript{331} This value is substantially compromised, however, if resulting legislation is potentially infirm because of religious influences.\textsuperscript{332}

Fourth, as a practical matter, a deferential approach to reviewing religious motivation is consistent with the longstanding involvement of religion in America's political life. It is hard to take seriously any assertion that religion cannot be the basis for law considering the frequent and at times high profile role that religion has had in our political and social life.\textsuperscript{333} Although religious views have often played a "pre- eminent" role, to borrow language from Edwards, there is no suggestion that the resulting legal change was invalid on that basis.

For these reasons, courts should continue to apply a highly deferential approach to assessing secular purpose, and consider eliminating the inquiry altogether in more conventional political contexts. This does not mean that laws premised upon, or influenced by, religious convictions are immune from other constitutional restraints. Rather, this approach suggests that the mere fact a law was influenced by, or reflects religious values, should not in and of itself be a disqualifying

\textsuperscript{330} See Scaperlanda, supra note 329, at 1615; Tribe, supra note 165, at 1280 ("actions that discourage religious involvement in politics raise free exercise concerns, by imposing a disability on the basis of religious conduct and, perhaps, belief"); see also Laycock, supra note 2, at 812 (evaluating legislative outputs for religious purposes restricts religious political "inputs" and thereby does "indirectly what cannot be done directly").

\textsuperscript{331} See notes 238-67 supra, and accompanying text.

\textsuperscript{332} See Tribe, supra note 165, at 1279-80 (attempting to reduce the impact of religious beliefs on political participation would "undercut" our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open").

\textsuperscript{333} See e.g., supra note 9; Noll, One Nation, supra note 5, see also, Laycock, supra note 2, at 803 ("[m]any of the books and articles that would bar religious arguments from political debate do not even acknowledge this history [of extensive religious involvement in politics], yet it is absolutely central to their claim that they somehow explain this history away").
feature. Certainly, to the extent a law mandates religious practices or observances, or impermissibly aids religion, it may violate the Establishment Clause. For example, school prayer, Bible reading, mandated instruction in religious dogma, government sponsorship of religious displays, financial support of churches, and other similar activities can be seen as violating the Constitution, not because of their religious motivation, but rather because they force involuntary religious observances. The coercive religious act itself, rather than the motivation behind it, creates an Establishment Clause problem.

Moreover, religiously based laws might violate other constitutional provisions. Most obvious would be a religiously influenced law attempting to prohibit abortions. Although the religious motivation should be irrelevant to the validity of the law, it would be invalid because it violated the recognized constitutional right to an abortion. Similarly, religious resistance to gay rights might be subject to privacy interests or recognition of gays as a quasi-suspect class under equal protection review. These inquiries illustrate the fact that religiously influenced laws are subject to the same ground rules as other laws.

Finally, the most fundamental and significant control on religious activity was anticipated by Madison in Federalist Number 10. Madison notes that religious factions, similar to other factions that might exist, are subject to the controls inherent in our republican form of government. This position subjects political ideas, religious or otherwise, to a deliberative decision-making process in which advocates of any position must convince others to join their position in order to

336. The use of the abortion and gay rights examples in this paragraph are not meant to suggest that political activity informed by religious belief would necessarily be opposed to abortion and gay rights. Certainly, a significant number of conservative Christians have been politically involved in such a manner. Nevertheless, a significant number of religious people support such rights. Indeed, as a practical matter religious political perspectives on most issues will run the full spectrum, defying labels such as liberal or conservative. See Skilten, supra note 3 (discussing diversity of political positions of those within Christian tradition); Fowler, supra note 9, at 77-110 (discussing variety of religious political traditions); Shriver, supra note 11, at 86-87 (discussing extensive and primarily liberal political agendas of mainline denominations in the 1990s). The abortion and gay rights issues were chosen because they are two issues on which people have often focused while advocating removal of religious beliefs from politics. See supra note 299. It should be emphasized, however, that proposals to remove religion from politics are not limited to those issues, and as typically expressed, would make resort to religious values inappropriate to a number of political issues.
effect change. This process involves both compromise and an assessment of the merits of any proposal, with the result being moderation of extreme positions and pursuit of common ground. In this sense, the marketplace of ideas itself acts as a control against any type of extremism. As noted by Justice Brennan's concurrence in *McDaniel v. Paty*, “[t]he antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls.”

