Doubting America's Sacred Duopoly: Disestablishment Theory and the Two-Party System

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If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

—Justice Robert Jackson,
Board of Education v. Barnette

[Congress, by passing the Federal Election Campaign Act,] has enshrined the Republican and Democratic Parties in a permanently preferred position.

—Chief Justice William Rehnquist
Buckley v. Valeo

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.

—James Madison,
Federalist, no. 47

I. Introduction

The American political system depends upon the First Amendment to protect diversity of thought, a concept underlying the free marketplace of ideas that serves as a check against the immense power vested in the government. The founders, recognizing the diversity of their growing nation, designed a constitution that protects against the institutionalization of a particular viewpoint or group. The founders

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knew that such unquestioned dominance leads to the variety of oppressions they experienced prior to the revolution. They built protections into the structure of the national government and the codified rights essential for the citizenry. With these barriers in place, the founders trusted that future citizens would be able to defend themselves against government coercion and abuse of power.

Since then the wall against misuse of power has worn thin by strategic, yet benevolent, political behavior primarily by elected officials and their appointees.[1] The structural barriers against the consolidation and abuse of power are routinely and baldly breached. The ability of the citizenry to safeguard their liberty through the process of elections has atrophied.

The most blatant example is the decay of traditional democratic values underlying our electoral process. Our highly regarded republican democracy has been infected by a strain of election law that effectively entrenches two groups in power—the Democratic and Republican parties. These laws grant competitive advantage to the two major parties and violate the democratic principles held by the founders and embodied in the First Amendment. Over the past hundred and forty years they have exercised their duopoly of power to further entrench themselves via electoral legislation. When public policy ideas are sifted through only two partisan filters the remaining ideas are inevitably limited. This limitation is a serious encroachment on the concept of free competition of ideas and the principle of limited government through decentralization of power.

The major parties have continued their dominance by limiting potential competition. The Democratic and Republican legislatures have virtually ensured reelection by tailoring election law to their advantage. This anticompetitive manipulation of election laws has created a state of political segregation—granting electoral privileges to a favored class of "major parties" and relegating outsiders to second-class electoral status as "minor parties" and independents. This creates privileges for certain groups in the political realm reminiscent of the exclusionary Jim Crow style legislation and policies. Instead of granting accommodation to

[1] "Each part of the legal framework, each rule of the electoral game, places a strategic limit on the campaign. Each adjustment in any one rule may affect one party or candidate more than another, and it may enlarge or reduce the party's role in the electoral process. Thus, electoral institutions, however much they are taken for granted, are much more than a neutral presence in the campaign and election. Political parties around the world have been quick to realize the possible advantages to be gained by selective tinkering with this framework, and the major American political parties are no exception." PAUL ALLEN BECK, PARTY POLITICS IN AMERICA 247 (8th ed. 1997). *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998). "But politics shares with all markets a vulnerability to anticompetitive behavior. In political markets, anticompetitive entities alter the rules of engagement to protect established powers from the risk of successful challenge." *Id.*

"Whites Only," ballot access laws, for example, essentially grant automatic access to "major parties only."[2]

The harms posed by political exclusion are increased exponentially when one considers that the exclusion, preference, and discrimination is in the area of electoral law—the very process of allocating power over *every* right Americans enjoy.[3] The fairness and integrity of the electoral system is the final line of defense between the people and the misuse of power feared by the founders. A fair electoral process with equal participation among citizens is necessary to protect all other rights and freedoms by ensuring the accountability of the government. The political duopoly flies in the face of this basic tenet.

Nonetheless, the founders' noble experiment was not a complete failure in the prevention of powerful hegemonies. In the realm of religious pluralism, Americans have enjoyed close to the ideal version of the free marketplace envisioned by the founders. No one (or two) sect(s) has achieved dominance throughout American society. No one or two sects have wielded the authority of the government to minimize dissent and enforce conformity. By keeping the power out of the hands of the few, the diverse groups that form the landscape of religious life in America—from Atheists to Muslims, Catholics to Jews, Baptists to Hindus—have been able to believe and enjoy equal liberty regardless of religious group membership. This great freedom, largely taken for granted, is largely a result of the enforcement of the Establishment Clause of the First Amendment.

This article argues that the Establishment Clause analysis and principles used to enforce government neutrality among religions (which I like to refer to as "Disestablishment Theory"), can similarly be applied to the electoral process. Disestablishment theory may provide the legal analytical tool necessary to confront the anticompetitive legislation

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[2] By this analogy I do not intend to minimize the oppression experienced by racial minorities throughout the nation's history, but to suggest that exclusionary policies in any form are just as vile and repugnant to the principle of equal participation embodied in the Constitution. In fact, many lessons from the Civil Rights Movement are easily applicable in the case of electoral laws creating a political caste system. For example, on public officials' tendency to enforce the status quo of exclusion, Dr. Martin Luther King, Jr. wrote:

> Some have asked, "Why didn't you give the new administration time to act?" The only answer that I can give to this inquiry is that the new administration must be prodded about as much as the outgoing one before it acts. We will be sadly mistaken if we feel that the election of Mr. Boutwell is much more articulate and gentle than Mr. Connor, they are both segregationists, dedicated to the task of maintaining the status quo.

Martin Luther King, Jr., *Letter from A Birmingham Jail, in* I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 87 (James Melvin Washington, ed. 1992).

[3] Political philosopher Hannah Arendt wrote: "It was not out of a desire for freedom that people eventually demanded their share in government or admission to the political realm, but out of mistrust in those who held power over their life and goods." Hannah Arendt, *What is Freedom?, in* THE PORTABLE HANNAH ARENDT 438, 444 (Peter Baehr ed., 2000).

enacted to further entrench the Democratic and Republican parties in power and to reinforce the ever-weakening barriers the founders erected to prevent misuse and over-accumulation of power.

In Part II, I shall describe the disestablishment theory by examining the relationship between the institutions of church and state throughout history. Then, I continue the description of disestablishment theory by examining the creation and enforcement of the First Amendment's Establishment Clause.

In Part III, I will describe how the courts have allowed the two major parties to effectively "establish" themselves by denying fair and open competition in the electoral process.

Finally, in Part IV, I will discuss how other legal scholars have addressed political uses of Establishment Clause reasoning. Following that, I will explain how disestablishment theory can be used in legal analysis to ensure the fairness and competitiveness of the electoral process. I will conclude by noting how this can prevent the current two-party system's pollution of America's representative democracy.

II. Establishment of Religion

A. History of Disestablishment Theory

Our society largely takes for granted the need for separation between church and state. Rarely do we examine the reasons behind this concept. I will briefly present the history of religious institutions' involvement in secular governing to show how the policy of separation became popular and how disestablishment theory is a useful tool to protect the liberties of the people and limit the power of government.

1. Pre-Colonial European Church-State Relations

European history is rife with conflict between religious and state authority. The beginning of the intrusion of religion into Western secular governments can be traced to the reign of Roman Emperor Constantine in the fourth century.[4] Constantine's conversion to Christianity led to Christianity becoming the official religion of the Roman Empire.[5] After moving the capital from Rome in the West to Constantinople in the East, Constantine exerted almost absolute authority over the church in the East but less in the West.[6] This led to the divergence of the ecclesiastical tradition of the East and West. The first state establishment of

[4] BRIAN TIERNEY, THE CRISIS OF CHURCH AND STATE: 1050-1300 8 (1988).
[5] *Id.*
[6] *Id.* at 9.

Christianity was complete soon after as Theodosius I declared that the Christian religion was the only religion recognized by the empire.[7]

Imperial authority soon lost its welcome in the ecclesiastical realm in Western Europe. When the empire asserted that everything was subject to the power of the emperor, St. Ambrose of Milan disagreed: "Palaces belong to the emperor, churches to the priesthood . . . . Where matters of faith are concerned it is the custom for bishops to judge Christian emperors, not for Emperors to judge bishops."[8]

The first major theory of the relationship between church and state was developed by St. Augustine.[9] St. Augustine divides existence into the City of God, representing heaven, and the City of Man composed of all earthly kingdoms or governments.[10] The Church, wrote St. Augustine, is the representative of the City of God on earth and its presence on earth creates inevitable tensions with the State.[11] The Church should influence the City of Man without being controlled by it and remain separate without becoming completely removed.[12] St. Augustine concluded that whenever there is a conflict between the commands of the State and Church that the Church should be followed even at the price of martyrdom.[13] Since the Church is closer to God it has the ultimate authority and should control regardless of the subject of the dispute.[14] The theology of St. Augustine became a major basis for church-state relations in the Middle Ages.[15]

The Church's expanding authority over the government became evident with the rise of Charlemagne.[16] In 753, Pope Stephen, seeking to repel the Lombards from threatening Rome encouraged Pepin, King of the Franks, to invade and return to the Roman See the lands taken by the Lombards.[17] This successful strategy led to the first papal claim of sovereignty in central Italy.[18] The Church then completed their "conquest" by splitting from the Eastern Roman Empire by crowning Pepin's son Charlemagne emperor.[19]

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[7] H. Wayne House, *A Tale of Two Kingdoms: Can There be Peaceful Coexistence of Religion with the Secular State?*, 12 BYU J. PUB. L. 203, 222 (1999).
[8] TIERNEY, *supra* note 4, at 9.
[9] *Id.*; RELIGION AND POLITICS: MAJOR THINKERS ON THE RELATION OF CHURCH AND STATE 11 (Garrett Ward Sheldon, ed., 1990)
[10] *Id.*
[11] *Id.*
[12] *Id.* at 12.
[13] *Id.*
[14] *Id.*
[15] RELIGION AND POLITICS: MAJOR THINKERS ON THE RELATION OF CHURCH AND STATE 13 (Garrett Ward Sheldon, ed., 1990).
[16] TIERNEY, *supra* note 4, at 17.
[17] *Id.*
[18] *Id.*
[19] *Id.*

By crowning Charlemagne, Pope Leo established the tradition that a papal coronation was essential to the legitimacy of an emperor.[20] This tradition continued throughout Europe as kings were "anointed with elaborate religious ceremonies that closely paralleled the consecration of a bishop; they were regarded as ministers of God set over prelates and people alike; they were hailed as vicars of Christ.[21] Indeed, the relationship went both ways as kings, seeking to ensure that successors to a noble's fief would be loyal to the crown, granted bishops governmental authority over large territories.[22] It became routine in Europe for kings to choose bishops, grant them fiefs, and give them rings and pastoral staffs symbolizing Episcopal office.[23] In this era, the conflation of church and state authority was blatant and acceptable.

Soon the relationship between religious and secular authorities strained. During the childhood of King Henry IV, the Church, led by Pope Gregory VII, attempted to impose reforms.[24] The most controversial reform was Gregory VII's re-enactment of the decree against lay investiture in 1075.[25] Lay investiture was the practice of allowing lay people, including kings, to appoint bishops.[26] King Henry refused to give up his right to appoint church leaders, including popes.[27] The disagreement eventually led to King Henry installing a new pope and Gregory VII dying in exile.[28]

The Reformation period saw a dramatic transformation in the relationship between church and state. Martin Luther, the leading figure of the Protestant Reformation, vigorously objected to the intermingling of church and state.[29] Luther accused the Catholic Church of interfering with the operation of the secular government.[30] Luther revealed that the Church has been able to avoid any check on its influence over governments:

> The Romanists have very cleverly built three walls around themselves. Hitherto they have protected themselves by these walls in such a way that

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[20] *Id.* at 18.
[21] *Id.* at 25.
[22] TIERNEY, *supra* note 4, at 25.
[23] *See id.* (noting other examples of reciprocal exertion of authority between the Church and the State in Europe include: King Henry III of Germany's dismissing three would-be popes and installing one of his choice).
[24] *Id.* at 45.
[25] *Id.* at 53.
[26] *Id.* at 51.
[27] *Id.* at 45. For a complete description of the dispute between Henry IV and Gregory VII, see generally *id.*
[28] TIERNEY, *supra* note 4, at 55.
[29] RELIGION AND POLITICS, *supra* note 9, at 57.
[30] *Id.*

> no one has been able to reform them. As a result, the whole of Christendom has fallen abominable.
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> In the first place, when pressed by the temporal power they have made decrees and declared that the temporal power had no jurisdiction over them, but that, on the contrary, the spiritual power is above the temporal. In the second place, when the attempt is made to reprove them with the Scriptures, they raise the objection that only the pope may interpret the Scriptures. In the third place, if threatened with a council, their story is that no one may summon a council but the pope.
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> In this way they have cunningly stolen our three rods from us, that they may go unpunished. They have ensconced themselves within the safe stronghold of these three walls so that they can practice all the knavery and wickedness which we see today. Even when they have been compelled to hold a council they have weakened its power in advance by putting the princes under oath to let them remain as they were. In addition, they have given the pope full authority over all decisions of a council, so that it is all the same whether there are many councils or no councils. They only deceive us with puppet shows and sham fights. They fear terribly for their skin in a really free council! They have so intimidated kings and princes with this technique that they believe it would be an offense against God not to be obedient to the Romanists in all their knavish and ghoulish deceits.[31]

Martin Luther argued that the unchecked authority of one powerful, organized body, the Roman Catholic Church, over the secular government leads to the "knavery and wickedness" once thought only to exist under a tyrannical regime.[32] Luther was the first to call for a separation between church and state with the state having the greater authority.

John Calvin, a French Reformation leader, took a slightly different view of separation. Calvin believed that the church and state institutions are separate, but at the same time related. He believed that both institutions should occupy equal positions on the hierarchy of

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[31] *Id.* at 69 (quoting Martin Luther, *The Freedom of a Christian, in* LUTHER: SELECTED POLITICAL WRITINGS (J. M. Porter, ed. 1974)).

[32] *Id.*

authority in this world. Calvin believed that the state should use religious values and laws as a tool to promote peace and order among the citizenry. "[F]or Calvin, if the State supports religion and forms citizens' "manners to civil justice" (its positive, ethical role),[33] it will not be required to expend as much effort in crime and punishment ("establishing general peace"—its negative, worldly role), because its populace will be less inclined to criminality. Thus the religious tenor of Calvin's politics contributes to its worldly duty of controlling and punishing sin."[34]

The Protestant Reformation was the largest upheaval in church-state relations up to that point in history. The influence of the church on the secular government diminished greatly. In this way, the Reformation was not only a religious movement, but also a broad political revolution. It served as a way for secular leaders to increase their power by rejecting papal authority.[35]

During the Reformation, "national" religious establishment first developed. Under the Peace of Augsburg, the Holy Roman Empire allowed the ruler of each empire to choose the religion of his territory.[36] This shifted authority from the Church to the secular governments because it gave the state power to "prescribe what shall be orthodox in . . . religion . . .or force citizens to confess by word or act their faith therein."[37]

Religion, therefore, became a means by which the ruling body could centralize authority in the secular government and increase their power over and allegiance from the people. In this way, wrote historian

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[33] This echoes the modern thoughts of some, specifically the Christian Coalition, that the government can use religious values, such as posting the Ten Commandments in schools, to create a better society. According to these groups, state supported religion is not meant to coerce belief in a particular religious system, merely to promote good morals/values.

[34] RELIGION AND POLITICS, *supra* note 8, at 95.

