

University of Missouri School of Law Scholarship Repository

Faculty Publications

1995

A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict or Chaos?

Carl H. Esbeck

University of Missouri School of Law, esbeckc@missouri.edu

Follow this and additional works at: <http://scholarship.law.missouri.edu/facpubs>



Part of the [First Amendment Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Carl H. Esbeck, A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?, 70 Notre Dame L. Rev. 581 (1995)

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.

A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?

Carl H. Esbeck*

TABLE OF CONTENTS

I. INTRODUCTION	582
II. RESTATEMENT OF THE LAW OF RELIGIOUS FREEDOM	592
A. <i>When Government May Not Hinder Religion</i>	596
B. <i>When Government May Not Help Religion</i>	601
C. <i>"Religion" and the First Amendment: Definition and Application</i>	610
III. IS A NEW THEORY BASED ON EQUALITY REPLACING AN OLDER REGIME ROOTED IN SEPARATIONISM AND COERCION?	614
IV. DIFFERING VISIONS OF THE FIRST AMENDMENT'S PURPOSE REGARDING RELIGION	622
A. <i>Protecting the Religiously Informed Conscience</i>	622
B. <i>Protecting the Society from Religion</i>	625
C. <i>Protecting Religion from the State</i>	635
D. <i>Protecting Religious Choice from State Influence</i>	638
E. <i>Protecting Religious Institutions as Counterweights to State Power and as Sources of Ultimate Meaning</i>	641
V. CONCLUSION	644
APPENDIX	
RESTATEMENT OF THE LAW OF RELIGIOUS FREEDOM	646

* Isabelle Wade and Paul C. Lyda Professor of Law, University of Missouri-Columbia. B.S., Iowa State University, 1971; J.D., Cornell University, 1974. Sincere thanks to Dean M. Kelley, Thomas C. Berg, Charles J. Emmerich, and Michael J. Woodruff for their helpful suggestions on an earlier draft of parts of this article.

I. INTRODUCTION

Religious freedom as guaranteed in the First Amendment makes religious pluralism more likely, while pluralism makes the maintenance of religious freedom as a fundamental civil right more necessary. It seems there is a limit, however, to the expansion of America's religious pluralism that, when exceeded, shatters cultural consensus thus rendering impossible the political and civil discourse necessary to sustain democratic institutions.¹ This follows because pluralism promises freedom but exacts a price in civic disunity and moral confusion. The question thereby resolves itself into just how a religiously diverse people are to live together, despite their deepest differences, while sharing in a national purpose that binds citizens together.

The problem of religious diversity and the maintenance of a common civil polity is an old one. Following the Thirty Years'

1 For reasons of legitimation, democratic societies require a sense of cohesion—a strong common commitment to the nation and its well-being. The commitment must come from the people, their beliefs and values; it cannot be created *ex nihilo*. Scholars of sociology, religious studies, and political philosophy are saying that the “culture wars” are a sign that the nation is testing the outer boundaries of the American experiment in self-government. They propose that a pluralism with no center, so to speak, cannot nurture the civic behaviors necessary to democracy. See, e.g., Francis Canavan, *The Pluralist Game*, LAW & CONTEMP. PROBS., Spring 1981, at 23; OS GUINNESS, *THE AMERICAN HOUR: A TIME OF RECKONING AND THE ONCE AND FUTURE ROLE OF FAITH* (1993) (America is in a crisis of cultural authority because her beliefs, traditions, and ideals—civic as well as religious—are losing their power to shape the private and public lives of citizens); James Hitchcock, *Church, State, and Moral Values: The Limits of American Pluralism*, LAW & CONTEMP. PROBS., Spring 1981, at 3; JAMES DAVISON HUNTER, *BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WARS* (1994); JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991). John Courtney Murray states the problem well:

For a century and a half the United States has displayed to the world the fact that political unity and stability are not necessarily dependent on the common sharing of one religious faith.

The reach of this demonstration is, of course, limited. Granted that the unity of the commonwealth can be achieved in the absence of a consensus with regard to the theological truths that govern the total life and destiny of man, it does not follow that this necessary civic unity can endure in the absence of a consensus more narrow in its scope, operative on the level of political life, with regard to the rational truths and moral precepts that govern the structure of the constitutional state, specify the substance of the commonwealth, and determine the ends of public policy.

JOHN C. MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 80* (1964). If democratic institutions cannot be sustained, human rights, including religious freedom, will also be lost.

War, the Peace of Westphalia (1648) resolved the matter simply, if crudely, by adopting the principle *cujus regio, ejus religio* (whose is the country, his is the religion). In a modern age where rationalism and individualism are enthroned, America's jural arrangements for dealing with religious dissent and the ordering of church-state relations have become far more refined and attentive to human rights. But the arrangements have seemingly lost all simplicity, and, if the sheer number of critics is to be weighed in the balance, the United States Supreme Court's decisions have departed from all consistency. Almost no one, not even a majority of the Justices on the Court,² is pleased with the current state of First Amendment case law concerning religion. The Supreme Court continues distancing itself from Establishment Clause doctrine first stated in *Lemon v. Kurtzman*,³ by not referring to—or noting only in passing—the three-part test.⁴ Why is this so? And why have religious dissent and church-state relations, once thought to be matters long settled, now erupted into a many-sided debate?⁵

Most threats to fundamental rights protected by the U.S. Con-

2 *Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2498-2500 (1994) (O'Connor, J., concurring in part and concurring in the judgment); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2149 (1993) (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2149-50 (Scalia, J., joined by Thomas, J., concurring in the judgment); *Wallace v. Jaffree*, 472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting). The majority opinion in *Grumet* was written by Justice Souter and joined by, *inter alia*, Justice Ginsberg. Justice Souter did not utilize or rely upon the test stated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to reach his conclusion that the Establishment Clause was violated. *Grumet*, 114 S. Ct. at 2487-94. Only Justice Blackmun continued to defend the *Lemon* test, *id.* at 2494-95, and he has since retired.

3 403 U.S. 602 (1971). The Court stated the test as follows:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.

Id. at 612-13 (citations and internal quotation omitted).

4 See *Grumet*, 114 S. Ct. at 2487-93 (majority does not rely on or utilize *Lemon* test to reach conclusion that Establishment Clause was violated); *Lamb's Chapel*, 113 S. Ct. at 2148 (majority mentions *Lemon* only in passing); *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1992) (majority makes no reference to *Lemon*). Although a majority of the Justices on the Court have expressed discontent with the *Lemon* test, the Court has not expressly overruled the test, apparently because there is no consensus on a replacement.

5 The criticism is not confined to cases decided under the Establishment Clause. Following the Supreme Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), which abandoned strict scrutiny review in Free Exercise Clause cases, Congress and the President showed their disapproval by enacting the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (1994 Supp.). RFRA provides a statutory compelling interest test for analysis of religious freedom claims.

stitution arise as bipolar conflicts (an individual versus a law or acts by an official under color of law) and, hence, are resolved by straightforward balancing tests. Take, for example, a claim that the government is suppressing someone's freedom of speech. With the exception of a few discrete types of speech (e.g., child pornography, criminal solicitation, perjury), an individual's expression, most notably political speech, is protected from content-based regulation unless governmental authorities come forth with the most compelling of justifications. Because courts also regard corporations and other associations as "persons" for free-speech purposes, the legal framework for determining an association's expressional rights utilizes the identical balancing test applicable to individuals.⁶

First Amendment religious freedom is not nearly so two-dimensional. In addition to sorting out the problem of the individual who wants—free of governmental limitations—to do something or to refrain from doing something out of religious scruples, there exists a second task. This task is the proper ordering of the relationship between two centers of authority: church and state.⁷ Religious freedom, then, unlike any other rights analysis under the

6 This is not to oversimplify the Free Speech Clause, for the Supreme Court has developed numerous rules that apply depending on context and other factors. The point here is that ultimately the constitutional law on freedom of speech reduces to a single question: How far can the government go in limiting private speech? In contrast, the constitutional law on freedom of religion requires answering two questions and sometimes harmonizing the answers: How far can the government go in limiting religious belief or practice? And, how far can the government go in advancing religion? Moreover, asking these two questions assumes a juridical definition of religion, a matter that in a given case may be disputed.