This view, where religious values must stand or fall on an equal basis with all other political perspectives, is most consistent with First Amendment values, our political philosophy, and traditions as a people. Such an approach does not disqualify or burden any one position based on its views, but equally subjects all to the marketplace of ideas. Religious values should have full entry into the political arena, and legislation resulting from or influenced by such values should not be viewed as infirm under the Establishment Clause on the basis of the religious motivation alone.

**IV. Conclusion**

In a recent issue of *Free Inquiry* magazine, Alan Dershowitz laments what he considers America's often unreceptive attitude toward unbelievers, including their role in the political arena. In arguing that “[t]he world must be made safe and secure for disbelievers,” Dershowitz states:

Atheists and agnostics . . . are every bit as qualified to hold public office as are people who believe in an intervening God. Disbelievers should not accept second-class status in a nation whose traditions and laws forbid tests of faith as a condition of citizenship or office holding.

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337. See *Federalist* No. 10, supra note 117, at 82-84. Madison noted that by delegating decisions “to a small body of citizens elected by the rest” it “... refine[d] and enlarge[d] the public views by passing them through the medium of a chosen body of citizens.” *Id.* Moreover, to the extent that elected officials might themselves, in some cases, be particularly factious and “destroy the trust of the people,” this would be offset by the larger territory a republican government could govern, taking “in a greater variety of parties and interests . . . [making] it less probable that a majority of the whole will have a common motive to invade the rights of other citizens . . . .” *Id.*


339. Alan M. Dershowitz, *Taking Disbelief Out of the Closet*, *Free Inquiry* 6, 7 (1999). Dershowitz's short op-ed piece concerns what he perceives to be the reluctance of Americans in public life to identify themselves as “atheists, agnostics, skeptics, or humanists.” He views this as a particular problem in politics, with an increasing pressure for American politicians to “publicly advertise their religious beliefs.” Although others have written about a perceived pressure in the opposite direction, most notably Stephen Carter in *The Culture of Disbelief*, supra note 4, I do
I concur. The thesis of this article is relatively simple and closely aligned with Dershowitz’s own concerns. Briefly stated, the thesis of this article is that our constitutional structure established a secular state that is neutral towards religion. In this sense, religious values should be viewed on the same level as any other value in terms of their political voice. Thus, religious norms should have entry into politics on the same basis as any other ethical/moral belief system, and for that reason can be the basis for law.

Such a vision is supported both by the historical context of our founding, the Constitution, and First Amendment jurisprudence. Although it is unlikely that religion was the dominant ideology behind our founding and resulting constitutional order, it was nonetheless an important contributing factor. More importantly, religion was closely intertwined with politics at our founding on various levels. Religion provided ideological support, lent its vocabulary to other ideologies, and provided a major motivation for revolution. Moreover, despite the difficulty of discerning the clear original intent of the First Amendment’s religion clauses, the historical context of the clauses and the rationales for their adoption indicate that they were not intended to banish religion from political life.

First Amendment jurisprudence and its supporting values also strongly support a neutral treatment of religious norms in the political process. Not only has the Supreme Court consistently applied a neutrality analysis to the Establishment Clause when religious speech is involved, but any attempt to preclude religious speech from politics is best understood as viewpoint discrimination, lying at the very heart of the Free Speech Clause. Moreover, the values underlying protection of free speech strongly require that religious values have access to the political process. Both the marketplace of ideas and self-governance theories state that ideas or values should not be excluded from the marketplace. Rather, all ideas and values should compete with all other ideas on their own merits. This is particularly true with regard to the political process, where the Court and commentators have consistently noted the need for open and free debate. Self-realization values similarly support the involvement of religion in politics. To require the devout to sever their religious values from political partici-
pation would require them to cut off their basic identity from a core First Amendment activity.

For these reasons, recent arguments that the Constitution in general, and the Establishment Clause in particular, require that religious values be removed from the political process are misplaced. Neither the letter nor the spirit of the First Amendment requires such a result. In fact, quite the opposite is true. Religious values can inform political reflection and direct political involvement the same as any other value system. Allowing religious values to influence politics includes not only an individual's right to rely on religious beliefs and values in helping form political opinions, but also recognizes the legitimacy of laws influenced by such beliefs.

This, of course, is the story of our nation. From our founding to the present day, religion has been a frequent and central participant in our political life. Religion's effect on political life has included highly visible movements, ranging from the noble to the embarrassing. Far more significant, however, is religion's role as a source of ethical and moral norms for the devout, who use religious expression in the political choices they make. At this level, religion and politics most commonly, and understandably, intersect. To suggest that such people set aside their religious convictions when entering the political arena is not only impossible to achieve, but is counter to our traditions as a nation and the values at the heart of the Constitution.