[35] Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1052 (1996). As Professor Douglas Laycock noted:

> Protestantism also spread for political reasons—it offered princes a legitimate excuse to repudiate bishops, to eliminate a competing source of authority in their domain, and to consolidate their power. It spread for economic reasons—local money would not have to be sent to Rome, and local princes could seize the lands of monasteries, convents, and bishops. It spread for dynastic and sexual reasons—Henry VIII in England needed a legitimate male heir, and he wanted to marry his mistress, but the Pope would not cooperate.

Id.

[36] *Id.*

[37] In his famous defense of freedom and diversity, Justice Jackson wrote: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

Will Durant, "Protestantism was nationalism extended to religion."[38] Of course, like other forms of nationalism, the "religious nationalism" created by the establishment of religion, resulted in the suppression and persecution of dissenters.[39] Emigration to the New World became a means for these non-conformists to escape persecution and enjoy freedom.[40]

2. *Church and State in Colonial America*

The promise of freedom of worship was a common reason for making the long voyage to America. However, the colonists would soon learn that such unlimited freedom was at most short-lived. While there was not an official religion declared for all colonies, the government of many colonies themselves soon responded to the diversity of religions by imposing restrictive establishment-type regulations.[41]

Initially, the colonists offered little resistance to the idea of an established, official colonial church.[42] The people of that era overwhelmingly believed that society required the church and the government to have a symbiotic relationship.[43] Each institution must share values and authority to make society work.[44] Dispute only arose

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[38] Laycock, *supra* note 35, at 1052 (quoting WILL DURANT, THE REFORMATION 457 (1957)).

[39] *Id.* at 1051-54. *See also* Everson v. Board of Education, 330 U.S. 1 (1947). In *Everson*, the Court wrote:

> The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.

Id. at 8-9.

[40] "In early 17th century England the Stuart monarchs, James I and Charles I, issued through Parliament repressive laws against the few remaining Catholics and the growing numbers of Protestant dissenters in England." JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 19 (2000).

[41] *See generally* EDWIN S. GAUSTAD, FAITH OF OUR FATHERS (1987).

[42] *Id.* at 12.

[43] *Id.*

[44] *Id.* at 12-13. "[W]hat was self-evident to the vast majority of the colonists and their leaders (religious or political) was that society survived only as church and state worked and worshiped

over which church would be official and to what extent are the "others" repressed. Accordingly, the identity of the established religion and the use of its authority varied across the colonies.

The colonies varied in the kind and success of religious establishment. In New England, where the Puritans and Pilgrims fled the corrupt Church of England, Anglicanism was unable to gain a foothold that could have led to an establishment.[45] Instead, the Congregational establishment would soon fill the void. By 1750, the number of Congregational churches in Connecticut and Massachusetts had grown to nearly four hundred.[46] This high concentration led to very close ties between civil and ecclesiastical authority.[47] For example, in Massachusetts, all citizens were required to attend the established Puritan church and all were taxed to support the church.[48] The southern colonies from Maryland to Georgia were dominated by Anglican establishments.[49] In New York, New Jersey, Pennsylvania, and Delaware, the Anglican church was prevalent but failed to become dominant.

This lack of dominance and corresponding lack of "official" establishment in these colonies resulted in tolerance for a diversity of religions.[50] In the colonies with strong Anglican and Congregational establishments, coercion and repression of other religions were much more frequent.[51] At the dawn of the revolutionary period, the colonies experienced a great range of religious liberties.

B. Disestablishment During the Creation of the Union

By the time of the American Revolution, the evils of establishment of religion were quickly being noticed by the majority. The founders, fearing a strong national government, sought to prevent the government from establishing an official body of thought. To this end, they recognized the need to prevent a hegemony of religious thought. The founders foreclosed the ability of the federal government to preference and enforce one (or two) "true faiths." The Establishment Clause was more an insurance of religious pluralism—opening a free marketplace of *religious* ideas—than a rejection of religious values as

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together, only as values were shared, only as common assumptions about human nature and the nature of God and the universe underlay all action—or at least all rationalization." *Id.*

[45] *Id.* at 18-20.

[46] *Id.*

[47] *Id.* at 20. "Although the term *theocracy* cannot properly be applied to these two colonies, the term *establishment* surely can. The alliance between civil and ecclesiastical forces was intimate, meaningful, and enduring. Society, politics, education were all imbued with the unmistakable imprint of the 'New England mind.'" *Id.*

[48] DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 1774-1789 25 (2000)

[49] GAUSTAD, *supra* note 41 at 17.

[50] *See id.* at 17-20.

[51] *Id.* at 25.

such. The founders sought to prohibit official recognition of certain religions over others and the coerced conformity therewith. The Establishment Clause was a check against the great power held by religious organizations rather than a removal of religious ideas from the public sphere.

1. Disestablishment to Protect Democracy

The pre-colonial history of church-state relations discussed above was not as ancient to the drafters of the Constitution as it is today in 2002. The views of the founders and the philosophers they cited were tempered by knowledge of European history, making them well aware of the enormous power that can be exerted through church authority. In fact, throughout history the church unquestionably has been the most powerful non-governmental organization. Through the Establishment Clause, the first Congress was trying to check the most powerful group known at the time. This represented a clear rejection of the European tradition "that understood a common religion to be essential to the stability of the political and social order."[52] The founders recognized that the coercive power of religious institutions had to be limited to create an effective democracy.[53]

While religion itself did hold a special meaning to the founders, it is doubtful that had such a behemoth organization existed outside of the religious context that the framers would have neglected to check its power.[54] Congress was not fearful of government exercising or

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[52] DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 1774-1789 25 (2000). Davis writes:

> [I]n many ways the period of the Continental Congress was a transitional phase between the old traditional theory, under which religion served as the glue of the social and political order, and the newer theory, under which it was thought that both religion and government might function best if constitutionally separated from one another.

Id. at 64.

[53] As author Derek Davis noted, the Establishment Clause was also enacted for reasons beyond religious matters:

> The separation of church and state as a political principle is often misunderstood. For many eighteenth-century thinkers, the separation was a means of achieving religious liberty. It did not refer to a cultural separation of religion from society, as many today assume, but rather an institutional separation of governmental and ecclesiastical power.

Id. at 224.

[54] ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 22 (1990).

> Those deeply influenced by the Enlightenment, such as Thomas Paine, Jefferson, and to a lesser extent Madison, approached the issue of church and

promoting religion nearly as much as the potential power that religion could exert over government and by this influence infringe religious and *all* other fundamental freedoms enjoyed by the citizenry. There are several examples that show that the founders were not opposed to solely the appearance of government exercising a religion. The first Congress appointed chaplains for its sessions, appointed chaplains for the armed forces, and planned for the inauguration of George Washington to end in a service at an Anglican church, St. Paul's Chapel in New York.[55] In fact, on the very day that they adopted the First Amendment, the first Congress asked the president to proclaim a day of "public thanksgiving and prayer."[56] The founding generation thus recognized, even supported, religious organizations as part of the American community without granting or delegating governmental power to them.[57]

These are just a few of the government actions taken during the period immediately preceding and following the enactment of the First Amendment that show the founders' toleration and even promotion of religious values and ideas in society. Indeed, the framers of the First Amendment believed that checking the power that could be exerted by

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> state suspicious of institutional religion and its potential for corrupting government. They were not necessarily irreligious; as adherents of deism, Jefferson and Paine rejected divine revelation, but affirmed the existence of an impersonal Creator . . . Madison, while circumspect about his religious beliefs, adhered closer to traditional Christian doctrine.

Id. at 22 (citing H. COMMAGER, JEFFERSON, NATIONALISM, AND THE ENLIGHTENMENT 64 (1975)).

[55] GEORGE GOLDBERG, CHURCH, STATE AND THE CONSTITUTION 12 (1987).

[56] *Id.*

[57] Many examples point to the founding generation drawing a line between permissible transfer of aid and impermissible transfer of power to religious groups. Congress granted land to a Baptist church in Mississippi and in 1833 authorized the State of Ohio to dispose of

> the lands heretofore reserved and appropriated by Congress for the support of religion within the Ohio Company's and John Cleeves Symmes' purchases, in the state of Ohio, and to invest the money arising from the sale thereof in some productive fund; the proceeds of which shall be forever annually applied, under the direction of the said legislature, for the support of religion.

CHESTER JAMES ANTIEAU, ET AL, FREEDOM FROM FEDERAL ESTABLISHMENT 164-65 (1965) (quoting 4 Statutes at Large 618-19). In 1803, the Senate ratified a treaty with the Kaskaskia Indians that stated:

> And whereas the greater part of said tribe have been baptized and received into the Catholic Church, to which they are much attached, the United States will give annually, for seven years, one hundred dollars towards the support of a priest of that religion, who will engage to perform for such tribe the duties of his office, and also to instruct as many of their children as possible, in the rudiments of literature, and the United States will further give the sum of three hundred dollars, to assist the said tribe in the erection of a church.

Id. at 167 (quoting CHARLES KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 67 (VOL. 2 1904)).

religious organizations was more important than precluding all government contact with religious ideas.

2. *Disestablishment to Foster Equality and Pluralism*

The framers of the First Amendment also sought to prevent preferential treatment of some religions over others at least from the federal level.[58] Independence from Great Britain allowed the new nation to break from the European traditions and provide more innovative freedoms, including religious freedom.[59]

The nation was born as a union of distinct states each preserving a level of sovereignty to govern at the local level deciding what is best for their distinct local culture. Federalism itself is built on the concept of respecting pluralism. The nation's pluralist values are evident in the law providing a great deal of freedom and equality among religious groups and ideas.

Hence, one of the main purposes of including the Establishment Clause in addition to the Free Exercise clause was to prevent the government from favoring one or few religions over others.[60] The

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[58] The framers, in order to get the Constitution ratified and the union formed, had to compromise on many issues, including state religious establishments, by leaving to the states the right to govern in certain subject matters. Author Thomas Curry writes:

> Americans in 1789 largely believed that issues of Church and State had been satisfactorily settled by the individual states. They agreed that the federal government had no power in such matters, but some individuals and groups wanted that fact stated explicitly. Granted, not all the states would have concurred on a single definition of religious liberty; but since they were denying power to Congress rather than giving it, differences among them on that score did not bring them into contention.

THOMAS J. CURRY, THE FIRST FREEDOMS 194 (1986).

[59] ANTIEAU, *supra* note 57, at 30.

> The new era also meant that religious liberty could be better *secured* by "disestablishing" those churches which had restricted religious freedom through an alliance with the state. . . . The significance of the relationship of the "disestablishment" movement to the American Revolution was that the relaxation of the tension of British rule allowed the patriots not only to preserve the existing rights of the colonists but also to accelerate the implementation of the principles of religious liberty.

Id.

[60] "[T]he concomitant understanding, which the Founding fathers also shared, that the only thing prohibited by the Establishment Clause of the First Amendment was *compulsion* of worship or the *preferential* treatment of one religion over competing religions, there would be little trouble today over interpretation and application of the Establishment Clause, and little "tension" between it and the free exercise clause." GOLDBERG, *supra* note 55, at 129. "All of the speakers agreed that the Bill of Rights should prohibit the new government from establishing a national religion. In addition, they did not want the government to have the power deliberately to favor one religion over another."

Reverend William Tennent, speaking before the South Carolina legislature in 1777 to promote disestablishment highlighted the inherent inequality of establishment:

> The law makes provision for the support of one church; it makes no provision for the others. The law builds superb churches for the one; it leaves the others to build their own churches. The law, by incorporating the one church, enables it to hold estates and to sue for rights; the law does not enable the others to hold any religious property not even the pittances which are bestowed by the hand of charity for their support. No dissenting church can hold or sue for their property at common law.[61]

Tennent's invocation of the principles of freedom and equality to promote robust diversity was a significant factor in persuading the South Carolina legislature to repeal its establishment of the Church of England. Another portion of his remarks sheds light on the idea that establishment in general is a policy best avoided in a pluralistic democratic society:

> The law vests the officers of the Church of England with power to tax not only her own people, but all other denominations within the bounds of each respective parish, for the support of the poor: an enormous power[] which ought to be vested in no one denomination, more than another. Greater distinction still [] where there are parishes the law throws the whole management of all the rights of freemen, into the hands of Church officers exclusively.
> And why all this inequality? Why does the law thus favour one, and bear hard upon every other denomination of Christians? The reason is only to be found in the spirit of the times when this unequal establishment was framed, and in the Machiavellian policy of the British government: which ought not any longer to take place in this country. . . . Sir[,] is this

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MICHAEL J. MALBIN, RELIGION AND POLITICS 9 (1978) (discussing the August 15, 1789 debate on the Bill of Rights in the House of Representatives).

[61] DAVIS, *supra* note 48, at 32 (citing *Writings of the Reverend William Tennent, 1740-1777*, SOUTH CAROLINA HISTORICAL MAGAZINE LXI (Newton B. Jones, ed. July-October 1960)).

> consistent with our first notions of justice and equality?[62]

The framers' emphasis on checking the influence of powerful religious groups and promoting equality and respect for religious pluralism can be further seen in the way Establishment Clause issues have been decided by the courts.

C. *Establishment Clause Jurisprudence*

The enforcement of the Establishment Clause demonstrates the degree to which we take for granted the idea that establishment is a necessary check against misuse of power and protection of individual liberty. Rather than deciding whether a state action creates an official religion, Establishment Clause jurisprudence focuses on whether a particular governmental interaction with a religion could eventually lead to the establishment of a state religion. This slippery-slope focused jurisprudence merely asks whether the government is granting a preference to a particular religion—or to religion rather than non-religion—and whether that preference could be seen as a government endorsement of that religious viewpoint to the exclusion of others. That modern Establishment Clause jurisprudence is concerned with even the minor details of church-state interaction is a testament to how much we take for granted the principle of disestablishment.

1. Establishment Clause Schools of Thought

Modern interpretations of the Establishment Clause have evolved into two major schools of thought: separationists and accommodationists (or non-preferentialists). The two camps essentially only differ on the scope of the Establishment Clause's mandate of respecting religious pluralism.

a. Strict Separation

The separationist theory of the Establishment Clause is based on Thomas Jefferson's notion that there should be "a wall of separation between church and state."[63] Separationists believe that government has no business in religion—that it should not favor religion over non-

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[62] ANTIEAU, *supra* note 57, at 35-36 (quoting Reverend William Tennant, *Address of the Reverend William Tennant to the House of Assembly, November 11, 1777,* (American State Records Series, Library of Congress (microfilm)(1778)).

[63] Reynolds v. United States, 98 U.S. 145 (1878) (citing 1 Jeff. Works 113).

religion. The separationist view clearly endorses protecting pluralism. It even extends the analysis of religious pluralism to include non-religious groups. Not only may the government not favor one or a few religions over others, as the separationist view holds, it cannot favor religion over non-religion.

b. Accommodation

The accommodationist viewpoint holds that government interaction with religion is permissible so long as the government does not favor some religions over others. Here, the "wall of separation" merely prohibits the government from "abridging religious liberty by discriminatory practices against religion generally, or against any particular sects or denominations; the wall was not intended, however, to enjoin the government from fostering religion generally or all such religious groups or institutions as are willing to accept government aid."[64]

Despite the disagreement between accommodationists and separationists over the proper scope of religious pluralism protected by the Establishment Clause, they both agree that government preference of one or few religious groups over all others is unconstitutional. Both would certainly be outraged if the government were to grant a position of authority to one or a few religious sects with the power to define the religious (or any) rights of all citizens. Such an act clearly meets the fundamental definition of establishment of religion.