7 Religious organizations possess an institutional character distinct from other voluntary organizations and, therefore, hold unique institutional rights, not merely the sum of the derivative rights of an organization's members. The rationale is that religious organizations have a sphere in which they may operate unhindered in accordance with their understanding of their own divine origin and mission. This unique character is acknowledged by the necessity under the Establishment Clause of keeping organized religion and the offices of state in the proper relationship. See JOHN C. BENNETT, *CHRISTIANS AND THE STATE* 195-99 (1958); MARK D. HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 5-15 (1965); Paul G. Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, in *CHURCH AND STATE: THE SUPREME COURT AND THE FIRST AMENDMENT* 67 (Philip B. Kurland ed., 1975); Herbert Richardson, *Civil Religion in Theological Perspective*, in *AMERICAN CIVIL RELIGION* 161, 178-80 (Russell E. Richey & Donald G. Jones eds., 1974); LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-11, at 1236 (2d ed. 1988); MIER DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* 177 (1986) (church autonomy identified as an example of "neo-feudalist influence on constitutional thinking"); Mark D. Howe, *Political Theory and the Nature of Liberty*, 67 *HARV. L. REV.* 91, 92-95 (1953) (identifying church autonomy as the "philosophy of political pluralism" that gives religious bodies some of the "prerogatives of sovereignty").

Constitution, requires patrolling the boundaries between two powerful institutions, church and state, much like a separation of powers provision.⁸ Moreover, this latter task entails a dual role: preventing government from improperly promoting religion⁹ and preventing government from interfering in the precincts of organized religion.¹⁰

Altogether, the First Amendment's regard for religious freedom must account for two relationships and, as to each, answer two questions. The two relationships are: (i) the interaction of the state with individual persons, who may profess one of a bewildering number of religious faiths or none at all; and (ii) the interaction of the state with religious organizations, the latter being either the *loci* of collective worship (church, synagogue, mosque) or auxiliary ministries of considerable variety (schools, soup kitchens, adoption agencies, shelters for battered women, mission societies, world hunger and refugee relief agencies). Concerning each of these relationships, First Amendment analysis begins by asking two questions: Is the state acting to *hinder* religion on the one hand, or is the state acting to *help* religion on the other? Not every instance where persons or religious organizations are hindered by the state is unconstitutional. Likewise, not every instance where

8 Professor John H. Garvey states:

[The Establishment Clause] speaks about relations between institutions, not between individuals and government The clause thus regulates affairs between government and the churches, much as the original Constitution regulates affairs between government and the states.

John H. Garvey, *A Comment on Church and State in Seventeenth and Eighteenth Century America*, 7 J.L. & RELIGION 275, 278 (1989).

9 See, e.g., *Engel v. Vitale*, 370 U.S. 421, 430 (1963) ("Although these two [religion] clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."); *McGowan v. Maryland*, 366 U.S. 420, 430 (1961) (notwithstanding that injury was economic rather than religious, plaintiffs have standing to bring Establishment Clause challenge to Sunday closing law because history "demonstrate[s] that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority").

10 See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 642 (1978) (Brennan, J., concurring in the judgment) ("Our decisions under the Establishment Clause prevent government from supporting or involving itself in religion or from becoming drawn into ecclesiastical disputes."); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730 (1871) ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.").

persons or religious organizations are helped by the state is unconstitutional. Therefore, ascertaining whether the state is hindering or helping religion does not itself determine whether there is a constitutional violation. Rather, the hinder/help inquiry is like a sorting gate which gets one steered in the direction of the line of case-law authority that most closely deals with the specific matter in question.

As the foregoing overview suggests, the juridical task of laying down principled rules regarding religious freedom and the First Amendment is more multidimensional than other areas of rights analysis. The Supreme Court's cases illustrate the diverse ways in which issues of religious freedom arise. For example, students of the Jehovah's Witnesses faith have a right to opt out of a state-mandated Pledge of Allegiance recited before the nation's flag because for them such an act is paramount to the worship of a graven image.¹¹ In this first type of case, the state cannot demand performance of an activity that one's faith prohibits. In a second line of cases, it is held that the state cannot prohibit an activity that one's faith commands. For example, a Baptist has a right to respond to what he believes is a call to the pastorate, yet not thereby suffer disqualification from holding public office.¹² In a converse situation, an atheist cannot be denied public office for refusing to take an oath professing belief in God.¹³ In this third type of case, the state cannot compel a choice between making a profession of faith or suffering loss of a civic advantage. The First Amendment is not just for those professing a creed, but also for those who subscribe to none. The claims by the Jehovah's Witnesses and the Baptist pastor illustrate unconstitutional *hindrances* to religion, whereas the oath of office was an unconstitutional *helping* of religion.

Since not every governmental hindrance or help to religion violates the First Amendment, the difficulty is in knowing when the state's actions have crossed the line into unconstitutional territory. For example, a religious pacifist has no constitutional right to withhold payment of taxes even though the payments go, *inter alia*, for the support of military activity contrary to the tenet of pacifism.¹⁴ Similarly, individuals who believe it violates their religious

11 *West Virginia v. Barnette*, 319 U.S. 624 (1943).

12 *McDaniel*, 435 U.S. 618.

13 *Torcaso v. Watkins*, 367 U.S. 488 (1961).

14 *United States v. American Friends Serv. Comm.*, 419 U.S. 7 (1974) (per curiam); see *United States v. Lee*, 455 U.S. 252, 260 (1982).

freedom to be compelled to pay taxes that, *inter alia*, support a church-related college of a religion different from their own are not thereby excused from paying taxes.¹⁵ The religious aspirations of both pacifists and taxpayers are doubtlessly hindered, yet the government's laws were found not to have crossed over into territory protected by the free exercise of religion.

In contrast, a state may enact tax deductions for school tuition payments, notwithstanding that the tax break overwhelmingly favors parochial school parents.¹⁶ Likewise, a state may provide a traveling evangelist access to a public park for conducting a revival meeting.¹⁷ Allowing the access materially helps the spread of religion, yet it does not violate the First Amendment. Indeed, the Court has held that granting access to public areas for religious purposes on a basis equal to that afforded others cannot be constitutionally denied.¹⁸

The foregoing cases all concern individual religionists and their interaction with either the coercive power of the state or the dispensing of its largess. A quite different set of issues arises when religious organizations enter the fray.¹⁹ This is because the First

15 *Tilton v. Richardson*, 403 U.S. 672, 689 (1971); *see Lee*, 455 U.S. at 257 (Amish employer required to pay Social Security tax on Amish employees notwithstanding that tax violated the religious belief that those within the Amish community are to care for one another).