2. Disestablishment Theory in the Courts

Fortunately, the courts have never had to decide a case challenging the explicit creation of an official church. The cases to date have dealt only with the conflict between accommodation and strict separation over government interaction with religion. The court has yet to deal with an extreme symbiotic relationship between a religious organization and a state or federal government. However, the Establishment Clause cases that have been decided by the Court do shed light on the Court's emphasis on protecting the rights of religious minorities by limiting the government's ability to prefer one or many religions.

The Court's treatment of the Establishment Clause began in earnest in the 1947 case of *Everson v. Board of Education.*[65] In *Everson,* a New Jersey township reimbursed parents for the cost of sending their

[64] LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 152 (2d ed. 1994).
[65] 330 U.S. 1, 15 (1947)

children by public transportation to private and parochial schools.[66] Writing for the majority, Justice Black stated that a broad interpretation of the Free Exercise Clause begs for a similarly broad reading of the Establishment Clause.[67] This reflects the Court's desire to afford the greatest protection to the large variety of religions from coercion or exclusion by the government. The Court used this interpretation of the Establishment Clause to find that New Jersey could not constitutionally grant aid to parochial school education. In reaffirming the pluralistic democratic principles that promote equality among citizens regardless of belief or group affiliation, the Court noted that:

> [o]n the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.[68]

The cases following *Everson* show that the Court continues to be suspicious when it appears that the government is favoring particular religions over others *or* favoring the religiously affiliated over the non-affiliated. However, the cases have dealt with issues of whether the government is prohibited from any, even indirect, relations with religion or whether neutrality among religious groups and non-religious groups is enough. In recent years, the Rehnquist Court has shifted the jurisprudence toward the accommodationist position.

The Court appears preoccupied with deciding whether incidental contact between government and religion is an establishment is because the issue of express government endorsement or preference for one

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[66] *Id.* at 3.

[67] *Id.* at 15. "The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause." *Id.*

[68] *Id.* at 25-26.

religion has already been decided—it is unconstitutional beyond reasonable dispute. Such issues would waste the time of any appellate court, let alone survive a motion for summary judgment at trial. Recent cases demonstrate that there *is* a consensus concerning some types of government action in violating the Establishment Clause—government must at least be neutral among religions and may not discriminate against religion.

In *Rosenberger v. Rector and Visitors of University of Virginia,* the Court was faced with the issue of whether a state could deny funding to a student-run newspaper with a religious theme.[69] The Court began its analysis by laying out several key principles that give substance to all of the First Amendment guarantees.[70] Government may not regulate speech based on the content of the message nor can it favor one speaker over another.[71] The Court emphasized that viewpoint based discrimination is "an egregious form of content discrimination" and constitutes a blatant violation of the First Amendment.[72]

The Court then applied these neutrality-based principles to the act of the University. By funding student newspapers, the University created a limited public forum. The Court found that:

> Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum,"[73] nor may it discriminate against speech on the basis of its viewpoint.[74] Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.[75]

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[69] Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995).
[70] *Id.* at 828.
[71] *Id.* at 828-29 (citing Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972); Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 643 (1994); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991)).
[72] *Id.* at 829 (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992)).
[73] *Id.* (citing Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 804-06 (1985); Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46-49 (1983)).
[74] *Id.* (citing Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 392-93 (1993); Perry Ed. Assn., 460 U.S. at 46; R.A.V., 505 U.S. at 386-388, 391-393; Texas v. Johnson, 491 U.S. 397, 414-15 (1989)).
[75] *Id.* at 829-30 (citing *Perry Ed. Assn.*, 460 U.S. at 46).

The Court explained that the University does not prohibit religion as a subject matter within student-run publications, but in this case selected student newspapers with religious editorial viewpoints for disfavored treatment.[76] Thus, the University's distinction was not based on the content of the message, but rather the viewpoint and identity of the speaker. In this part of its analysis the Court stressed neutrality and equality. Had the University banned all discussion of religion as a condition of subsidizing student newspapers—thus making secular-related speech the "purpose of the limited forum"—the denial of Student Activity Funds (SAF) to Wide Awake[77] may have been permissible. However, the University did not make such a judgment and chose not to limit the nature and content of the speech in the forum it created.

The Court also rejected the University's argument that the discrimination was permissible because the state provided funds rather than facility access.[78] "It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." The Court makes the distinction here that the State has more power to regulate the content when the government itself is the speaker, but when it offers a general public benefit that subsidizes expression, the state may not discriminate based on the viewpoint of the speaker.[79]

The Court then rejected the argument that scarcity of funds justifies the failure to fund all groups. Scarcity of resources does not make the discrimination constitutional. Even when distributing scarce resources the state must do so on a neutral basis.[80]

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[76] *Id.* at 831.

[77] Wide Awake was the student-run evangelical newspaper at issue in *Rosenburger*.

[78] The University wished to distinguish from the Court's previous decision in Lamb's Chapel. *Id.* at 832. "The University tries to escape the consequences of our holding in Lamb's Chapel by urging that this case involves the provision of funds rather than access to facilities. The University begins with the unremarkable proposition that the State must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission." *Id.*

[79] "Although acknowledging that the Government is not required to subsidize the exercise of fundamental rights, we reaffirmed the requirement of viewpoint neutrality in the Government's provision of financial benefits by observing that '[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to "ai[m] at the suppression of dangerous ideas,"'" *Id.* at 834. (citing Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545-46, 548 (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959), in turn quoting Speiser v. Randall, 357 U.S. 513, 519, (1958))).

[80] *Id.* at 835. "Had the meeting rooms in Lamb's Chapel been scarce, had the demand been greater than the supply, our decision would have been no different. It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible. Vital First Amendment speech principles are at stake here." *Id.*

In addressing the disestablishment concerns that the University subsidy of the religious newspaper created, the Court found ample neutrality in the University's policy.

> The SAF [Student Activity Fund] cannot be used for unlimited purposes, much less the illegitimate purpose of supporting one religion . . . the money goes to a special fund from which any group of students . . . can draw for purposes consistent with the University's educational mission; and to the extent the student is interested in speech, withdrawal is permitted to cover the whole spectrum of speech, whether it manifests a religious view, an antireligious view, or neither.[81]

The reasoning and holding of the Court in *Rosenberger* cements the principle of neutrality at the center of Establishment Clause as well as general First Amendment jurisprudence. In overturning the lower court's decision the Supreme Court held:

> To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.[82]

The question at the core of the strict separationist interpretation of the Establishment Clause has become almost a separate branch of Establishment Clause jurisprudence itself. When the challenged

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[81] *Id.* at 841. "The Court of Appeals' apparent concern that Wide Awake's religious orientation would be attributed to the University is not a plausible fear, and there is no real likelihood that the speech in question is being either endorsed or coerced by the State. *Id.* at 841-42 (citing Lee v. Weisman, 505 U.S. 577, 587, (1992); Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 489 (citing Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring))).

[82] *Id.* at 845-46.

government action does not necessarily discriminate among religious groups, but is perceived as "advancing religion" a different analysis has been applied. When this issue arose courts have frequently applied the *Lemon* test.[83] The *Lemon* test states that government action violates the Establishment Clause when it (1) has no "secular purpose," (2) has a "primary effect" of advancing religion and (3) fosters "excessive entanglement" between church and state.[84] While the *Lemon* test has been quoted and cited frequently, its parts are ambiguous enough to allow a wide range of reasonable interpretations to a given set of facts. This has occurred most recently at the Supreme Court level in *Agostini v. Felton,* where the *Lemon* test was used to overturn *Aguilar v. Felton*—the same case, twelve years earlier, applying the same *Lemon* test.[85]

In *Agostini v. Felton,* the plaintiffs sought the reversal of an injunction preventing the State of New York from providing public school teachers to teach remedial lessons to poor children at parochial school facilities.[86] The Court analyzed an issue related to the second part of the *Lemon* test: whether the presence of public school teachers on parochial school grounds "created a 'graphic symbol of the "concert or union or dependency" of church and state—a symbolic union that would "'convey a message of government endorsement ... of religion' and thereby violate a 'core purpose' of the Establishment Clause."[87] The Court rejected the presumption that the presence of the public school teacher on the parochial school grounds creates an impermissible "symbolic union."[88] The presumption was unwarranted because it was based solely on the location of the remedial educational services.[89]

The Court also addressed the issue of whether a program violates the Establishment Clause by using criteria for selecting beneficiaries that creates a financial incentive for people to "undertake religious indoctrination."[90] The Court resolved this problem of a state program potentially having an indirect effect on the "demand" for religion by invoking the principle of neutrality.

> This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that

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[83] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[84] *Id.* at 612.
[85] *See* Agostini v. Felton, 521 U.S. 203 (1997).
[86] *Id.*
[87] *Id.* at 220 (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 389-91 (1985) (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952))).
[88] "We do not see any perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside. To draw this line based solely on the location of the public employee is neither 'sensible' nor 'sound,' and the Court in *Zobrest* rejected it." *Id.* at 227-28.
[89] *Id.*
[90] *Id.* at 231.

> neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion.
>
> In *Ball* and *Aguilar*, the Court gave this consideration no weight. Before and since those decisions, we have sustained programs that provided aid to all eligible children regardless of where they attended school.[91]

Again, neutrality is the guiding principle in *both* accommodationist and separationist interpretations of the Establishment Clause present within the recent Supreme Court decisions.

A final case illustrative of the Supreme Court's Establishment Clause interpretation is *Board of Education of Kiryas Joel Village School District v. Grumet*.[92] In *Kiryas Joel*, the State of New York enacted a special statute carving out a new school district around the Village of Kiryas Joel in Orange County, New York.[93] The statute, in effect, delegated governmental authority to a specific religious group—the Satmars of Kiryas Joel Village.[94] Holding that the statute was unconstitutional, the Court expressly rejected the argument that civic power over the school district was delegated to the "qualified voters of the village of Kiryas Joel," rather than to a specific religious group.[95]

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[91] *Id.* (citation omitted).

[92] 512 U.S. 687 (1994).

[93] *Id.* at 690. The Court wrote:

> The village of Kiryas Joel in Orange County, New York, is a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism. . . . [T]he Satmars purchased an approved but undeveloped subdivision in the town of Monroe and began assembling the community that has since become the village of Kiryas Joel. When a zoning dispute arose in the course of settlement, the Satmars presented the Town Board of Monroe with a petition to form a new village within the town, a right that New York's Village Law gives almost any group of residents who satisfy certain procedural niceties. Neighbors who did not wish to secede with the Satmars objected strenuously, and after arduous negotiations the proposed boundaries of the village of Kiryas Joel were drawn to include just the 320 acres owned and inhabited entirely by Satmars.

Id. at 690-91 (citations omitted).

[94] *Id.* at 696.

> 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.

Id. at 696.

[95]

> What makes this litigation different from *Larkin* is the delegation here of civic power to the 'qualified voters of the village of Kiryas Joel,' as distinct from a religious leader such

The Court found that this distinction simply served as a pretext for granting to the Satmars governing authority over the public schools in the new school district.[96]

The Court explained that it is permissible to have some political authority in the hands of a religious group, so long as the delegation is not based on religious identity.[97] The Court again relied on the principle of neutrality when it reasoned that:

> [w]here "fusion" is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority.[98]

According to the court, had the state used "customary and neutral principles" to create the new school district, the boundary would not have followed religious community lines.[99] Therefore, in applying the principle of neutrality, the Court held that the New York statute "crosse[d] the line from permissible accommodation to impermissible establishment."[100]

D. Broader Principles at Work in the Establishment Clause Context

The Supreme Court's Establishment Clause jurisprudence maintains that the Constitution requires government to be neutral toward and among religions. The neutrality principle is grounded in the founding concept of maximizing freedom and equality among the increasingly diverse American citizenry. This fundamental value of respecting the pluralism of American society serves as an important check on the power of the government to limit the rights enjoyed by the people.

The concept of neutrality that has been invoked by the Courts to successfully protect religious freedom and equality should therefore be a

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as the village rov, or an institution of religious government like the formally constituted parish council in *Larkin*. In light of the circumstances of these cases, however, this distinction turns out to lack constitutional significance.

Id. at 698.

[96] "[T]he context here persuades us that Chapter 748 effectively identifies these recipients of governmental authority by reference to doctrinal adherence, even though it does not do so expressly." *Id.* at 699.

[97] *Id.* at 698-99.

[98] *Id.* at 699.

[99] *Id.* at 702.

[100] *Id.* at 710.

powerful tool in the protection of political freedom and equality as well. Enforcing the principle of neutrality via a disestablishment theory is perhaps most salient in electoral policy—the law that sets the rules of the power game.

III. The Established Political "Faiths:" The Democratic and Republican Parties

The values underlying the First Amendment—neutrality, equality, fairness—have been implemented successfully through the Establishment Clause to prevent a national religious orthodoxy. Therefore, disestablishment reasoning may be highly useful in securing these same values in the area of American society arguably as fundamental as religion: the electoral process.

In the United States, governmental power is allocated through elections. Electoral favoritism by the government is arguably as repugnant to fundamental American ideals as is religious favoritism. If the preferences granted by election law to "major parties" were instead granted to "major religions," those laws would not survive a summary judgment motion asserted by the first meager taxpayer litigant.

In the following section, I examine the preferences given to so-called major parties and how these preferences have entrenched Democratic and Republican parties in power.

A. Laws that Favor "Major Parties"

It is well-known that laws governing the electoral process bestow advantages on the two major parties. That basic fact should not be at all surprising because these laws have been crafted by Republican- and Democratic-dominated legislatures for the past century and a half.[101] The courts (also composed of members of the major parties) have upheld

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[101] A. James Reichley, *The Future of the Two-Party System After 1996, in* THE STATE OF THE PARTIES 14 (John C. Green & Daniel M. Shea, eds. 3d ed. 1999). "The representatives of the two major parties have taken pains to enact election laws that strongly favor major party candidates." *Id.* at 14. David K. Ryden, *"The Good, the Bad, and the Ugly:" The Judicial Shaping of Party Activities, in* THE STATE OF THE PARTIES 56 (John C. Green & Daniel M. Shea, eds. 3d ed. 1999). "State and federal election laws are overtly hostile to minor parties. Democratic- and Republican-controlled legislatures have severely disadvantaged minor and new parties in garnering access to the ballot, qualifying for public financing, and structuring primary laws." *Id.;* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process,* 50 STAN. L. REV. 643 (1998). "Many reasons, of course, contributed to the reorganization of democratic life into its current forms. But among them were the increasingly sophisticated ways, over the course of the twentieth century, that the two dominant parties managed to manipulate and capture the ground rules of political competition so as to freeze out serious challengers." *Id.* at 644. "Laws governing most elections are either specifically designed to limit the prospects for third party and Independent candidates or to work to the advantage of the two major parties." Ron Faucheux & Paul S. Herrnson, *Outside Looking in: Views of Third Party and Independent Candidates,* CAMPAIGNS AND ELECTIONS, August 1, 1999, at 27.

the distinction between major parties and minor parties in election laws. Creating and upholding laws that build a competitive advantage for certain groups in the contest for power draws the American system away from true democratic elections and towards the hereditary monarchy the framers explicitly rejected.[102] Professor Erwin Chemerinsky explains:

> [T]hat an incumbent is trying to use the powers of the government to stay in office strike[s] at the very heart of a democratic society. The American political system is premised on the ability of the people to hold their officials accountable through open elections. The integrity of the electoral process is threatened if the government's powers and resources are used to aid one candidate and to oppose another.[103]

The knowledge that such a system filters all candidates and policy ideas[104] through two private organizations makes it nearly impossible to honestly explain how the American political system can be considered a representative democracy.[105] Professor Laurence Tribe also

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[102] "Traditionally, the legitimacy of elections as a democratic institution has rested on the ideal that they are free and fair contests between candidates and parties. In blessing state attempts to use electoral rules to stack the deck in favor of particular parties, the Court violates this crucial principle of fair competition." Douglas J. Amy, *Entrenching the Two-Party System: The Supreme Court's Fusion Decision, in* THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 150 (David K. Ryden, ed. 2000).