16 *Mueller v. Allen*, 463 U.S. 388 (1983).

17 *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Kunz v. New York*, 340 U.S. 290 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

18 *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

19 *See supra* text accompanying notes 7-10. That the role of the First Amendment in patrolling the boundaries of church and state goes beyond individual religious injury is most evident in the Court's cases involving standing doctrine and the Establishment Clause. Normally, an individual asserting a constitutional claim must have suffered a personal, concrete injury that would be remediable by judicial process. The Court has carved out an exception to this general standing requirement in the case of federal and state taxpayers raising Establishment Clause challenges to governmental spending programs. *Bowen v. Kendrick*, 487 U.S. 589, 618-20 (1988) (federal taxpayer); *Flast v. Cohen*, 392 U.S. 83 (1968) (federal taxpayer); *Doremus v. Board of Educ.*, 342 U.S. 429, 433 (1952) (allowing state taxpayer challenge of offending law only when "supported by [a] separate tax or paid for from [a] particular appropriation or that it adds any sum whatever to the cost of conducting the school"). When there is an improper fusing of church and state such that a government is providing a benefit to religious organizations, individuals do not necessarily suffer a direct, personal harm. Thus, no one has standing to sue in the traditional sense. *Garvey, supra* note 8, at 278-79. This has led the Court to make an exception to standing rules, thereby permitting judicial examination on the merits of church participation in governmental financial programs. In a taxpayer's claim the real lament is not that he or she has suffered an injury because a few cents in taxes were mis-

Amendment requires an ordering of relations between the institutions of organized religion and the offices of state. In popular terms, this is expressed as the "wall of separation between church and state." By contrast, the amendment does not command a separation of individual believers from their government—an impossibility, unless one is prepared either to cleave in half the human heart or to disenfranchise all religious citizens. Thus, there is a uniqueness about certain types of state alliances with a church, as well as interventions by the state into the internal affairs of a church, that endanger religious freedom.

Once again the Supreme Court's cases are illustrative of the complications. Government may exempt religious organizations from paying property taxes,²⁰ as well as from compliance with legislation barring discrimination in employment.²¹ Should a dispute over religious doctrine result in the summary removal of a cleric from ecclesiastical office, the civil courts will decline to review alleged irregularities concerning procedural due process or the denial of substantive rights.²² All three of these exemptions clearly help organized religious bodies by maintaining their operational autonomy. Indeed, in a lawsuit that requires resolving a dispute over religious doctrine, the longstanding rule is that the First Amendment would be violated if a court presumed to take jurisdiction. In contrast to these three cases, government may regulate religious organizations by imposing minimum wage laws,²³ as well as by assessing a uniform tax on the sale of religious literature by a church.²⁴ Although compliance with the labor law and payment of the tax surely hinders the freedom of religious organizations by taking their resources that could be used in other ways, it gave the Court little pause to declare that the required separation of church and state was not transgressed.

spent. Rather, monetary damages in the form of misspent taxes is a surrogate for injury to the civic polity resulting from a misbalance of the proper relationship between church and state. The underlying claim is that the two "powers" of organized religion and the offices of state must be "separated" as required by the Establishment Clause, and, when they are not so separated, plaintiff suffers an injury to the correct ordering of these two powers. The plaintiff is essentially a named representative acting on behalf of the public interest.

20 *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

21 *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

22 *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929).

23 *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985).

24 *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990).

Upon first impression these series of cases appear hard to reconcile.

If the foregoing framework is not complicated enough, like a canopy suspended over all of this analysis is the problem of defining "religion" for First Amendment purposes. For example, if individuals involved in a church-operated shelter for the homeless should claim that the shelter's operation is protected by the First Amendment because it is an exercise of religion, their claim is plausible and, if sincere, will be acknowledged by the courts as coming within the definition of "religion." If, however, the government then enacts social welfare legislation establishing several state-operated shelters for the homeless, is the state now participating in a religious activity? Common sense says "no," yet how can the identical activity be religious for the individual claimants but not religious for the state? Or assume that one of the central tenets of a church is that gambling is sin. Church members actively seek to dissuade people from gambling, work against its legalization, and establish self-help groups for those addicted to gambling. If the legislature then enacts a state-wide lottery and aggressively advertises so as to induce sales, is the state actively suppressing "religion" by throwing its considerable weight against a central tenet of this church? Again, the answer would seem to be "no," but how is this reconcilable with what is surely known to be religion for other purposes? Some argue that there are two definitions of "religion" for purposes of the First Amendment: one for the Establishment Clause and another for the Free Exercise Clause.²⁵ Others find this an unsatisfactory hermeneutic, for the term "religion" appears only once in the text of the amendment.²⁶

25 LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6, 828 (1st ed. 1978); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978); cf. TRIBE, *supra* note 7, § 14-6, at 1186 n.53 (collecting authorities and criticizing two definitions proposal).

26 Justice Rutledge, writing about the text of the First Amendment in *Everson v. Board of Education*, 330 U.S. 1 (1947), observed:

"Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

Id. at 32 (Rutledge, J., dissenting). See *Malnak v. Yogi*, 592 F.2d 197, 210-13 (3d Cir. 1979) (Adams, J., concurring in the result) (rejecting two definitions proposal); TRIBE, *supra*

There is a logic to the results in the foregoing illustrations, but it is not always easily grasped. Part II of this article sets about systematizing and thereby making sense of the Supreme Court's religion cases. Beginning in 1923, the American Law Institute undertook a Restatement of the principal subjects of the common law: contracts, agency, torts, property, trusts, judgments, conflict of laws, etc.²⁷ Part II is a draft of a *Restatement of the Law of Religious Freedom* as distilled from the Supreme Court's First Amendment cases.

To pursue such a *Restatement* may appear ambitious given the derision presently heaped upon the Court's current Establishment Clause doctrine originating with *Lemon v. Kurtzman*.²⁸ But the approach of a Restatement of the Law is a far less imposing task than the one-size-fits-all formula attempted by the three-part *Lemon* test.²⁹ Such formulaic abstractions attempt to encompass and explain in a single verbal map all the Court's cases on the proper relationship among church, state, and persons of faith or none. Considerable judicial energy is spent "refining" the formula to achieve the desired result and then reconciling holdings with the plain meaning of the verbal equation. Observing that "the slide away from *Lemon's* unitary approach is well under way," in *Kiryas Joel Village School District v. Grumet*,³⁰ Justice O'Connor suggested that what was no longer needed in religious liberty cases was "a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause."³¹ Rather, Justice O'Connor called for "a less unitary approach" as offering a more promising "structure for analysis."³² She reasoned that "[i]f each test covers a narrower and more homogeneous area, the tests may be more precise and therefore easier to apply."³³

The *Restatement of the Law of Religious Freedom* appearing in Part

note 7, § 14-6, at 1186 n.54 (collecting authorities).

27 RESTATEMENT OF CONTRACTS at vii-xii (1932).

28 403 U.S. 602 (1971). See *supra* notes 2-4 and accompanying text.

29 This is not only true of the *Lemon* test, but applies as well to Justice Kennedy's coercion test, *County of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); Justice O'Connor's endorsement test, *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); and Chief Justice Rehnquist's nonpreferentialism test, *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

30 114 S. Ct. 2481, 2500 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

31 *Id.* at 2498-99.

32 *Id.* at 2500.

33 *Id.*

II is such an approach. The jural arrangements that deal with religious freedom are simply too multidimensional for the single-formula approach to succeed. Moreover, the rash of concurring and dissenting opinions generated by the three-part *Lemon* test gives the appearance of greater disagreement among the Justices than is the actual case. An additional benefit of the *Restatement*, as will be seen in Part II, is the realization that there are fewer religious freedom issues actually dividing the Supreme Court than conventional wisdom has previously assumed.

Part III of this article demonstrates that the *Restatement* can quickly be put to good use, testing scholarly theories and alarmist predictions concerning where the Court is supposedly headed (or wrongheaded) with the First Amendment. One author claims, as explored in Part III of this article, that the Establishment Clause cases can best be understood as a collision of two competing theories of church-state relations.³⁴ The argumentation behind this claim is that the apparent incoherence in Establishment Clause cases is indicative of a trend, in which the Court is now mid-stream, of replacing an older regime focused on *separationism* with a new regime based on *equality*. Moreover, the claim argues that the unexpected adoption of a new Free Exercise Clause test in the peyote case, *Employment Division v. Smith*,³⁵ similarly can be understood as replacing an older theory centered on prohibiting *coercion of conscience* with a theory that also is based on *equality*. Using the *Restatement of the Law of Religious Freedom*, Part III of this article demonstrates that this claim succeeds only by half.³⁶

Part IV of this article explores why the debate concerning religious freedom swirls around theories rooted in *coercion* and *separationism* on the one hand, and *religious choice* on the other. Behind these three concepts are differing presuppositions which animate the forces and factions in American society that contend over religious freedom. These theories—really competing visions—differ as to what is the fundamental purpose of the First Amendment. Is it to protect individuals from coercion,³⁷ to protect the society from religion,³⁸ to protect religion from the

34 See *infra* note 133 and accompanying text.

35 494 U.S. 872 (1990) (upholding employment dismissals of drug counselors who, as a sacrament in Native American Church, ingested the illegal drug of peyote).

36 See *infra* text accompanying notes 179-82.

37 See *infra* Part IV.A.

38 See *infra* Part IV.B.

state,³⁹ to protect freedom of religious choice,⁴⁰ or to protect mediating institutions⁴¹ (of which the church is one important such institution) that serve both as a counterweight to the power of the modern state and as communities of ultimate meaning? References to these differing visions are found in Supreme Court cases and scholarly literature. With the aid of the *Restatement*, these five visions are explored in Part IV, with brief references to some of the Justices' opinions, as well as to books and articles that extol them.

II. RESTATEMENT OF THE LAW OF RELIGIOUS FREEDOM

There is near universal agreement on the starting point: the overarching purpose of the First Amendment is to secure religious freedom, for persons of faith or none, and for religious organizations. However, this point of departure has not advanced the major conflicts very far toward an amicable resolution because of the sharp dispute over the meaning of religious freedom.

As with all freedoms guaranteed by the Bill of Rights, the Free Exercise and Establishment Clauses protect "negative" rights. That is, the Religion Clauses tell the government what it may not do.⁴² This is the most straightforward sense in which it is said that government cannot improperly *hinder*⁴³ religion.

39 See *infra* Part IV.C.

40 See *infra* Part IV.D.

41 See *infra* Part IV.E.

42 *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.").

A closely parallel principle is that the Religion Clauses do not confer a right upon citizens to demand that government make certain choices in the conduct of its internal affairs or the uses to which it puts government property so that citizens can better exercise their religion. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (holding that the decision to build forest road on federal lands is not subject to free exercise claims by Native Americans); *Bowen v. Roy*, 476 U.S. 693 (1986) (holding that the government's internal use of a Social Security number is not amenable to free exercise claim by Abenaki Native American).

43 If government action is divided into its elemental parts, it is made up of imposing and lifting burdens, as well as extending and withholding benefits. Analytically, a claim that government is improperly *hindering* religion can arise in one of four scenarios:

1. Government imposes a burden on religion, when the burden is not imposed on others similarly situated.
2. Government imposes a burden on religion, when the burden is imposed on others similarly situated.
3. Government withholds a benefit from religion, when the benefit is extended to others similarly situated.

As with all “negative” rights found in the Bill of Rights, the Free Exercise and Establishment Clauses do not act as a limitation on what private individuals or religious organizations may do.⁴⁴ Nevertheless, because of the unique task of the Religion Clauses in ordering two centers of power,⁴⁵ government is restrained from certain involvements with religion and religious organizations when the government’s actions unlawfully promote religion. It is in this latter sense—unusual in constitutional rights analysis—that it is said that government cannot improperly *help*⁴⁶ religion.⁴⁷

4. Government discriminates among religions by imposing a burden on some religions but not others, or by extending a benefit to some religions but not others.

“Burden” is defined *infra* note 90, and “benefit” is defined *infra* note 89. As will be seen below in RESTATEMENT I, the Supreme Court has addressed each of these scenarios.

Concerning point four (discrimination among religions), the Court has addressed this scenario, not as a matter of *hindering* some religions, but as a matter of *helping* other religions. Presumably the Court’s rationale is that to discriminate against some religions has the potential of *helping* other religions. But that is only a potential consequence. Discrimination against one religion may not result in *helping* other religions. Thus, it is more logical to regard scenario four as a problem of improperly *hindering* religion. The Supreme Court has not taken this approach. Accordingly, the RESTATEMENT follows the Court’s lead and takes up the matter of discrimination among religions as a matter of *helping* religion. See RESTATEMENT OF THE LAW OF RELIGIOUS FREEDOM II.B.4 [hereinafter RESTATEMENT].

44 Richard J. Neuhaus writes:

The religion clause of the First Amendment is entirely a check upon government, not a check upon religion. Even if a particular religion were to agitate successfully to have itself officially established, it is the government that would have to do the establishing. And that is what the government is forbidden to do. As wrongheaded as it would be, religions are perfectly free to agitate to have themselves established, for that too is part of religious freedom. What is prohibited by the First Amendment is the . . . [use] of government power in giving in to such agitations. And the only reason the government is not free to establish a religion is that it would violate religious freedom. The religion clause is not then, as some claim, a check upon both government and religion, nor is it a provision in which two clauses are to be “balanced” against one another. The religion clause is not to protect the state from the church but to protect the church from the state. Similarly, in press-state relations, the First Amendment is not to protect the state from the press but to protect the press from the state. The “great object” of the Bill of Rights, [James] Madison most explicitly said when introducing his draft to the House [of Representatives], was to “limit and qualify the powers of Government.”

Richard J. Neuhaus, *Establishment Is Not The Issue*, in RELIGION & SOC’Y REP., June 1987, at 1, 3.

45 See *supra* text accompanying notes 7-10.

46 As stated *supra* note 43, if government action is divided into its elemental parts, it is made up of imposing and lifting burdens, as well as extending and withholding benefits. Analytically, a claim that government is improperly *helping* religion can arise in one of four scenarios:

To begin at the most elementary level, a cardinal rule of construction is that the text of the First Amendment has to be assumed internally coherent. Accordingly, the Free Exercise and Establishment Clauses must be construed as never in contradiction. Because the clauses cannot be in opposition to one another, when the clauses do overlap in their purview it must be because the underlying principles of both clauses are violated. A second canon of construction is to avoid redundancy, thus each clause must have its own arena of independent operation. Neither clause is merely instrumental to the other's role, nor is either subordinate to the other in the event of apparent tension between the clauses. The Religion Clauses are best envisioned as a draft team pulling together in the direction of full freedom for religion.