[103] Erwin Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency*, 49 OHIO ST. L.J. 773 (1988) (footnotes omitted).

[104] "Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens." Issacharoff & Pildes, *supra* note 1, at 646. The fact that a mere *two* groups control the flow of society's policy goals and ideas is a frightening inhibition on the responsiveness and growth of the nation. As Arendt writes, "What usually remains intact in the epochs of petrification and foreordained doom is the faculty of freedom itself, the sheer capacity to begin, which animates and inspires all human activities and is the hidden source of production of all great and beautiful things. But so long as this source remains hidden, freedom is not a worldly, tangible reality; that is, it is not political." Arendt, *supra* note 3, at 458.

[105] A disturbing trend has emerged of representatives becoming more loyal to their parties in recent years. "The average legislator showed party loyalty of less than 60 percent in 1970. In 1996, the degree of loyalty had climbed to 80 percent for Democrats and to an astounding 87 percent for Republicans. Cohesion was still greater on the thirty-three House roll calls in 1995 on final passage of items in the Contract with America. Republicans were unanimous on sixteen of these votes, and the median number of Republican dissents was but *one*. Neither the British House of Commons nor the erstwhile Supreme Soviet could rival this record of party unity." Gerald M. Pomper, *Parliamentary Government in The United States, in* THE STATE OF THE PARTIES 261 (John C. Green & Daniel M. Shea, eds. 3d ed. 1999). Certainly this trend raises alarm on issues where a representative's party and constituents disagree. Consider a majority-minority district represented by a member of the Democratic Party. She knows her district will never elect a Republican, therefore, since it is a "two-party system" she ultimately feels more pressure from and accountability to the party leadership. *See* Michael A. Fits, *Back to the Future: The Enduring Dilemmas Revealed in the Supreme Court's Treatment of Political Parties, in* THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 105 (David K. Ryden, ed. 2000). "During the past few years, the level of party voting in Congress, the strength of national party organizations, and the amount of party

found the anti-competitive tailoring of election law suspicious when one applies basic democratic ideals:

> Democracy envisions rule by successive temporary majorities. The capacity to displace incumbents in favor of the representatives of a recently coalesced majority, is therefore an essential attribute of the election system in a democratic republic. Consequently, both citizens and courts should be chary of efforts by government officials to control the very electoral system which is the primary check on this power. Few prospects are so antithetical to the notion of rule by the people as that of a temporary majority entrenching itself by cleverly manipulating the system through which the voters, in theory, can register their dissatisfaction by choosing new leadership.[106]

A system of electoral laws that entrenches two parties makes a sham of accountability.[107] The losing party is no longer voted out, but merely delegated to the beauty pageant status of runner up. Should the winner fail to sufficiently perform her duties, the second place contestant is entitled to take her place. At worst, the losing party is virtually entitled to inherit the opposition vote at the next election. How much true accountability can remain? State and federal electoral laws and policies create just such an anti-competitive system. Justice Thurgood Marshall noted this danger posed by the process of electoral legislation: "The necessity for [applying a higher standard of review to electoral legislation] becomes evident when we consider that major parties, which by definition are ordinarily in control of legislative institutions, may seek to perpetuate themselves at the expense of developing minor parties."[108]

In the following section, I will examine three of the major categories of legal preference for the major parties: ballot access, political gerrymandering, and participation in important electoral fora.

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funding have all increased, while party identification and party-line voting by the public continue to decline." *Id.;* Douglas J. Amy, *Entrenching the Two-Party System: The Supreme Court's Fusion Decision, in* THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 150 (David K. Ryden, ed. 2000). "At a time when more and more Americans are abandoning the major parties and questioning the worth of the two-party system, the Court chose to endorse electoral rules that serve to protect the privileged position of these parties." *Id.*

[106] Chemerinsky, *supra* note 103, at 773-74 (*quoting* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1097 (2d ed. 1988)).

[107] "Minor party competition, by highlighting important issues that the major parties would rather not address, produces more responsive and intellectually honed parties. The more diffuse the more dulled, conservative, and risk-averse the major parties become." Ryden, *supra* note 102, at 58.

[108] Munro v. Socialist Workers Party, 479 U.S. 189, 201 (1986).

1. Ballot Access

Some of the most significant contributors to the establishment of the two major parties are ballot access laws. The disparate effects these laws have on minor parties are striking. If independent or minor party candidates are able to overcome the strict ballot access restrictions,[109] they are usually left with much fewer resources to spend on the actual campaign.[110] The impact of strict ballot access requirements is often overlooked by those arguing for the maintenance of such barriers to participation.

The Supreme Court announced the current constitutional standard governing ballot access in *Anderson v. Celebrezze*.[111] In 1980, supporters of independent presidential candidate John Anderson sought to have his name placed on the ballot in every state.[112] However, by the time Anderson announced his candidacy on April 24, 1980 the deadline for filing for candidacy in several states, including Ohio, had passed.[113] Anderson and two registered voters filed suit in the United States District Court for the Southern District of Ohio to challenge the constitutionality of the ballot access restrictions.[114]

The Court outlined the process for judging the constitutionality of state election laws:

> [A court must] resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider

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[109] "In Pennsylvania, for example, major party candidates for the state senate need only 2,000 signatures on petitions to get their names on the ballot, for minor parties ... 29,000." A. James Reichley, *The Future of the Two-Party System After 1996, in* THE STATE OF THE PARTIES 14 (John C. Green & Daniel M. Shea, eds. 3d ed. 1999).

[110] Christian Collet & Martin P. Wattenberg, *Strategically Unambitious: Minor Party and Independent Candidates in the 1996 Congressional Elections, in* THE STATE OF THE PARTIES 224 (John C. Green & Daniel M. Shea, eds. 3d ed. 1999). "'We've had to spend our money just getting on the ballot,' [Libertarian U.S. Senate candidate Jack] Iannantuono laments. 'We needed to get 35,000 signatures to make certain we have at least the required 24,390 valid signatures.'" *A Libertarian's High Hurdles*, CAMPAIGNS AND ELECTIONS, September 1, 1998, at 8.

[111] 460 U.S. 780 (1983).

[112] *Id.* at 782.

[113] *Id.* at 783.

[114] *Id.*

> the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[115]

Here the Court created a multi-tiered approach to decide constitutional challenges to state election laws. First, the court must determine whether the burden on the plaintiff's rights (usually freedom of association) is severe. If not, the court applies what, in election law cases, has been a highly deferential intermediate level of scrutiny.[116] If the court finds the burden on the plaintiff's rights is severe then the court applies strict scrutiny.

In *Anderson,* the Court proceeded to define and weigh the burdens and interests asserted. The Court noted that the March filing deadline placed a recognizable burden on independent candidates but not major party candidates.[117] "The Ohio filing deadline challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process."[118] The Court therefore found that the burden on the plaintiffs' rights was severe.

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[115] *Id.* at 789 (citations omitted).

[116] *See generally* Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997); Burdick v. Takushi, 504 U.S. 428 (1992); Munro v. Socialist Workers Party, 479 U.S. 189 (1986).

[117] *Anderson,* 460 U.S. at 791. The Court wrote:

> Indeed, because it takes time for an independent Presidential candidate and his supporters to gather the requisite 5,000 signatures on nominating petitions, the independent must decide to run well in advance of the March filing deadline. In contrast, Ohio law provides for the automatic inclusion of the Presidential nominees of the major parties on the general election ballot, even if they have never filed a statement of candidacy in Ohio. Their identities are not established until after the major-party conventions in August. If the State's filing deadline were later in the year, a newly-emergent independent candidate could serve as the focal point for a grouping of Ohio voters who decide, after mid-March, that they are dissatisfied with the choices within the two major parties.

Anderson, 460 U.S. at 791 (citations omitted). The Court continued:

> Not only does the challenged Ohio statute totally exclude any candidate who makes the decision to run for President as an independent after the March deadline. It also burdens the signature-gathering efforts of independents who decide to run in time to meet the deadline. When the primary campaigns are far in the future and the election itself is even more remote, the obstacles facing an independent candidate's organizing efforts are compounded. Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign.

Id. at 792.

[118] *Id.*

The Court then examined the interests asserted by the state. The State of Ohio argued that the early deadline promoted voter education, equal treatment for partisan and independent candidates, and political stability.[119] The Court found that the state's legitimate interest in voter education did not justify the burden on the plaintiff's rights. On the asserted interest of ensuring "equal treatment," the Court found that it was invalid.[120] As to the state's interest in protecting political stability, the Court explained that "Ohio's asserted interest in political stability amounts to a desire to protect existing political parties from competition—competition for campaign workers, voter support, and other campaign resources—generated by independent candidates who have previously been affiliated with the party."[121]

The Court correctly noted that the law was crafted too broadly to meet this interest. The early filing deadline applied to all independent candidates—not just those who recently left one of the two major parties.[122] Weighing these interests against the Anderson supporters' freedom of choice and freedom of association the Court held that the March filing deadline was unconstitutional.[123]

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[119] *Id.* at 796.

[120] *Id.* at 799. The Court held:

> We also find no merit in the State's claim that the early filing deadline serves the interest of treating all candidates alike. It is true that a candidate participating in a primary election must declare his candidacy on the same date as an independent. But both the burdens and the benefits of the respective requirements are materially different, and the reasons for requiring early filing for a primary candidate are inapplicable to independent candidates in the general election. The consequences of failing to meet the statutory deadline are entirely different for party primary participants and independents. The name of the nominees of the Democratic and Republican parties will appear on the Ohio ballot in November even if they did not decide to run until after Ohio's March deadline had passed, but the independent is simply denied a position on the ballot if he waits too long.

Id.

[121] *Id.* at 801.

[122] *Id.* at 805-06. The Court wrote:

> We conclude that Ohio's March filing deadline for independent candidates for the office of President of the United States cannot be justified by the State's asserted interest in protecting political stability. "For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty." "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

Id. (quoting Dunn v. Blumstein, 405 U.S. 330, 343 (1972); NAACP v. Button, 371 U.S. 415, 438 (1963); Kusper v. Pontikes, 414 U.S. 51, 59 (1973)).

[123] *Id.* at 806.

Despite the Court's attempt to enforce fair and open elections in *Anderson*, ballot access laws have continued to be written and applied in ways that help insulate the two major parties from effective competition.[124] For example, the Georgia ballot access law requires the candidate or party to get signatures from enough registered voters to equal five percent of the turnout in the previous general election.[125] Commentators may point out that this standard is reasonable because it is only a small percentage of the state's population. Such arguments overlook the fact that the process is more than simply getting people to sign a piece of paper. Gathering the necessary signatures is much more complex.[126] Usually, petition forms must be pre-approved, only certain signatures will "count," and they all must be verified.[127] In some states the law forbids persons who sign petitions from voting in primary elections. For example the West Virginia version required those who gather signatures to explicitly warn the signers of the prohibition.[128] It is clear that although the required number of signatures may seem reasonable, potential minor party candidates may be strangled by red tape.

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[124] Recently, the New York state election commission issued a recommendation to *double* the votes needed for a minor party to gain a ballot position. Erin Duggan, *Two's Company, Eight's a Crowd,* THE POST-STANDARD (SYRACUSE), February 3, 2001. Minor party members quickly objected to the new proposal: "'I think it's just an attempt by the two major parties to get rid of the minor parties,' said state Right to Life Party Chairman Kenneth Diem. 'The two major parties do not like other parties being included in politics because they think they own America, and they're wrong.'" *Id.*

[125] *See* John Turcotte, *Open Ballot Access,* ATLANTA JOURNAL-CONSTITUTION, April 12, 2000, at 16A. Turcotte concluded "A candidate had better ballot access in Soviet Georgia than in the Peach State." *Id. See* Faucheux & Hermson, *supra* note 101.

[126] "Then there are the countless state laws that prescribe higher thresholds for the number of correct signatures required on third-party nominating petitions than for regulars on two-party ballots. Even the laws that apply equally to all parties are discriminatory, because they are written in such detail that ballot access for third-party candidates requires expensive legal assistance just to get through the morass of procedures. That mind-numbing detail is doubly discriminatory because the implementation of these laws thrusts tremendous discretion into the hands of the registrars, commissioners and election boards, all staffed by political careeristas of the two major parties, whose bipartisan presence is supposed to provide 'neutrality with finality'—but it is common knowledge that they can agree with each other to manipulate the laws for the purpose of discouraging the candidacies of smaller and newer parties." Theodore J. Lowi, *Deregulate the Duopoly,* THE NATION, December 4, 2000.

[127] *Id.* Jennifer Bundy, *State Supreme Court Refuses to Hear Giardina Ballot Case,* CHARLESTON GAZETTE & DAILY MAIL, March 29, 2000.

[128] *Id.* "The Legislature in 1999 did not change another section of law that requires those who gather signatures to explain the prohibition. Consequently, [Independent Gubernatorial candidate Denise] Giardina said, people who might otherwise sign her petition are scared away by the prospect of losing their vote in other races. Giardina says lawmakers intended to allow people to both sign petitions and cast primary votes. Secretary of State Ken Hechler, the state's top elections officer, agreed. The Democratic Party did not and intervened in a lawsuit that had been filed to clarify the issue. Kanawha Circuit Court Judge Herman Canady's ruling said petition gatherers must tell people that signing the petition will prevent them from voting in the primary. He also said, "Those that have previously signed a certificate of nomination may not vote in the upcoming election." *Id.*

2. Access to Important Electoral Fora

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.[129]

The most common example of government limiting access to important expressive fora is the candidate debate. In modern campaigns, debates are vital to communicating to voters and demonstrating one's fitness for the office. When debates are televised their communicative value is increased exponentially. Therefore, exclusion of minor party candidates from the debate has an enormous impact and expresses the idea that the two major party candidates are the only "real" choices. Professor Steven Shiffrin further explained the importance of these mass communicative forums:

> Moreover, the broadcasting forum is distinctly more powerful than municipal auditoriums, and the consequence of the denial of access correspondingly more severe. Those denied access to television have no ready method of communicating their message to the millions who would otherwise have been reached. From the standpoint of access to the marketplace of ideas, governmental power to determine what messages shall and shall not get access to television is demonstrably more serious than similar control over access rights to municipal auditoriums.[130]

The major recent case discussing access to televised debates is *Arkansas Educational Television Commission v. Forbes.*[131] In *Forbes,* an independent candidate for Arkansas' Third Congressional District

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[129] Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972).
[130] Steven Shiffrin, *Government Speech,* 27 UCLA L. REV. 565, 586 (1980) (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975))
[131] 523 U.S. 666 (1998).

was denied permission to appear in a debate with the two major party candidates.[132] The debate was to be broadcast on Arkansas' public television network.[133] The Court held that the televised candidate debate was a non-public forum subject to lesser constitutional scrutiny.[134] That left the editors to use their "journalistic discretion" to select the debate participants.[135] However, the Court explained that "to be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property."[136]

The Court found that the exclusion of Forbes was both reasonable and viewpoint-neutral.[137] The record included testimony that the exclusion of Forbes was based not on his stand on the issues, but on his miniscule support among the public.[138] The effort and organization of Forbes' campaign could be described as half-hearted at best.[139]

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[132] *Id.* at 669-70.
[133] *Id.*
[134] *Id.* at 669. A possible compromise solution would be to include all major party candidates, the leading minor party candidate, and the leading independent candidate. This meets all of the journalistic concerns about eliminating "the prospect of cacophony . . . and [severely limiting possible] First Amendment liability." *Id.* at 681. While the forum doctrine doesn't demand completely open access, the decision of who to include, especially by a state actor exercising "journalistic discretion," should be reasonable. The Court wrote:

> The debate's status as a nonpublic forum, however, did not give AETC unfettered power to exclude any candidate it wished. As Justice O'Connor has observed, nonpublic forum status "does not mean that the government can restrict speech in whatever way it likes." To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property.

Id. at 682 (citing *Cornelius*, 473 U.S. at 800).
[135] *Id.*
[136] *Id* at 682 (citing *Cornelius*, 473 U.S. at 800).
[137] *Id.*
[138] *Id.* The Court further noted:

> AETC Executive Director Susan Howarth testified Forbes' views had "absolutely" no role in the decision to exclude him from the debate. She further testified Forbes was excluded because (1) "the Arkansas voters did not consider him a serious candidate"; (2) "the news organizations also did not consider him a serious candidate"; (3) "the Associated Press and a national election result reporting service did not plan to run his name in results on election night"; (4) Forbes apparently had "little, if any, financial support, failing to report campaign finances to the Secretary of State's office or to the Federal Election Commission"; and (5) "there [was] no 'Forbes for Congress' campaign headquarters other than his house." Forbes himself described his campaign organization as "bedlam" and the media coverage of his campaign as "zilch." It is, in short, beyond dispute that Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest.

Id. (citations omitted).
[139] *Id.*

Although, the exclusion of Forbes specifically seems justified, the *Forbes* decision sets a precedent that allows broad discretion in excluding candidates from debates. The rule the Court sets forth in *Forbes* is that candidates may be excluded by reasonable, viewpoint-neutral discretion. The Court found Forbes' "own objective lack of support, not his platform, was the criterion" for his exclusion.[140] Apparently, the Court is sure that the Forbes campaign would meet any reasonable standard used to calculate "lack of support," so it felt no need to elaborate on what would be an unreasonable standard. Is a five percent standing in the polls low enough to constitute objective "lack of support"? Ten percent? Twenty percent? How about the percentage statutorily required for ballot access *itself*? All the Court was sure of was that whatever a reasonable standard turns out to be, the exclusion of Forbes met the criteria.

The debate access issue is critical at the national level. In 2000, presidential candidates had to show at least fifteen percent support in one of the major national polls to be included in the televised debates.[141] Author Ted Jelen notes that this places independent and minor party presidential candidates in a unique position:

> Since these debates have become pivotal events in the conduct of general election campaigns since 1976, exclusion from debates can be a huge handicap for candidates from outside the two party system. A candidate such as Ross Perot in 1996 is faced with something of a Catch-22: In order to gain popular support, the candidate must participate in debates; in order to participate in televised debates, the candidate must demonstrate popular support.[142]

This "Catch-22" is the theme of the election laws crafted by the major parties.[143] The theme was also present in the Supreme Court's *Forbes* decision.

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[140] *Id.*

[141] TED G. JELEN, ROSS FOR BOSS: THE PEROT PHENOMENON AND BEYOND 4 (2001).

[142] *Id.*

[143] The governing body of the presidential debates, the Commission on Presidential Debates, decides access to the debates. "The official organizer is the Commission on Presidential Debates (CPD), which was set up by the Democratic and Republican National Committees in 1987 to oust the League of Women Voters, which had the temerity to invite Independent John Anderson to debate in 1980 and refused to be a marionette for the two parties. Despite its recent appalling insistence that it is 'nonpartisan,' the CPD was launched as an avowedly 'bipartisan' corporation 'to implement joint sponsorship of general election presidential and vice-presidential debates . . . by the national Republican and Democratic Committees between their respective nominees.' It has been chaired continuously by Frank Fahrenkopf, Jr. and Paul Kirk, Jr., the former national Republican and Democratic party chairs and powerhouse lawyer/lobbyists. The debate commission has been

The most disturbing aspect of *Forbes*, from a disestablishment standpoint, is that the issue was framed as the exclusion of minor party candidates rather than a legal guarantee of access for the two major parties. In the majority opinion there was no mention of whether the standard of measuring "lack of support" even applies to the two major parties. In fact, when the automatic forum access was introduced at oral argument, the subject quickly changed:

> QUESTION: Isn't it true that you put both party, major party candidates on even though one has a tiny percent and so is not of much interest to the public?
> MR. MARKS: Yes, Your Honor, and the reason, as reflected in the record in the testimony of Ms. Howarth and Ms. Oliver, is that a major party nomination carries with it a degree of public support that news people usually don't ignore, and they didn't ignore in this case. They felt it was—
> QUESTION: May I return to Justice O'Connor's question about what these standards of newsworthiness were?[144]

It is not unforeseeable that in some districts a Democratic or Republican nominee may not even reach the "objective" public support threshold set for minor parties. Yet, if a debate were to be scheduled it is hard to imagine the producers failing to invite both major party candidates. Candidates from outside the two major parties, on the other hand, face a presumption of exclusion—they are required to prove their worthiness to be included. They are required to demonstrate some arbitrary measure of public support to satisfy the exercise of journalistic discretion.[145]

Allowing automatic access to televised debates damages the integrity of the electoral process and American democracy itself. As noted earlier, the debate is an integral part of the election campaign. Televised debates excluding minor party candidates send a message to the potential voter. That message is: "Here are your real choices. The other names on the ballot amount to typographical errors." Granting automatic access to televised debates helps create a "political orthodoxy" in violation of disestablishment principles.

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scrupulously divided ever since between Democratic and Republican Party loyalists." Jamin B. Raskin, *Let's Take Back the Debates!*, THE NATION, February 7, 2000.

[144] 1997 WL 664266 (U.S.Oral.Arg.), 66 USLW 3321, at 14.

[145] That the Court leaves such important power over the political process in the hands of a private decisionmaker is shocking to say the least.

3. *Partisan Gerrymandering*

State governments also grant immense privileges to major parties during the process of redistricting. Following the decennial census, the legislative district lines are redrawn to comply with the constitutional "one person, one vote" requirement. The purpose of this process is supposed to be to ensure that each district has the same amount of people. However, in practice the procedure has taken on a different role—to carve out and distribute "safe" districts among the major parties.[146] By doing so, the state, for all intents and purposes, allocates power to specific groups while excluding others.[147]

Through the process of redistricting, the major parties have been able to establish a stranglehold on the electoral process. Partisan gerrymandering subverts the democratic process by allowing parties in control of the legislature to divide up the state to create as many safe districts as possible.[148] Instead of the voters choosing their representative, the parties are choosing their voters.[149] Of course, this perpetuates the exclusion of any other party or group not participating directly in the redistricting process.

The impact of political gerrymandering on the competitiveness of elections has not been given the attention it deserves. For example, following the 1990 census, Texas experienced what is sometimes referred to as "the great partisan gerrymander of '91."[150] The Democrat-controlled legislature carefully created conservative districts around the Republican incumbents. This "packing" strategy helped the Democrats in the 1992 election to win 21 of the other 22 districts.[151]

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[146] WILLIAM J. KEEFE, PARTIES, POLITICS, AND PUBLIC POLICY IN AMERICA 219 (8th ed. 1998); *See* Davis v. Bandemer, 478 U.S. 109 (1986); BECK, *supra* note 1, at 253-56.

[147] "By approving a one-party gerrymander deliberately designed to protect the party in power against its partisan opponents, the Court stamped its imprimatur on political parties operating at their worst. Gerrymanders designed by one political party, regardless of the data used to construct them, usually are detrimental to the goal of 'fair and effective representation;' by ensuring incumbent protection, such gerrymanders weaken the role of elections as instruments of government responsiveness." Howard A. Scarrow, *Vote Dilution, Party Dilution, and the Voting Rights Act: The Search for "Fair and Effective" Representation, in* THE SUPREME COURT AND THE ELECTORAL PROCESS 55 (David K. Ryden, ed. 2000).

[148] "Given control over the legislative map, a minority party can gain or a majority party secure a majority of seats in the legislature by stacking and splitting the opposing party's votes. Indeed, gerrymandering can secure a very lopsided legislative majority and place it far beyond likely legislative reversal." Stephen E. Gottlieb, *Districting and the Meanings of Pluralism: The Court's Futile Search for Standards in* Kiryas Joel, *in* THE SUPREME COURT AND THE ELECTORAL PROCESS 71 (David K. Ryden, ed. 2000).

[149] "As the saying goes, 'In gerrymandered election districts, the voters don't choose their politicians - the politicians choose their voters.'" *Rigged Political Maps are a Disgrace,* THE INDIANAPOLIS STAR, April 22, 2001, at D02.

[150] Joshua Green, *Gerrymandering for Position in 2002,* THE AMERICAN PROSPECT, April 23, 2001, at 16.

[151] *Id.*

Majority parties have also used gerrymandering to target opposing incumbents by drawing them into unfavorable districts or consolidating multiple districts pitting incumbents against each other.[152] Redistricting allows the parties to alter the rules of electoral competition to their own advantage—a fact recognized and actively accepted by the courts.[153] While the Court has noticed the problems caused by gerrymandering, it has failed to develop a justiciable standard for ensuring fairness in the redistricting process.

The seminal case concerning political gerrymandering was *Davis v. Bandemer*.[154] Following the 1980 census, the Indiana legislature sought to reapportion the state's districts. The Republican-controlled Indiana House and Senate constructed and adopted a redistricting plan that diminished the electoral chances for the Democratic Party in the state.[155] The effects were apparent from the results of the 1982 election. The Democrats received 51.9% of the popular vote, but claimed victory in only 43% of the seats.[156] Several Indiana Democrats filed suit in Federal District Court claiming that the reapportionment plan was a political gerrymander intended to disadvantage Democrats as a group.[157]

The Supreme Court for the first time held that Equal Protection claims based on political gerrymandering are justiciable.[158] However, in doing so they announced an unclear standard for resolving such claims. The Court held that: "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[159]

The Court required not only a showing of discriminatory intent, but also an actual discriminatory effect beyond the disproportionate results of one election.[160] A plaintiff must demonstrate the impact of the gerrymander in multiple elections to show that she has suffered injury in fact. "Specifically, even if a state legislature redistricts with the specific intention of disadvantaging one political party's election prospects, we do not believe that there has been an unconstitutional discrimination

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[152] *Id;* Kimball Brace & Doug Chapin, *Redistricting Roulette,* CAMPAIGNS & ELECTIONS, March 1991; *Rigged Political Maps are a Disgrace,* THE INDIANAPOLIS STAR, April 22, 2001, at D02. "This happens because the politicians put protecting their own interests above those of the voters. In essence, those in control hand-pick the voters they want. It's a situation that cries for reform. It doesn't matter whether Democrats or Republicans draw the lines. The needs of the politicians always come first." *Id.*

[153] "The reality is that districting inevitably has and is intended to have substantial political consequences." Davis v. Bandemer, 478 U.S. 109, 129 (1986).

[154] 478 U.S. 109 (1986).

[155] *Id.* at 113.

[156] *Id.* at 114-15.

[157] *Id.* at 115.

[158] *Id.* at 113.

[159] *Davis,* 478 U.S. at 132.

[160] *Id.*

against members of that party unless the redistricting does in fact disadvantage it at the polls."[161] The *Davis* Court upheld the challenged redistricting plan because the Democrats were unable to show that they had "been unconstitutionally denied its chance to effectively influence the political process."[162]

Through a disestablishment theory analysis, partisan gerrymandering raises issues similar to the ones discussed in *Kiryas Joel*.[163] The school district in *Kiryas Joel* was intentionally drawn following the residential boundaries of a religious group. The Court found that the purpose was to create a distinct district for the Satmars. The redistricting process has been used in a similar way by the major parties. The districts are knowingly drawn around predominantly Republican or Democratic "territory" to create safe seats.

The Court in *Kiryas Joel* struck down the special school district because it was a "government's purposeful delegation on the basis of religion."[164] The Court again maintained the principle of neutrality in describing the difference between a permissible and impermissible religiously homogeneous district.[165] However, in the case of a partisan gerrymander, the Court in *Davis* accepted the partisan intent in drafting districts as natural and unavoidable.[166] This is an explicit rejection of the neutrality principle in an important part of the electoral process. It does not take a cynic to see the Court's thinking as an erosion of the bedrock principle of democracy—fair and open elections.

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[161] *Id.* at 138-39.

[162] *Id.* at 132-33.

[163] *Kiryas Joel*, at 701 n.5. "Although not dispositive in this facial challenge, the pattern of interdistrict transfers, proposed and presently occurring, tends to confirm that religion rather than geography is the organizing principle for this district." *Id.* "Because the district's creation ran uniquely counter to state practice, following the lines of a religious community where the customary and neutral principles would not have dictated the same result, we have good reasons to treat this district as the reflection of a religious criterion for identifying the recipients of civil authority." *Id.* at 702.

[164] *Kiryas Joel*, at 699.

[165] *Id.*

[166] *See generally*, Davis v. Bandemer, 478 U.S. 109 (1986). "Indeed, quite aside from the anecdotal evidence, the shape of the House and Senate Districts, and the alleged disregard for political boundaries, we think it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win." *Id.* at 128. "The reality is that districting inevitably has and is intended to have substantial political consequences. ... As long as redistricting is done by a legislature it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id.* at 129.

B. *First Amendment Challenges Have Failed to Prevent Political Establishment*

[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.[167]

The founders understood freedom of speech to be vital to the political process. With that in mind it is abhorrent that we have allowed the government to grant preference to one class of speakers over others. The speakers considered here, of course, are the two major political parties. Whether the government discriminates among parties based on the identity of the speaker (which reeks of the arbitrariness previously experienced in racially discriminatory legislation) or by ideology allegedly held by the speaker (which reeks of classic viewpoint based discrimination) the act of discrimination still undermines the democratic ideas on which the government was founded.