Religious practice frequently takes the form of oral speech, displays of symbols, written publications, group meetings, and appeals to officials. The First Amendment's expressional clauses

1. Government extends a benefit to religion, when the benefit is withheld from others similarly situated.
2. Government extends a benefit to religion, when the benefit is extended to others similarly situated.
3. Government refrains from imposing a burden on religion, when the burden is imposed on others similarly situated.
4. Government discriminates among religions by imposing a burden on some religions but not others, or by extending a benefit to some religions but not others.

"Burden" is defined *infra* note 90, and "benefit" is defined *infra* note 89. As will be shown below in RESTATEMENT II, the Supreme Court has addressed each of these scenarios.

47 There is a simplistic appeal to envisioning the Free Exercise Clause as addressing all cases where it is claimed that the state is improperly *hindering* religion, and likewise invoking the Establishment Clause as dealing with all cases where the state is said to be improperly *helping* religion. Although such an organizing principle does in fact fit many situations, it has not always been followed by the Court. Thus, there are circumstances where the Establishment Clause has been applied to prevent religion from being hindered by government. *See, e.g.,* Larson v. Valente, 456 U.S. 228 (1982) (discriminating against a new religious movement violates the Establishment Clause); McDaniel v. Paty, 435 U.S. 618, 636-42 (1978) (Brennan, J., concurring in the judgment) (state law barring clerics from public office violates both Religion Clauses); *see also infra* text accompanying notes 202-214. Further, the fact that the Establishment Clause addresses both the *hindering* and *helping* of religion is evident from elements two and three of the *Lemon* test, *see supra* note 3, and Justice O'Connor's no-endorsement test as originally stated in Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (focusing on whether law's purpose is to endorse or disapprove of religion, or whether the practice under review in fact conveys a message of endorsement or disapproval). This occurs because the Establishment Clause—not just the Free Exercise Clause—serves religious freedom, the agreed-upon starting point. And this common goal can mean that either clause may, on occasion, deal with claims of improper hindering of religion.

(freedom of speech, freedom of the press, freedom to assemble, and freedom to petition) also protect religion when it takes the form of communication or assemblage. With few exceptions, the Supreme Court strikes down content-based regulations directed at speech of political, artistic, or educational content. The same high protection is accorded speech with religious content.⁴⁸ By subsuming the amendment's protection for religious expression under the Free Speech Clause, the Court has given religious expression a broader base, one predicated on the notion that the content of everyone's speech is equal before the law. The Free Speech Clause is a more secure base because the rule that government may make no content-based distinctions in speech is well settled in the courts and more widely accepted by the populace than are principles of religious freedom. However, when the state itself is the speaker, the aim of the First Amendment turns one hundred and eighty degrees. No longer is the concern over suppression of private speech and, thereby, the improper hindering of religion; the concern is with the government's own speech and the possible improper helping of religion.⁴⁹

Although not mentioned in the text of the First Amendment, freedom of thought has long been understood to be necessarily embraced within the ambit of the amendment's protection. Complete freedom of thought is necessary to the exercise of free speech. The Court has sensibly included religious belief as part of this freedom of thought.⁵⁰

Religious freedom cannot be absolute, of course, but is necessarily attenuated by society's interest in protecting health, safety, and other collective concerns of the highest order.⁵¹ The oft-used illustration is that the First Amendment cannot shield one who has committed an act of human sacrifice from being prosecuted for murder.

To summarize the foregoing framework, First Amendment religious freedom cases are organized along several significant distinctions: (i) cases involving religious speech versus those not involving speech; (ii) cases involving private speech versus those involving government speech; (iii) cases involving individuals ver-

48 See *infra* text accompanying notes 60-62.

49 See *infra* text accompanying notes 78-83.

50 See *infra* text accompanying note 59.

51 See *infra* text accompanying note 70.

sus those involving religious organizations;⁵² and, (iv) cases involving the imposition of governmental burdens versus those involving the conferring of governmental benefits.⁵³ Only "state action," of course, can violate the amendment.⁵⁴

At this juncture, it bears emphasizing that the *Restatement* is intended to be descriptive only, not prescriptive as to how things ought to be.⁵⁵ The latter would take a separate paper, one adopting a more critical approach. Nor is the *Restatement* meant to be a once-for-all-time codification concerning the issues that surround the First Amendment's clauses on religion. The *Restatement* is a mere snapshot of the present. Later interpretations by the Court will doubtless evolve with our shared understandings of the relationship between the Constitution and the society it is to serve.

With the foregoing distinctions and caveats in hand, a survey of the cases reveals that the Supreme Court has applied the following rules concerning religious freedom and the First Amendment:

RESTATEMENT OF THE LAW OF RELIGIOUS FREEDOM⁵⁶

I. When Government May Not *Hinder* Religion

A. The Free Speech Clause⁵⁷ protects the expression of an individual or religious organization from governmental

52 See *supra* notes 7-10 and accompanying text.

53 See *supra* notes 43 and 46. "Benefit" is defined *infra* note 89, and "burden" is defined *infra* note 90.

54 Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987), states:

A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence.

Id. at 337 (emphasis in original). See *supra* note 44.

55 This thought, however, raises a related point. Some commentators frequently criticize the Supreme Court's religion cases for inconsistency, which, if true, would leave the Court quite vulnerable. But many of these critics are really at odds with the Court's substantive understanding of religious freedom. The RESTATEMENT should help here as well. Once commentators appreciate that large blocks of the Court's case law are not in hopeless disarray, their criticism will have to be targeted where it will be most constructive, namely on the merits of the Court's jurisprudence.

56 The RESTATEMENT, without the encumbering footnotes, is reproduced in the Appendix.

57 As used here, "Free Speech Clause" is shorthand for the four expressional clauses in the First Amendment (speech, press, assembly, and petition), as well as freedom of thought which the Court has inferred from the expressional clauses. Moreover, freedom of speech necessarily entails the right not to speak.

restrictions⁵⁸ as follows:

1. Individuals and religious organizations cannot by word or symbolic act be forced to profess a belief contrary to their religion.⁵⁹
2. An individual or a religious organization is entitled to protection of religious expression to the same extent as nonreligious expression, such as political, artistic, or educational speech.⁶⁰ The Free Exercise Clause

58 "Governmental restrictions" include both the written law (statutes, regulations, ordinances), as well as acts under color of law by governmental officials and employees.

59 *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (sustaining a claim by Jehovah's Witness that state statute requiring motor vehicle license plates bear the motto "Live Free or Die" violates freedom of thought guarantee which includes the "right to refrain from speaking at all"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (compulsory flag salute and pledge of allegiance "invades the sphere of intellect and spirit"); see *United States v. Ballard*, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men."); see *infra* note 222. Although the holdings in *Wooley* and *Barnette* were based primarily on the Free Speech Clause, logically the same result would be reached under the Free Exercise Clause.

There are two additional cases instructive on the rule stated in the text. In *Girouard v. United States*, 328 U.S. 61 (1946), the Court held that Congress had not required as a condition of naturalization the taking of an oath to bear arms. Plaintiff was a religious pacifist. The holding was based on statutory construction. Although not a First Amendment case, the dictum reveals that the Court focused on religious freedom in reaching its result. *First Unitarian Church v. County of L.A.*, 357 U.S. 545 (1958), is an example of a victory for a religious organization. The Court struck down a loyalty oath required to obtain a municipal property tax exemption. The Court, however, based its holding on procedural due process, expressly stating that the case did not necessitate reaching the religious freedom claim raised under the First Amendment.