In *Williams v. Rhodes*,[168] the Court explained that state actions granting preferences to major parties in the electoral process—acts of political establishment—are unconstitutional:

> The fact is, however, that the Ohio system does not merely favor a "two-party system"; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.[169]

In subsequent cases, however, the Court has accepted on its face the asserted state interest of promoting a two-party system sufficient to uphold election laws disadvantaging minor parties. Therefore, the court has often held, protecting the two-party system is permissible as long as you are not aiming to protect two *specific* parties. The Court fails to see that crafting election laws in pursuit of that interest has, if not the express purpose, the undeniable effect of substantially establishing the parties

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[167] FCC v. Pacifica Foundation, 438 U.S. 726, 745-46 (1978).
[168] 393 U.S. 23 (1968).
[169] *Id.* at 31-32.

that happen to occupy the position of the two major parties at the time the legislation is passed.[170] A certain passage by William Shakespeare describes this well:

> Who is so gross
> That cannot see this palpable device?
> Yet who so bold but says he sees it not?
> Bad is the world, and all will come to naught,
> When such ill dealing must be seen in thought.[171]

The state interest in protecting the two-party system is pretextual *per se*, and cannot honestly be called "legitimate" under the Court's holding in *Williams v. Rhodes* protecting the competitiveness of the electoral system. Because courts have accepted promotion of a two-party system as a legitimate state interest, the First Amendment has been unable to prevent the decay of the electoral process by acts of political establishment favoring major parties.

The Supreme Court has held that political parties enjoy associational rights conferred by the First Amendment.[172] In 1958 Justice Harlan explained the importance of the First Amendment freedom of association: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[173] He noted that regardless of the purpose and nature of the association state action inhibiting the freedom of association "is subject to the closest scrutiny."[174]

The Court has found a corresponding freedom *not* to associate within the freedom of association. As Justice Marshall wrote in *Tashjian v. Republican Party of Connecticut*, "[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution."[175] Political parties, therefore, have a right to define who participates in the selection of their nominees.

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[170] This may even be an indication of unconscious bias among the justices who, in no small measure, owe their seats to their political affiliation. For a good description of the phenomenon of unconscious bias see Barbara Flagg, *"Was Blind, But Now I See:" White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

[171] WILLIAM SHAKESPEARE, RICHARD III act 3, sc. 6.

[172] The "freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 214 (1986).

[173] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

[174] *Id.* at 461.

[175] 479 U.S. 208, 224 (1986) (holding that a state's imposition of a closed primary system violates the associational rights of a party seeking to open up its primary to non-party members).

Because the Court recognizes a party's right to select its own nominee as a First Amendment associational right, some burdens on the nomination process may be found unconstitutional.[176] In *Tashjian v. Republican Party of Connecticut*, the Republican Party of Connecticut challenged a state election law requiring parties to use closed primaries.[177] The Republican Party of Connecticut wanted to maintain an open primary which allowed independents to vote in the Republican primary.

In deciding in favor of the Republican Party in *Tashjian*, the Court developed a two-tiered standard for determining the constitutionality of a state restriction of a party's associational right.[178] Courts should first weigh the character and magnitude of the burden on the party's associational right.[179] If the burden is severe, the court will apply strict scrutiny.[180] If the state imposes a lesser burden an intermediate level of scrutiny applies. To survive strict scrutiny, the burden on the infringed right must be outweighed by a compelling state interest and the state's law must be narrowly tailored to meet the interest.[181]

In 1997, the Court decided the case of *Timmons v. Twin Cities Area New Party*, upholding Minnesota's anti-fusion law.[182] Fusion allows a candidate to accept the nomination of more than one political party, thereby having his or her name placed on the ballot multiple times.[183] Minor parties use fusion to communicate with the public and, perhaps more importantly, to help the new party reach electoral thresholds necessary for "major party" status.[184] Under a fusion strategy a fledgling party would endorse and have its name on the ballot next to the name of the popular major party candidate. It is easy to see why the two major parties would object to minor parties gaining popularity on the coattails of the Democratic or Republican nominee.

The Court in *Timmons* described the fusion ban's burden on the minor parties' associational rights as insignificant: "Respondent is free to try to convince Representative Dawkins to be the New Party's not the DFL's [Democrat Farmer Labor Party] candidate. Whether the party still wants to endorse a candidate who, because of the fusion ban, will not appear on the ballot as the party's candidate, is up to the party."[185]

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[176] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).
[177] 479 U.S. 208 (1986).
[178] *Id.* (citing Anderson v. Celebrezze, 460 U.S. 780, 789 (1968)).
[179] *Id.*
[180] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997).
[181] *Id.*
[182] *Id.* at 353-54.
[183] *Id.* at 354 n.1.
[184] *Id.* at 356-57.
[185] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 360 (1997).

Finding the burden slight, the court applied a less exacting standard of review. It then almost effortlessly found the burden justified by "'correspondingly weighty' valid state interests in ballot integrity and political stability."[186] The *Timmons* decision shows how the First Amendment associational rights are toothless in a system determined to favor major parties.

In fact, major parties have asserted *their own* associational rights to challenge the few attempts by state legislatures to open up the electoral process. One method of electoral reform that has become the target of major parties is the blanket primary. The Court recently decided the constitutionality of blanket primaries in *California Democratic Party v. Jones.*[187] The voters of California adopted Proposition 198 setting up a blanket primary system.[188] Several political parties sued, claiming that their freedom of association was infringed by the state allowing non-party members to vote in their primary election.

The major issue defining the case is whether primary elections are the process of a private group selecting its leader or just part of the broader public election process.[189] The respondents claimed that because primaries play an integral role in citizens' selection of public officials primaries are public proceedings and the State must act to make sure the primaries are conducted fairly.[190] The Court answered by explaining that because primaries select a party's nominee, they are not "wholly public affairs that the States may regulate freely."[191] The Court noted that political parties do have significant First Amendment interests at stake when the State seeks to regulate the primary elections.[192] Given that the parties have a First Amendment right in the process of selecting their nominees, the Court applied the test adopted in *Timmons.*

First, the Court considered the strength of the interests asserted by each side. The majority opinion began by explaining the justification for recognizing the freedom of association. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates

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[186] *Id.* at 370.

[187] 530 U.S. 567 (2000).

[188] "The blanket primary is a version of the open primary in which the voter is not limited to the ballot of any single party. All voters receive the same ballot, and a voter is not limited to the candidates of any single party but may vote, as to each office contested, for any candidate regardless of party affiliation." California Democratic Party v. Jones, 984 F. Supp. 1288, 1291-92 (1997). Under California's blanket primary "all persons entitled to vote, including those not affiliated with any political party, shall have the right to vote . . . for any candidate regardless of the candidate's political affiliation." Jones, 530 U.S. at 570. (quoting Cal. Elec. Code Ann. § 2001, 2151 (West Supp. 2000)).

[189] *Id.* at 572.

[190] *Id.*

[191] *Id.*

[192] The Court also notes its prior holdings that established "States have a major role to play in structuring and monitoring the election process, including primaries." *Id.* (citing Burdick v. Takushi, 504 U.S. 428 (1992); Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986)).

who espouse their political views."[193] The Court then explained the impact of primary elections on the political functioning of these constitutionally protected associations:

> In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views.[194]

The Court assigned a heavy weight to the major parties' interest noting that precedents "vigorously affirm" that the First Amendment grants special protection for the "process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences.'"[195] In other words, ensuring the purity of a party's ideology from outside influence is protected strongly by the associational rights granted by the First Amendment.

Second, the Court measured the strength of the state's asserted interest in imposing the burdens created by the blanket primary. The Court responded to each of the seven state interests presented. The first two interests asserted were dismissed by the Court as illegitimate. The respondents claimed that the blanket primary was adopted to produce "elected officials who better represent the electorate and expand[] candidate debate beyond the scope of partisan concerns."[196] The Court held that these two state interests are attempts to alter the content of the debate and the identity of the parties' nominees.[197] "Both of these supposed interests, therefore, reduce to nothing more than a stark repudiation of freedom of political association: Parties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not be congenial to the majority."[198]

The third state interest was remedying the disenfranchisement of independent and minor party members caused by the closed primary system. The Court gave little weight to this interest, citing the *Tashjian* holding that a "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to

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[193] California Democratic Party v. Jones, 530 U.S. 567, 574 (2000).
[194] *Id.* at 575.
[195] *Id.*
[196] *Id.* at 579.
[197] *Id.*
[198] 530 U.S. 567 (2000).

determine its own membership qualifications."[199] Further, the Court explained that "[t]he voter who feels himself disenfranchised should simply join the party."[200]

The Court considered the final four state interests together.[201] The state believed that the blanket primary would promote fairness, afford voters greater choice, increase voter turnout, and protect voters' privacy.[202] The Court found the fairness interest unpersuasive because it is less fair to have nonparty members select the party nominee than to have non-party members wait until the general election to make their choice.[203] The Court rejected the interest of increasing choice by noting the blanket primary system itself was intended to produce more "centrist" candidates that would be more representative of the people.[204] In that way, the Court explained, blanket primaries *narrow* the choices by excluding from serious contention all but the more centrist candidates. The Court dismissed the interest in increasing voter participation in the same manner.[205] The state asserts that a party affiliation is a protected private matter. The Court rejected this argument outright. "If such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appointment to certain offices."[206]

The Court concluded that even if the state's asserted interests were compelling, the blanket primary system is not narrowly tailored to achieve them.[207] The Court offers simple alternatives that address the state's interests without burdening associational rights.[208] The Court does this by briefly describing a hypothetical nonpartisan blanket primary election.[209] After balancing the interests the court holds "[t]he

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[199] *Id.* (citing Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 215-16 n.6 (1986)).
[200] *Id.*
[201] *Id.* at 580.
[202] *Id.*
[203] California Democratic Party v. Jones, 530 U.S. 567 (2000).
[204] *Id.*
[205] *Id.*
[206] *Id.* at 585.
[207] *Id.*
[208] *Id.* at 585-86.
[209] *Id.* The Court described a hypothetical primary:

> Respondents could protect them all by resorting to a nonpartisan blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot—which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"—

burden Proposition 198 places on petitioners' rights of political association is both severe and unnecessary."[210]

Both Petitioners and Respondents agreed that the Court should apply the following flexible standard described in *Timmons*:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the "character and magnitude" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiff's [sic] rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable nondiscriminatory restrictions."[211]

The majority's opinion in *California Democratic Party v. Jones*, illustrates that the key to using an associational rights argument successfully to prevent political establishment is to convince the Court that the burden on the associational rights of the political parties (rather than individual citizens) is less than severe. However, this case demonstrates that the Court, to protect the two-party system, will deem highly speculative "severe" burdens as sufficient to trigger heightened scrutiny under the *Timmons* test.[212]

The Court exaggerates the burdens posed by a blanket primary system. By opening the primaries to non-party members, candidates are forced to appeal to a broader range of voters. "Even when the person favored by a majority of the party members prevails, he will have prevailed by taking somewhat different positions."[213] The Court found

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> all without severely burdening a political party's First Amendment right of association.

Id.

[210] *Id.* at 586.

[211] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (citations omitted).

[212] The Court in *California Democratic Party v. Jones* found the mere *possibility* of party raiding, where members of a party vote in the opposition's primary for the weakest candidate, places a severe burden on a party's associational rights. In fact, the petitioners were unable to provide conclusive evidence that the blanket primary system has a negative effect on major parties. Respondent's Brief, 2000 WL 340273 at 28. "Given the real-life complexity of political campaigns, the District Court found "almost unanimity" among the experts that there is little evidence raiding will be a factor in California's blanket primary. . . . The parties' own experts acknowledged that the vast majority of voters who cross over do so simply to vote for the candidate they most prefer." *Id.*

[213] California Democratic Party v. Jones, 530 U.S. 567, 580 (2000).

that the blanket primary system encroaches on a party's right to define its ideology. Yet, the severity of this burden is discounted when one considers the political reality that nominees generally adopt more moderate positions following the party primary. It is difficult to imagine how the mere potential for altering a candidate's message just a few months earlier in the political process than usual poses such a severe burden on the parties. In fact, during the primary stage a candidate may gain an early advantage by appealing to the center. By accepting the mere possibility of a severe burden on the major parties as sufficient to trigger strict scrutiny, the Court moves the standard back toward finding a per se violation of associational rights unconstitutional.

The final quirk found in the *Jones* decision is that both sides asserted the same fundamental interest: furthering democratic principles. The political parties assert, and the Court agrees, that "representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."[214] The State of California, on behalf of its nonpartisan citizens, asserted that because the outcome of a major party's primary has a significant effect on the outcome of the general election (through its automatic ballot access and presumption of electoral legitimacy), primaries are at least in part a public function and accordingly the state has a right to ensure the fairness of the election process.

As it continues to do in this line of cases, the Court sides with the interests asserted by the two major political parties rather than protecting similar rights asserted by minor parties and individual citizens.[215] Many would describe the line of cases from *Tashjian*, through *Timmons*, and to *Jones*, as inconsistent insofar as the application of political parties' First Amendment associational rights is concerned. *Tashjian* struck down a state's closed primary law. *Timmons* upheld a state's anti-fusion law. *Jones* struck down a state's blanket primary law.

However, these cases are actually consistent—they show that the Court finds and applies reasoning that favors those interests asserted by the major party as opposed to similar conflicting First Amendment interests advanced by "outsiders." In *Tashjian*, the Republican party wanted to open its primary to independents. In *Timmons*, the partisan legislature banned the parasitic practice of fusion to promote the two-party system. In *Jones*, the major parties wished to exclude nonpartisans from the primary election process. These outcomes illustrate the extent to which the two major parties are privileged when election laws are

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[214] *Id.* at 574.

[215] For a case where both interests coincided see *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), where the court struck down a Connecticut closed primary statute which conflicted with a Republican party rule that *opened* the Republican primary to non-members.

challenged by First Amendment claims. Many opinions appear to be bending over backwards to accommodate the needs of the major parties in the name of promoting a stable two-party system—an interest that is not *legitimate* under basic free democratic ideals.

This recent line of cases shows how the *Timmons* standard is too flexible in practice. It allows states to craft legislation favoring the two major parties and enables courts to easily find sufficient reason to uphold such legislation in the face of First Amendment claims. Justice Scalia, writing for the majority in *Jones* remarked that "[t]he voter who feels himself disenfranchised should simply join the party."[216] That the highest court in the land has the gall to make such a statement in its official opinion shows how the First Amendment jurisprudence fails to prevent establishment in the political realm.

IV. Toward a Workable Political Establishment Standard

A. Similar Attempts to Enforce Government Neutrality in the Political Arena

1. Kamenshine's "Implied Political Establishment Clause"

The idea of applying Establishment Clause analysis to the political realm is not entirely new. In 1979, Professor Robert D. Kamenshine argued that government participation in the marketplace of ideas infringes upon the public's freedom of expression in a manner similar to governmental encroachment on freedom of religion.[217] Using traditional Establishment Clause terminology, Kamenshine's theory can be described as a strict separationist interpretation of the government's role in the public debate.[218] Kamenshine's argument, similar to many separationist interpretations of the Establishment Clause, merely wanders about the curtilage of the central theme of the disestablishment theory: neutrality amidst diversity.

In the two decades since the publication of Kamenshine's article many of his concerns about government participation in the marketplace

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[216] California Democratic Party v. Jones, 530 U.S. 567, 584 (2000). This statement is appalling. Continuing the disestablishment analogy, imagine what this statement would require if translated into the religious realm. It would be similar to saying, "Sorry folks, the government is allowed to deny Jews and Catholics the right to vote. However, if you join one of our state's favored faiths, the government will welcome you into the voting booths with open arms." The Court's statement turns its back on precedents condemning state coercion of thought and association. The Court, in a sense, requires the voter to surrender her right *not* to associate with a party in exchange for the right to vote for the candidate of her choice in the critical primary election.

[217] Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979).

[218] "Laws or programs that operate to restrict an individual's free expression are not the only threat to the system of freedom of speech. Government programs which disseminate information or assist private disseminators also pose a threat to that system." *Id.* at 1106.

of ideas do not necessarily require such a strict separation of "Politics and State." However, an "implied political Establishment Clause" with a much narrower scope would be useful to prevent the government from unjustly structuring the political process by favoring some participants over others.

While Kamenshine was correct in questioning acts of political establishment by the government, he focuses his argument on the minor harms posed by what he describes as acts of political establishment. Kamenshine's was concerned with government expression of ideas and subsidizing only certain private viewpoints. "Similarly, the political Establishment Clause suggested here would protect the free speech values on which a democratic system depends from the specific threat posed by government propagandizing."[219] The article applies the framework of the *Lemon* test to various situations of government expression and indoctrination of ideas. However, the use of the *Lemon* test is inappropriate to govern the issue of political establishment.

Kamenshine failed to adequately address the political establishment problem because he focused on government expression rather than government favoritism in the marketplace of ideas. Establishment in the realm of communication of ideas is much less of a threat than establishment in the allocation of power. Kamenshine's core values may be correct,[220] but in aiming his analysis of the establishment problem he picked the wrong target[221] and misses it in such a way as to damage the credibility of future arguments proposing to apply disestablishment theory in the political realm.[222]

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[219] *Id.* at 1119.

[220] "Political establishment is clearly a subject of first amendment concern. It threatens the primary object that the freedom-of-speech clause was designed to protect; a free marketplace of ideas necessary to true self-government. Thus, the Court may appropriately interpret the first amendment to protect against this threat." *Id.* at 1106. "The fact that the political process is the primary source of control over government makes it all the more important that courts prevent the government from manipulating that process." *Id.* at 1119. "Public financing is clearly a scarce resource that can have a major impact on the political process. Unequal distribution of this resource by the government may distort the marketplace of ideas and thus raises serious political establishment concerns." *Id.* at 1147. "Campaign funding , unlike ballot access, correlates closely with the ability to gain public support in the first place; without some aid at the outset , many minority parties may never be able to marshal enough such support to qualify under the plan. Thus, contrary to the Court's finding, the financing of election campaigns involved in *Buckley* perpetuates the political status quo even more than do ballot access restrictions." *Id.* at 1147 n.164.

[221] "The implied political Establishment Clause would prohibit government advocacy of political viewpoints and unequal government assistance to private political dissemination." *Id.* at 1153.

[222] Some scholars may note that government speech is merely one voice among others in the marketplace of ideas and dismiss the need that Kamenshine sees for restricting government speech via the Establishment Clause. The danger in this is when those same scholars based on Kamenshine's analysis reject the possibility of applying disestablishment principles in the political arena. Indeed, Kamenshine's description of government speech includes the terms "propaganda" and "indoctrination," that, while noting that Kamenshine surely did not mean them this way, connotate that the speaker is outside the mainstream—especially when such words are used to describe the United States. *See* Frederick Schauer, Book Review, *Is Government Speech a*

2. *Yudof's* When Government Speaks

Another commentator who saw the dangers of political establishment is Professor Mark Yudof. In 1979, Yudof first published an excerpt from his widely cited book *When Government Speaks: Politics, Law, and Government Expression in America* published in 1983.[223] Yudof's concern, like Kamenshine's, is that government participation in the marketplace of ideas has at least the potential for severe effects on the democratic process. He warns against government speech drowning out other ideas or amounting to propaganda and indoctrination:

> As government and its opportunity to communicate have expanded, so have its institutional interests as perceived by its functionaries. Inevitably, government, or those who are part of it, seeks to persuade citizens to act, or to allow it to act differently than they would have without the information supplied by government. . . . The obvious danger is that government persuaders will come to disrespect citizens and their role of ultimate decider, and manipulate them by communicating only what makes them accede to government's plans, policies, and goals. The opportunities for such abuse are numerous.[224]

As we begin the twenty-first century, targeting propaganda and indoctrination are no longer appropriate ends for tinkering with freedom of expression. Since the 1970s the potential for the propaganda Yudof fears is unlikely. Government by no means dominates the mass media. In modern America there is little to no risk of government hijacking the mass media to "drown out" dissenting ideas.[225] The business of media has become too massive and prolific. It has its own agenda—profit.[226] Yudof's fears give government too much credit—it is hard to believe any government can control the hundreds of cable channels, let alone the

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Problem?, 35 STAN. L. REV. 373, 379-80 (1983) (reviewing MARK G. YUDOF, WHEN GOVERNMENT SPEAKS (1983)).

[223] MARK G. YUDOF, WHEN GOVERNMENT SPEAKS (1983). *See also* Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979).

[224] MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 6 (1983)

[225] Politics in the Clinton era have developed partisanship and spin into an art form. This fact is not lost on the citizenry. Since the 1970's people are much more likely to take the expressed opinions of public officials with a grain of salt.

[226] Perhaps when the interests of media profit and government propaganda align, then Yudof's reasoning would be more appropriate.

Internet. Other commentators have also found similar flaws in Yudof's argument.[227]

In the end, Yudof makes the same mistake as Kamenshine—promoting the correct democratic principles and values but aiming at the wrong target—government expression. Today government expression is little threat because there are so many other voices in the marketplace of ideas.

However, the constitutional values of pluralism and equality need to be invoked, possibly through the First Amendment, when the government bestows advantages upon certain speakers competing in the field of ideas. Again, this concern is at its apex in the penultimate political battlefield, the electoral process. It is in that area that the disestablishment theory is most applicable.

3. *Other Comments on Issues Approaching Disestablishment Theory*

Professor Steven Shiffrin postulates that, while an analogy between church-state separation and government-granted political preferences is useful, the methods used to enforce the religious Establishment Clause in the political realm are impracticable.[228] "[F]ew

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[227] Frederick Schauer, Book Review, *Is Government Speech A Problem?*, 35 STAN. L. REV. 373 (1983). Schauer writes:

> There is by no means a perfect correlation between government attempts to persuade and the fact of persuasion. People are not simply brainwashed by the state, but very often exercise choice and reach conclusions contrary to those that the government desires. Moreover, the government is not the only communicator. To the extent that the quantity and power of private sector communications increase and to the extent that those communications convey messages different from the government's, the effect of government communications may decrease. Yudof is therefore unable to rely heavily on the social sciences to compel the conclusion that government speech is a first amendment problem; he must depend instead on the intuitive appeal of the idea that governments frequently try to manipulate the processes of consent and sometimes succeed in doing so.

Id. at 377. Mark V. Tushnet, Book Review, *Talking to Each Other: Reflections on Yudof's When Government Speaks*, 1984 WIS. L. REV. 129. Tushnet writes:

> Yudof focuses on what might be called substantive government speech, that is, expression proposing or criticizing specific policies. As I have said, the degree of pluralism in the United States means that substantive government speech is not a real problem. In most situations there are opponents and critics who have enough access to the means of communication to assure that no substantive speech will be so loud as to drown out opposition.

Id. at 134.

[228] Shiffrin, *supra* note 130, at 606-08. Shiffrin notes:

> Similarly insight is gained by examining some of the concerns underlying the Establishment Clause. When governments speak they threaten to overwhelm

would suggest that government cannot speak on the health question despite free speech costs. In short, there can be no room for a non-religious Establishment Clause."

I argue that this is inaccurate. A political establishment clause properly tailored would aim at a much narrower scope of government action than the religious Establishment Clause. A political Establishment Clause would ban actions tending to entrench groups in power but would not prohibit the government to be a speaker in the marketplace of ideas. Yudof and Kamenshine's views find government participation in the marketplace of ideas to be harmful, while I believe that it is not nearly as harmful as government *structuring* the marketplace of ideas to the benefit of certain speakers. A political Establishment Clause would strictly scrutinize actions such as automatic ballot access, but not the numerous reports published daily by the GPO.[229]

As I argued above, the founders did not fear religious ideas to the extent they feared religious institutions monopolizing power or the government favoring some religions but not others. Shiffrin further explains:

> An establishment clause model for non-religious speech would entirely prevent government persuasion or sponsorship of beliefs. That surely would go too far. It is simply too late in the day to propose that the Government Printing Office must close up shop, that subsidies for broadcasting and the arts must be abandoned, that legislatures and Commissions cannot produce public reports, or that controversial governmentally subsidized press conferences by public officials are unconstitutional. Government has legitimate interests in informing, in educating, and in persuading.[230]

However, government has *no legitimate* interest in structuring the electoral marketplace of ideas to establish two groups as national

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> or impinge upon individual choice, a concern at the heart of the Establishment Clause; when governments address partisan electoral issues they tend to undermine respect for the political system and to depart from equality in ways that demand justification, just as government speech in support of particular religions diminishes respect for the political system and infringes upon equality. Many subsidies for . . . political parties . . . create entanglement problems that undermine values of autonomy, values akin to those represented by the Establishment Clause's "high wall."

Id. at 608.

[229] In fact there is a value to allowing the government and its officials to speak—the citizenry will be better informed and suspicious when the government remains silent on certain issues.

[230] Shiffrin, *supra* note 130, at 606.

political orthodoxy. Speech by the government is much less of a threat than government encasing those same ideas and groups into law.

B. Political Establishment, not Government Speech, Should Be Unconstitutional

The bases for a constitutionally required "political establishment clause" permeate many areas of constitutional jurisprudence.

The right to vote has been protected by the courts for years, but this right is an illusion if it cannot be exercised in a legitimate electoral process. The right to vote is meaningless if the elections are not fair and accurate. Just picture an election where the ballot boxes are replaced by paper shredders.

Fair, democratic elections are required in the body of the Constitution itself. For example, Article IV, § 4 guarantees to each state a republican form of government.[231] This type of government, by most definitions, is premised on the notion of popular sovereignty.[232] Popular sovereignty requires direct democracy or the selection of representatives—each requiring elections.[233] Therefore, the citizens as a whole, have a right to fair elections under the republican government clause of Article IV, § 4.

Unfortunately, courts have continued to find that the Guarantee Clause to be a non-justiciable political question.[234] Regardless of the

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[231] U.S. CONST. art. IV, §4. "The United States shall guarantee to every State in this Union a Republican Form of Government..."

[232] "The right to vote in various federal elections is adverted to in several constitutional provisions, and whatever additional content Article IV's Republican Form of Government Clause may have, at a bare minimum it means that states must hold popular elections." JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 118 (1980); Akhil Reed Amar, *The Central Meaning of Republican Government, Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994). "Since a fundamental goal of a democracy is to promote free and genuine citizen opinion, the notion that the non-political aspects of government can takes sides in election contests or bestow an advantage on one of several competing factions must be emphatically rejected." Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578, 560 (1980).

[233] ELY, *supra* note 232, at 240 n.78. "There does not seem anything reckless in the proposition that a government is not 'republican' unless the important policy issues are decided by elected officials: in fact we have seen that that is close to the term's core meaning." *Id.*

[234] *Id.* at 118. "[T]he Supreme Court has historically characterized claims arising under the Republican Form Clause as presenting "political questions" unfit for judicial resolution. ... [T]hat generalization is rooted in a category mistake. The early cases of Luther v. Borden, 7 How. 1 (1849), involving an attempt to get the Court to decide under the Republican Form Clause which of two contending governments was the "real" government of Rhode Island, did involve a situation whose political tangle the Court probably was wise to leave to Congress. It was, however, a gross mistake of logic to infer, as subsequent cases did, that all cases brought under the Republican Form Clause must therefore also present political questions. In fact it seems likely that this unfortunate doctrine—that all Republican Form cases are necessarily cases involving political questions—will wholly pass from the scene one of these days. . . . the right to vote in state elections is a rather special constitutional prerogative ... that cannot be teased out of the language of equal protection alone and in textual terms is most naturally assignable to the Republican Form Clause." *Id.* (citing WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION (1972); Arthur E. Bonfield, *The*

judiciary's enforcement role, the inclusion of this Clause in the body of the Constitution strengthens the argument that citizens are guaranteed not just the right to participate in elections, but to participate in legitimate and fair elections.

Fundamental First Amendment freedoms are also related to the maintenance of fair and accurate elections. The First Amendment, while often at odds with electoral regulations, by its nature pervades the election process up to, and arguably including, the physical act of voting. The marketplace of ideas protected by the First Amendment, is the arena of pre-election deliberation where the will of the majority forms. Therefore, government actions that bestow unfair advantages in the electoral marketplace of ideas undermine the notion that the resulting election reflects the will of the people. Granting only certain groups preferences in the electoral process should be highly scrutinized.

Constitutional jurisprudence, including the text of the document itself, demands government neutrality in the electoral process. We should look to the successful enforcement of government neutrality in the religious realm as a guide to ensuring neutrality in the electoral process. The same values underlie both areas of government neutrality: equality, freedom of thought, and respect for diversity. Therefore, courts should apply traditional religious Establishment Clause reasoning to the extent necessary to enforce government neutrality in the electoral process, thereby preventing political establishment.

C. *The* Lemon *Test and Political Disestablishment*

Applying a disestablishment model borrowed from the religious context can help ensure the legitimacy of the electoral process by preventing certain groups—the two major parties—from unfair advantage in the marketplace of ideas, specifically, the electoral marketplace.

While the use of disestablishment principles in the political context is helpful, some specific standards of constitutionality in religious Establishment Clause jurisprudence translate poorly in combating a political establishment. The most striking example of this imperfect fit is the widely-cited *Lemon* test.

The *Lemon* test states that government action violates the Establishment Clause when it (1) has no "secular purpose," (2) has a

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Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 MINN. L. REV. 513 (1962)); *See* New York v. U.S., 505 U.S. 144, 182-84 (1992) (suggesting that perhaps not all claims under Article IV, §4 are nonjusticiable political questions).

"primary effect" of advancing religion and (3) fosters "excessive entanglement" between church and state.[235]

In the political establishment context, the search for at least one "secular"—or as it would translate, a "nonpartisan"—purpose would fail to address the goal of disestablishment. In the area of political establishment, analyzing the intent of the legislature is fruitless and counterproductive. Disestablishment theory is a check against legislators manipulating the law to their political advantage—the sincerity of their expressed intent in passing a discriminatory law is unreliable, perhaps even untrustworthy. A legislature could easily assert that a nonpartisan interest would be pursued by a law that significantly stifles outside competition. For example, the strict ballot access restriction rejected in *Anderson* could pass this "nonpartisan purpose" test. The asserted state interest of avoiding voter confusion by limiting the number of names on the ballot would be a sufficient "nonpartisan purpose" to cover for residual anti-competitive legislative intent. The translation of the "secular purpose" part of the *Lemon* test is unworkable in enforcing disestablishment principles in the electoral process.

The "primary effect" part of the *Lemon* test is also inappropriate. It would allow partisan legislators to tailor a law to meet a benign problem, thus creating a neutral "primary effect," but in practice the legislation could lawfully have a substantial, even intentional, discriminatory effect on a certain class of electoral participants. The targeted problem could even be highly speculative such as the interest in preventing "party raiding" often cited to challenge open and blanket primaries.