The rule stated in the text does not, without more, prevent government from exposing individuals or organizations to ideas that offend or contradict their religion. *Mozert v. Hawkins County Board of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (exposing public school students to religiously offensive literature not protected by free exercise); *Cornwell v. State Bd. of Educ.*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970) (teaching sex education in public school does not violate either Free Exercise or Establishment Clauses); *Rosenberg v. Board of Educ.*, 92 N.Y.S.2d 344 (1949) (Jewish parents unsuccessful in attempt to exclude from public school curriculum Shakespeare's "The Merchant of Venice" and Dickens' "Oliver Twist" because of characterization of Jews). A state taking into account the religious sensibilities of its citizens may be a virtue, but it is not a First Amendment right.

60 *Kunz v. New York*, 340 U.S. 290 (1951) (meeting permit); *Saia v. New York*, 334 U.S. 558 (1948) (sound amplification); *Tucker v. Texas*, 326 U.S. 517 (1946) (literature distribution); *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (license tax); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (handbills); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (license tax); *Jones v. Opelika (II)*, 319 U.S. 103 (1943) (handbills); *Jamison v. Texas*, 318 U.S. 413 (1943) (handbills); *Largent v. Texas*, 318 U.S. 418 (1943) (door-to-door solicitation); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (breach of the peace); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (handbills); *Lovell v. City of Griffin*, 303

grants no more than equal rights to religious expression,⁶¹ and the Free Speech Clause requires no less.⁶²

Governmental expression is treated differently than speech by a private individual or a religious organization,⁶³ for the focus shifts to one of government helping religion.⁶⁴

- B. The Free Exercise Clause protects an individual's religious belief or practice⁶⁵ from governmental restrictions as follows:
 1. Government cannot place an individual in the position of having to prove the truth of his or her religious beliefs, but sincerity is required when invoking protection.⁶⁶
 2. Government cannot enforce a restriction that pur-

U.S. 444 (1938)(literature distribution).

61 *Heffron v. International Soc'y of Krishna Consciousness*, 452 U.S. 640, 652-53 (1981)(solicitation on state fair grounds); *Douglas v. City of Jeannette*, 319 U.S. 157, 179 (1943)(Jackson, J., concurring in the result)(religious literature sold by itinerant preachers).

62 *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993)(viewpoint discrimination); *Widmar v. Vincent*, 454 U.S. 263 (1981)(content discrimination); *Niemotko v. Maryland*, 340 U.S. 268 (1951)(same); see *Board of Educ. v. Mergens*, 496 U.S. 226 (1990)(upholding Equal Access Act). Although the holdings were based on the Free Speech Clause, logically the same result would be reached under the Free Exercise Clause.

63 *Mergens*, 496 U.S. at 250 (plurality opinion)("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."); see *Widmar*, 454 U.S. at 271 n.9 (Establishment Clause requires distinguishing between religious speech by government and nonreligious speech by government).

64 See RESTATEMENT IIA.

65 Religion consists of both belief and practice, the latter arising out of the underlying belief. An individual's freedom to believe or think anything he or she wants is absolute, at least until one tries to act on that belief. *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). But religious acts are protected also, as the First Amendment confirms by use of the action word "exercise," denoting practice or observance.

In the rhetoric of early cases, the Supreme Court appeared to distinguish sharply between belief and action. See *Davis v. Beason*, 133 U.S. 333, 342-43 (1890)(Mormon polygamy); *Reynolds v. United States*, 98 U.S. 145, 166 (1878)(Mormon polygamy). The distinction appeared in the Court's early modern cases as well. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 603-04 (1961)(plurality opinion). This was interpreted as a signal that the Court intended to give half-hearted protection to religious practices. But the Court's recent cases make only rare mention of the belief/action distinction, suggesting that the Court has quietly acknowledged its error in making too much of it.

66 *United States v. Ballard*, 322 U.S. 78, 86-87 (1944)(prosecution for mail fraud); *id.* at 94-95 (Jackson, J., dissenting).

posefully⁶⁷ discriminates against religion, religious practice, or against an individual because of his or her religion.⁶⁸ However, a restriction's discriminatory effect is not, without more, unconstitutional.⁶⁹ Even in the face of purposeful discrimination, government may proceed to enforce a restriction upon proof that it furthers a compelling state interest that cannot be achieved by means less restrictive to the religious

67 "Purposefully" means the legislature's statutory objective as apparent from the text and its authoritative interpretation or application. Inquiry into "purpose" may go beyond the mere text or "face" of a statute. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2227 (1993); see *Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2489 (1994).

Legislative purpose should not be confused with legislative motive. A judicial inquiry may not go into the motive of each legislator supporting a legislative bill. A motive analysis would have implications not only for the denial of religious freedom, *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment), but also for violating separation of powers, *United States v. O'Brien*, 391 U.S. 367, 383 (1968). See *Mergens*, 496 U.S. at 249 (plurality opinion) ("Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law."); *Edwards v. Aguillard*, 482 U.S. 578, 615-16 (1987) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring in the judgment); *Clayton ex rel. Clayton v. Place*, 884 F.2d 376, 380 (8th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990) ("We simply do not believe elected officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the Establishment Clause."); STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 111-13 (1993).

68 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2226; *McDaniel*, 435 U.S. 618; see *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 385-92 (1990) (distinguishing and explaining *Follett v. Town of McCormick*, 321 U.S. 573 (1944), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)); *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982). See also *Cummings v. Missouri*, 71 U.S. 277 (1866), where an individual was arrested for performing his duties as a Catholic priest contrary to the state constitution. Following the Civil War, the constitution was amended to require the taking of an oath denying certain past acts having to do with the war. Failure to take the oath disqualified an individual from assuming numerous offices, including clerical. The Court struck down the provision as an *ex post facto* law. The issue of religious freedom was not discussed.

When the government's discrimination is purposeful, no substantial burden on religion need be shown by the religious claimant. *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994) (refusing to apply substantial burden requirement "to non-neutral government actions [because such] would make petty harassment of religious institutions . . . immune from the protection of the First Amendment").

69 *Employment Div. v. Smith*, 494 U.S. 872 (1990). By enacting the Religious Freedom Restoration Act, 42 U.S.C.A. §§ 2000bb to 2000bb-4 (West Supp. 1994), Congress has sought to go beyond the rule stated in the text by granting more protection to the free exercise of religion. Statutory protection for religious freedom that goes beyond the First Amendment is not unusual. See RESTATEMENT I.L.C.5.

practice.⁷⁰

C. The Religion Clauses⁷¹ protect a religious belief or practice of a religious organization from governmental restrictions as follows:

1. A religious organization is protected from restrictions that invade its institutional autonomy.⁷² Restrictions that generate a detailed inquiry into religious doctrine⁷³ or that entail a civil resolution of a dispute over doctrine⁷⁴ violate an organization's institutional

70 *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.29 (1983) (eliminating racial discrimination in schools); *United States v. Lee*, 455 U.S. 252, 260 (1982) (fair and efficient collection of taxes); *Johnson v. Robison*, 415 U.S. 361, 383-86 (1974) (raising and supporting the armed forces); *Gillette v. United States*, 401 U.S. 437, 461-62 (1971) (same); *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968) (administering blood transfusions to children over religious objections of parents).

The compelling interest test is an assessment of the importance of the law in question being enforced without exceptions for religious claimants. The test is not a balancing of the importance of uniform enforcement of the law against the degree of impact the law has on the claimant's religious practice. Courts are not competent to weigh the extent of harm to one's spiritual development nor evaluate the relative merits of differing claims of religious harm. *Smith*, 494 U.S. at 885-87.

71 Because the Establishment Clause, not just the Free Exercise Clause, protects religious freedom, the Supreme Court is careful to premise church autonomy cases on both clauses. *See* cases cited *infra* note 74. The Establishment Clause, with its role in ordering relations between organized religion and the offices of state, much like a "wall of separation" that screens out unconstitutional conduct coming from either side of the divide, *see supra* notes 7-10, is particularly appropriate in these institutional separation cases.

72 "Institutional autonomy" means there is a sphere within which a religious organization may provide for the definition, development, and transmission of the organization's beliefs and practices without governmental interference and may freely select, promote, discipline, and dismiss its clerics, officers, and members. The jurisprudential basis for institutional autonomy is the subject of the authorities cited *supra* in note 7 and *infra* Part IV.C.

73 *Bob Jones Univ.*, 461 U.S. at 604 n.30; *Widmar v. Vincent*, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981); *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981); *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970); *Cantwell v. Connecticut*, 310 U.S. 296, 305-06 (1940) (petty officials not to be given discretion to decide what is a legitimate "religion" for purposes of issuing solicitation permit); *Espinosa v. Rusk*, 634 F.2d 477 (10th Cir. 1980), *aff'd mem.*, 456 U.S. 951 (1982) (striking down ordinance that charged officials with issuance of a solicitation permit depending upon determination whether collection of money was for "secular" or "spiritual" purposes).

74 *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976) (civil courts may not probe into procedures churches used to remove clerics); *Maryland & Virginia Churches v. Sharpsburg Church*, 396 U.S. 367 (1970) (in resolving church property disputes, civil courts may not adjudicate questions of church doctrine); *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969) (judicial interference hazards inhibiting the free development of religious doctrine and implicating secular interests in matters of purely ecclesiastical concern); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (First

autonomy.

2. Concerning litigation over the ownership of church property, states have the option of following either the rule of judicial deference⁷⁵ or of neutral principles of law,⁷⁶ so long as the prohibitions in *Restatement I.C.1* are followed.

Apart from the prohibitions in *Restatement I*, the Religion Clauses are not violated by the regulation or taxation of religious organizations, so long as similarly situated non-religious organizations are subject to the same law.⁷⁷

II. When Government May Not *Help* Religion

- A. Concerning governmental expression, government may neither confess inherently religious⁷⁸ beliefs⁷⁹ nor advo-

Amendment contains "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"; *Gonzalez v. Archbishop*, 280 U.S. 1 (1929); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131 (1872); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); see *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987) (ability of religious organizations to define and carry out their missions); *id.* at 342-43 (Brennan, J., concurring in the judgment) (religious organizations need to be able to discriminate in favor of co-religionists as employees); *NLRB v. Catholic Bishop*, 440 U.S. 490, 502-04 (1979) (noting "serious First Amendment question" should teacher/school relationship at parochial schools be regulated by labor board).

⁷⁵ *Bouldin*, 82 U.S. (15 Wall.) 131; *Watson*, 80 U.S. (13 Wall.) 679. The rule of judicial deference is that civil courts are to do no more than determine the highest ecclesiastical tribunal with jurisdiction over the dispute, ascertain the decision of the tribunal, and defer to its resolution of the dispute.

⁷⁶ *Jones v. Wolf*, 443 U.S. 595 (1979).

⁷⁷ *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384-98 (1990); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985); see *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 24-25 (1989) (plurality opinion). *But cf.* *Saint Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) (adopting rule of statutory construction that assumes Congress intended to exempt all parochial schools thereby avoiding issue of institutional autonomy); *Catholic Bishop of Chicago*, 440 U.S. 490 (same); *Rector of Holy Trinity Church v. United States*, 143 U.S. 457 (1892) (adopting rule of statutory construction that assumes Congress intended to exempt churches thereby avoiding issue of institutional autonomy).

In *Swaggart*, 493 U.S. at 396-98, and *Texas Monthly*, 489 U.S. at 20, the Court cautioned against making distinctions between core religious practices (e.g., worship, doctrinal teaching, distributing sacred literature) and those activities by religious organizations that are more ancillary (e.g., operating a soup kitchen or hospital). In the absence of legislative guidance, courts should avoid making distinctions that turn on the doctrine of the religion or church in question, as well as avoid making "centrality" determinations. See RESTATEMENT III.A.

⁷⁸ "Inherently religious" means those intrinsically religious activities of worship and

cate that individuals profess inherently religious beliefs or that individuals observe such practices.⁸⁰ Government may acknowledge the role of religion in society and teach about its contributions to, for example, history, literature, music, and the visual arts.⁸¹ But the Establish-

prayer and the propagation or inculcation of the sort of matters that comprise confessional statements or creeds. The term also includes the supernatural claims of churches, mosques, synagogues, temples, and other houses of worship. These words are not used to identify buildings, but to describe the confessional community around which a religion identifies and defines itself, conducts its worship, teaches doctrine, and propagates the faith to children and adult converts.

The Supreme Court has found that prayer, devotional Bible reading, veneration of the Ten Commandments, classes in confessional religion, and the biblical story of creation are all inherently religious. *See* *Lee v. Weisman*, 112 S. Ct. 2649 (1992)(prayer); *Edwards v. Aguillard*, 482 U.S. 578 (1987)(creationism); *Wallace v. Jaffree*, 472 U.S. 38 (1985)(prayer); *Stone v. Graham*, 449 U.S. 39 (1980)(per curiam)(Ten Commandments); *Epperson v. Arkansas*, 393 U.S. 97 (1968)(creationism); *School Dist. v. Schempp*, 374 U.S. 203 (1963)(prayer and Bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962)(prayer); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948)(teaching religion).

On the other hand, legislation restricting abortion, Sunday closing laws, rules prohibiting interracial marriage, and teenage sexuality counseling are not inherently religious. *See* *Bowen v. Kendrick*, 487 U.S. 589 (1988)(teenage counseling); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983)(interracial marriage); *Harris v. McRae*, 448 U.S. 297 (1980)(abortion restrictions); *McGowan v. Maryland*, 366 U.S. 420 (1961)(Sunday closing law); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961)(Sunday closing law).

79 For examples of cases where government is confessing inherently religious beliefs, see *County of Allegheny v. ACLU*, 492 U.S. 573 (1989)(public display of nativity of Jesus as the Messiah); *Stone*, 449 U.S. 39 (posting of Ten Commandments in school classrooms). *But cf.* *Lynch v. Donnelly*, 465 U.S. 668 (1984)(upholding nativity of Jesus situated among other holiday displays).

80 For examples of cases where government is advocating that individuals profess inherently religious beliefs or that they observe such practices, see *Lee*, 112 S. Ct. 2649 (prayer); *Edwards*, 482 U.S. 578 (teaching scientific creationism); *Wallace*, 472 U.S. 38 (encouraging prayer); *Epperson*, 393 U.S. 97 (prohibiting teaching evolution); *Schempp*, 374 U.S. 203 (prayer and devotional Bible reading); *Engel*, 370 U.S. 421 (teacher led prayer); *McCollum*, 333 U.S. 203 (facilitating the teaching of religion). *But cf.* *Marsh v. Chambers*, 463 U.S. 783 (1983)(upholding legislative chaplain and prayer).