The "excessive entanglement" part of the *Lemon* test makes absolutely no sense in the political establishment context. It is expressly within the government's powers to regulate the electoral process. In fact, a major premise of my argument is that it is government's *duty* to ensure the fairness of the electoral process. In that sense, legitimate elections are impossible without "excessive entanglement."

However, merely because the *Lemon* test does not translate directly into a political disestablishment jurisprudence does not preclude the use of religious disestablishment reasoning in the political realm. Indeed, the *Lemon* test has almost been completely discarded by the justices in deciding *religious* establishment cases since the 1980s. If the *Lemon* test is even mentioned, it is denigrated to the status of "guideline" rather than a binding standard.

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[235] Lemon v. Kurtzman, 403 U.S. at 612.

D. *Other Religious Establishment Clause Standards and Political Disestablishment*

As the *Lemon* test lost popularity among the justices, several new standards were articulated and often applied in religious Establishment Clause cases.[236] Some of these new standards provide insights for how to create a political Establishment Clause standard based on protecting traditional religious disestablishment values such as neutrality and equality.

In *Lynch v. Donnelly,* in 1984, Justice O'Connor wrote in her concurring opinion that the *Lemon* test has outlived its usefulness.[237] She proposed a modification of the *Lemon* test that has become known as the "endorsement test".[238] Under O'Connor's endorsement test the constitutionality of a government action related to religion depends on whether a reasonable objective observer would perceive the government action as "communicating a message of government endorsement or disapproval of religion."[239] The protection of government neutrality among religions is evident in this test. Justice O'Connor's early description of her endorsement standard indicates that it may be even more useful in a political establishment context:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community . . . . Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[240]

O'Connor's endorsement test highlights neutrality as a central purpose of the Establishment Clause. This endorsement test was used by the plurality in *Texas Monthly v. Bullock* to strike down a state policy of exempting religious publications from sales tax.[241] The Court stated that when government directly subsidizes religious groups but not other

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[236] *See generally* Lisa Langendorfer, Comment, *Establishing a Pattern: An Analysis of the Supreme Court's Establishment Clause Jurisprudence,* 33 U. RICH. L. REV. 705 (1999).
[237] 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring).
[238] *See id.*
[239] *Id.* at 692.
[240] *Id.* at 688. In the political realm this often translates more than just a feeling of exclusion. Nonpartisan citizens by choosing not to become a member of a major party lose the right to vote for the candidate of their choice in a closed primary election—a contest where automatic ballot access is at stake.
[241] 489 U.S. 1 (1989).

groups, "it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community."[242] The endorsement test may be very helpful in crafting a political disestablishment standard.

Justice Souter also rejected the *Lemon* test. In his concurring opinion in *Lee v. Weisman,* Justice Souter offered a modified version of O'Connor's endorsement test.[243] This is generally described as a favoritism test. Justice Souter strongly emphasizes the importance of neutrality in Establishment Clause jurisprudence and adopts a more separationist version of the endorsement test. In formulating his favoritism test, Justice Souter wrote:

> While the Establishment Clause's concept of neutrality is not self-revealing, our recent cases have invested it with specific content: the State may not favor or endorse either religion generally over nonreligion or one religion over others. This principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community.[244]

This favoritism test can be easily adapted to create a standard for preventing political establishment. A similar political establishment standard would ensure that partisan affiliation "is irrelevant to every citizen's standing in the political community." Justice Souter applied his favoritism test in writing the majority opinion in *Kiryas Joel.*[245] In striking down the special school district created for the Satmars by the State of New York, Souter wrote:

> The fact that this school district was created by a special and unusual Act of the legislature also gives reason for concern whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups. This is the second malady the *Larkin* Court identified in the law before it, the absence of an "effective means of guaranteeing" that governmental power will be and has been neutrally employed.[246]

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[242] *Id.* at 15 (quoting Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring)).
[243] 505 U.S. 577, 627 (1992) (Souter, J., concurring).
[244] *Id.* at 627 (citations omitted).
[245] Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994).
[246] *Id.* at 702-03 (citing Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125 (1982)). The Court found:

Essentially Justice Souter's favoritism test is the endorsement test with an extra emphasis on neutrality to ensure government does not favor religion over non-religion. Despite this separationist leaning, Souter's favoritism test is also instructive in designing a workable political establishment standard.

E. Sketching a Political Disestablishment Standard

As I begin to draft a workable political disestablishment standard, one should keep in mind the central goals of implementing such a theory. The Constitution guarantees to the citizenry a republican form of government and the Court has recognized the fundamental nature of a person's right to vote. Each of these fundamental tenets of American governance is violated by unfair and inaccurate elections. For more than a century, the electoral process has been crafted to the advantage of so-called major parties. That the government grants such an important preference for certain classes brings disestablishment theory to the forefront.

From the nation's experience in enforcing the religious Establishment Clause of the First Amendment it is evident that disestablishment theory demands neutrality. Keeping in mind that neutrality is the central principle of disestablishment theory, what follows is my attempt to craft a workable standard for political disestablishment in the electoral process.

Government action in the realm of religion triggers Establishment Clause scrutiny. Likewise, a political disestablishment analysis should be triggered whenever the government regulates in the area of access to political power—namely the electoral process.[247] A

> But whereas in Larkin it was religious groups the Court thought might exercise civic power to advance the interests of religion (or religious adherents), here the threat to neutrality occurs at an antecedent stage. The fundamental source of constitutional concern here is that the legislature itself may fail to exercise governmental authority in a religiously neutral way. The anomalously case-specific nature of the legislature's exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion.

Id. at 703.

[247] "[W]hen interpreting the various constitutional provisions that protect self-government, such as the First Amendment, the Court should construe those provisions against a background conception of democracy that recognizes the importance of competitive political markets to ensuring appropriately responsive representation. As part of that inquiry, the Court ought to focus on whether the process remains sufficiently open to challenge and reform, or whether the costs of mobilizing effective challenge have been raised so high as to leave the system insufficiently responsive." Issacharoff & Pildes, *supra* note 1, at 671.

political establishment standard must be limited to the context of campaigns and elections. The gateway part of the test would require that the challenged government action influences the electoral process.

One of the purposes of this part is to prevent a chilling effect on government speech. Contrary to the assertions of Kamenshine and Yudof, the risks of government propaganda and indoctrination are not significant in modern America to warrant such excessive scrutiny of government speech. Indeed, government speech is not only minimally threatening but also valuable in itself as a part of a representative democracy. Allowing the government to speak freely is vital to informing the public what the government is doing. This is the purpose behind the "government in the sunshine" laws. To the extent that it prevents state secrecy, government speech should be encouraged rather than suppressed.

This gateway part also precludes challenges to other non-political subject matter where the government may find it necessary to grant preferences. In those cases, the traditional judicial analyses will apply. For example, state action that discriminates based on race will still be subject to strict scrutiny rather than a disestablishment analysis. Government action that does not affect the electoral process is not subject to scrutiny under a political establishment standard.

The next part of a political disestablishment standard is determining whether the government action creates an advantage for certain groups, usually political parties, or candidates in the electoral process. If a government action classifies on its face on the basis of partisan affiliation in distributing access, subsidies, or other advantages in the electoral process; or the state action has reasonably foreseeable discriminatory/privileging effects, it is an unconstitutional violation of political disestablishment.

This is an adaptation of Justice O'Connor's endorsement test.[248] It targets government action that would "communicat[e] a message of government endorsement or disapproval" to a reasonably objective observer.[249] This also incorporates Justice Souter's emphasis on neutrality. If the government chooses to grant aid to political parties or candidates it must do so equally. The constitutionality of such electoral subsidies would depend on "whether the benefit received . . . is one that the legislature will provide equally to other . . . [political] groups."[250]

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[248] The term "endorsement" becomes problematic when translated into a discussion about campaigns and elections. The "endorsement" challenged by a political disestablishment clause is not the typical expression of an opinion that a particular candidate or party should be elected. Rather, "endorsement" in the establishment context means that a particular candidate or party falls within the "mainstream" and correspondingly implies that those not endorsed are not legitimate or outsiders.

[249] *Lynch*, 465 U.S. at 692.

[250] *Kiryas Joel*, 512 U.S. at 702-03.

This will ensure that "governmental power will be and has been neutrally employed."[251]

If the discriminatory or privileging effects are not reasonably foreseeable, a rational basis test will suffice. Under the political disestablishment doctrine, however, promoting or protecting a two-party system is no longer a "legitimate state interest" that can be used to defend state action with *any* privileging or discriminatory effect. Under the rational basis test for state action that causes unforeseeable privileging or discriminatory effects, traditional justifications, such as the promotion of an orderly election process, would pass muster.

Finally, borrowing from the religious Establishment Clause jurisprudence, the scope of permissible standing to sue on an establishment claim is broad. People may challenge government action that may violate the Establishment Clause as taxpayers.[252] In the political context, all citizens individually have a right to vote. Additionally, under the Article IV Guarantee Clause, all citizens as a group, have a right to a republican government. The combination of these fundamental rights should bestow standing to any citizen challenging a state action granting preferences and advantages in the electoral process. Like the religious Establishment Clause, the right against political establishment is a group right to be enjoyed by the people as a whole. Therefore, a broad rule of standing in the category of political establishment is warranted.

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[251] *Id.* at 703 (citing Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125 (1982)).

[252] *See generally* Flast v. Cohen, 392 U.S. 83 (1968); William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221 (1988).

> [T]he protection provided by the Establishment Clause cannot be fully realized unless there is easy and unrestricted access to the courts to challenge federal expenditures or grants that might violate the clause. Justice Brennan, like Justice Rutledge forty years earlier, has concluded that federal taxpayers should be given special status to challenge expenditures as violative of the Establishment Clause, based on the historical argument that the clause was enacted to prevent the forced exaction of moneys for the support of state-sponsored religion. There is much to be said for this argument, but I would prefer to read the Establishment Clause as protecting all members of our society, not merely taxpayers, from excessive entanglement of church and state.

Id. at 269 (citing Everson v. Board of Educ., 330 U.S. 1, 28 (1947) (Rutledge, J., dissenting); Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 504 (1982) (Brennan, J., dissenting) ("The taxpayer was the direct and intended beneficiary of the prohibition on financial aid to religion.")).

V. Conclusion

The right to vote is arguably the most important of the fundamental rights recognized by the Supreme Court's interpretation of the Constitution. An important assumption underlying the right to vote as the primary means of exercising popular sovereignty in the constitutionally mandated republican government is that the process in which the vote is exercised must be fair and accurate. The current system of elections in most states bestows significant advantages on only two "major parties," and correspondingly, as a consequence of the zero-sum nature of elections, imposes disfavored treatment on all other political participants. The resulting elections can hardly be called fair.

Although the First Amendment has generally failed to prevent the duopoly in the electoral process, a different clause has had success in preventing the hegemony of certain groups in a similarly important area of American society—the Establishment Clause. The Establishment Clause's traditional enforcement of values such as equality and neutrality in the context of religion creates a useful paradigm for enforcing these same values in the electoral process through which Americans exercise their fundamental right to vote and choose the trustees of their rights, freedom, and social welfare.

Throughout most of European history, the church, as measured by its influence on secular government, has been the most powerful non-governmental organization known to man. Disestablishment theory emerged as a check against religious institutional influence on the state. The relatively new tradition of separation of church and state likely contributed to the development of the democratic republican form of government. In modern America, the most powerful non-governmental organizations are the two major political parties. Disestablishment theory is a useful tool for checking the power of these organizations that have already overcome some of the structural barriers the founders built into the government.

The Court does not give special or elevated status to the electoral process as compared to any other areas of public life.[253] By not doing so, the Court refuses to fully recognize the vital importance of the electoral process. In our representative democracy, only through elections can people hope to regulate the conduct of elected officials. Therefore, an open and fair electoral process is vital to protecting all rights and liberties enjoyed by all citizens. The fundamental importance of the electoral process is denigrated when, in challenges to state regulation of the

[253] *Anderson*, 460 U.S. at 789. "Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation." *Id.*

electoral process, the Court applies "an analytical process that parallels its work in ordinary litigation."[254]

Establishment, by its nature, enshrines the status quo. Establishment reveals the reasons why American society is still struggling with the same problems that it has faced for nearly half a century. Social progress is stymied when those in power tailor policy only to remain in power—they thus avoid touching the third rail of so-called "wedge issues."[255] It is within these wedge issues that many of the major problems facing America reside. A system that keeps the same groups in power prevents these issues from even being addressed, let alone solved.[256] As Dr. Martin Luther King, Jr. wrote: "When people are

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[254] *Id.*

[255] A recent book by former Clinton strategist, Dick Morris, illustrates how basic political strategic behavior leads to the neglect of vital issues. DICK MORRIS, THE NEW PRINCE: MACHIAVELLI UPDATED FOR THE TWENTY-FIRST CENTURY (1999). Morris opens the book promisingly, stating:

> This book is based on a single premise: If American politicians were truly pragmatic and did what was really in their own best self-interest, our political process would be a lot more clean, positive, nonpartisan, and issue-oriented. ...The core advice of this book is to stay positive; to focus on the issues; to rise above party; and to lead through ideas.

Id. at xv-xvi. While it initially appears that Morris is encouraging political actors to engage in more issue-oriented campaigns, soon he reveals that to the pragmatic candidate "issues" become means to an end rather than actual policy goals:

> Ultimately, it is not the issue itself that is crucial; it is what a candidate's advocacy of a specific cause says about his values and philosophy. Issues become a form of symbolic speech, an opportunity to speak to a candidate's character and attribute.

Id. at 176-77. Therefore, issues that do not fit within the politician's strategic interest, at least in Morris' world of high level political campaigns, get ignored in campaigns and during terms of office. Morris continues with a description that implies that the merits of an issue or policy goal are irrelevant in modern American politics:

> Polling is the key to selecting the right issue. You must ask the voters a specific question and measure the intensity of their reaction to gauge the impact of an issue. Then you need to follow up the question with arguments, first on one side, then on the other, to test its ability to survive debate. Finally, you've got to put the issue in the context of your own political situation to evaluate its strength and salience.
>
> To test an issues impact, a pollster needs to put each proposal through such a gauntlet. An issue must:
>
> - tap into a basic concern
> - meet with strong support but also attract a measure of strong opposition
> - command a large majority that grows, or at least doesn't shrink, after pro and con argumentation
> - significantly affect voter decisions about the election at hand.

Id. at 179. Applying Morris' pragmatic campaign strategy inevitably will exclude certain vital social policy issues from public debate. The rise of a more competitive electoral system would go a long way to bringing more issues to the table.

[256] "Though Supreme Court opinions rejecting state protection of the two-party system will not lead to the creations of viable third parties, the extra protections for the Democratic and Republican

mired in oppression, they realize deliverance only when they have accumulated the power to enforce change. The powerful never lose opportunities—they remain available to them. The powerless, on the other hand, never experience opportunity—it is always arriving at a later time."[257]

parties that *Timmons* allows could further retard development of a competitive political market. Without third parties to challenge the positions of the two major parties and their candidates, the major parties are likely to become (some would say, remain) complacent and unresponsive to social pressures and movements." Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should not Allow the States to Protect the Democrats and Republicans From Political Competition*, 1997 SUP. CT. REV. 331, 334.

[257] Martin Luther King, Jr., *Black Power Defined, in* I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 154 (James Melvin Washington, ed. 1992).