Narrow exceptions to the rule stated in the text exist in situations where government has isolated an individual from his or her religious community, such as in the armed forces or in prison. In these "special environments," government may bring religion to the individual because government is responsible for the individual's inability to obtain the requisite religious services at his or her own initiative. *See Schempp*, 374 U.S. at 299 (Brennan, J., concurring)("[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion . . .").

81 *Edwards*, 482 U.S. at 606-08 (Powell, J., concurring); *Schempp*, 374 U.S. at 225; *McCollum*, 333 U.S. at 235-38 (Jackson, J., concurring). The rule stated in the text accords with *Florey v. Sioux Falls School District*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980)(allowing public school to include Christmas music as part of balanced program of secular and sacred selections representative of the culture and season).

ment Clause is violated when the expression places government's imprimatur on a religion⁸² or on an inher-

82 Government's imprimatur must not be placed on a particular religion, confession of faith, or creed. However, America's governmental institutions have long acknowledged general theism in such forms as the national motto ("In God We Trust"), the Pledge of Allegiance ("one nation, under God, indivisible"), and patriotic music ("God Bless America"). To modern rationalists, these are nostalgic references from an age when America was unabashedly more pious. Although inconsistent with current Establishment Clause doctrine, in the opinion of modernists official references to God are a blend of patriotism and civil religion, *de minimis* in their harm to nontheists. Thus, it is prudent to overlook the inconsistency. See LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 184-85* (1986).

The idea that our governmental institutions are in a sense "under God" was present at America's founding, and this political philosophy is reflected in many of its constituting documents and the words of early statesmen. See *Wallace*, 472 U.S. at 91-106 (Rehnquist, J., dissenting) (numerous references to America's religious origins); *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 465-72 (1892) (same). As Justice Douglas observed concerning America in *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), "We are a religious people whose institutions presuppose a Supreme Being."

Notwithstanding 200 years of secularization, this idea persists into the present. Empirical studies show that a majority of Americans still believe that "God is the moral guiding force of American democracy." See Jeffery L. Sheler, *Spiritual America*, U.S. NEWS & WORLD REP., Apr. 4, 1994, at 48, 51 (55% answered in the affirmative).

This is a First Amendment issue of great sensitivity, and the courts have, in uneasy fashion, postponed the working out of the implications of America's historic public philosophy. See *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring) (city's display including nativity scene does not violate the Establishment Clause); *Schempp*, 374 U.S. at 303-04 (Brennan, J., concurring) ("In God We Trust" and "one nation under God" are constitutional); *Zorach*, 343 U.S. at 312-13 (dicta approving of "appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths" and "the supplication with which the Court opens each session: 'God save the United States and this Honorable Court'"); *Sherman v. Community Consol. Sch. Dist.*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993) (recitation of Pledge of Allegiance at public schools, including phrase "one nation, under God," not unconstitutional where students free not to participate); *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979) (rejecting claim that national motto "In God We Trust" and its required use is unconstitutional); *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) ("In God We Trust" not violative of First Amendment).

It is helpful here to distinguish between a principle of law and a political postulate concerning what is necessary to sustain American democracy. Hence, there is no contradiction between the institutional separation of church and state as a juridical principle and a cultural consensus that republican government must ultimately "be legitimized by making it answerable to transcendent moral law." A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* 112-13, 348 (1985). Through religion "human rights are rooted in the moral worth with which a loving Creator has endowed each human soul." *Id.* at 348. So long as theistic religion remains the chief source and teacher of moral authority in America, government's mere acknowledgement of that fact is not, without more, inconsistent with the Establishment Clause. But government should refrain from endorsing any confessional statement concerning the Deity. Thus, this minimalist god-in-common is purposely left ambiguous in any official sense.

Dr. Os Guinness, in his sociological critique of America and her faiths, put the matter succinctly:

ently religious belief or practice.⁸³

B. Concerning governmental action that is not expressional, the Free Speech and Establishment Clauses are violated as follows:

1. Government cannot penalize "blasphemy," the "sacriligious," or other activity that does no more than speak ill of a religion.⁸⁴

Converging developments . . . reveal with ever sharper clarity the audacious gamble that underlies the American experiment. The American republic simultaneously relies on ultimate beliefs (for otherwise it has no right to the [human] rights by which it thrives), yet rejects any fixed, final, or official formulation of them (for here the First Amendment is the clearest, most original, and most constructive). The republic will therefore always remain the "undecided experiment" in freedom, a gravity-defying gamble that stands or falls on the dynamism and endurance of its "unofficial" faiths.

OS GUINNESS, *THE AMERICAN HOUR: A TIME OF RECKONING AND THE ONCE AND FUTURE ROLE OF FAITH* 18-19 (1993). To the extent that official, general references to God supports theism, as opposed to more particularistic references to Christianity or Judaism, very few Americans object. Indeed, one could safely predict that there would be a general outcry—even vigorous resistance—if the Supreme Court declared unconstitutional governmental references to God. It would not be prudent for the federal courts, wielding the Establishment Clause, to influence the contemporary debate over America's public philosophy one way or the other. Thus, the courts have not declared unconstitutional official references to theistic belief or unspecific references to God as undergirding America's political institutions.

⁸³ Elected and other high public officials may, without violating the First Amendment, be specific about their religious faith when they speak. In America, pronouncements by elected officials that interweave patriotism and religion have a long and venerable tradition. Familiar examples are presidential speeches that call upon God's providence as the nation faces some new challenge or adventure or that conclude with "may God bless America," celebration of Thanksgiving as a day for collective acknowledgement of God's hand in the harvest and other good favor, and the practice started by George Washington of taking the presidential oath of office with the added "so help me God." See Robert N. Bellah, *Civil Religion in America*, 96 *DAEDALUS* 1 (1967).

It is expected that a reasonable member of an audience, upon hearing the President speak of religious belief or practice, understands that the President does so out of a reflection of his own faith and not as one explicating official policy or prescribing rules of citizen conduct. Citizens neither want nor expect the President to hide his religious faith when in public, nor do they want or expect him to disregard any solace he may find in his religion. See Sheler, *supra* note 82, at 48, 51 (Although 53% of registered voters polled thought "[W]e have to keep church and state completely separate," 78% of the same group thought "[t]he [P]resident should be a moral and spiritual leader," and 84% thought that "our government would be better if policies were more directed by moral values."). Moreover, citizens suffer no coercion and only de minimis pressure to adopt the President's religious beliefs or practices, merely upon hearing him reference religion. Finally, citizens must be expected to understand that elected public officials have a right to free exercise of their own religious faith, including the right to openly speak about it.

⁸⁴ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505-06 (1952) (striking down law

2. Government cannot compel an individual, upon pain of material penalty, inconvenience, or loss of public benefit or advantage, to profess a religious belief⁸⁵ or to observe an inherently religious practice.⁸⁶
3. Government cannot delegate civil authority to a religious organization.⁸⁷
4. Government cannot purposefully discriminate among religions,⁸⁸ nor utilize classifications based on denominational or sectarian affiliation to extend benefits⁸⁹ or to impose burdens^{90, 91}.

permitting censorship of films that are "sacrilegious"); see *Epperson v. Arkansas*, 393 U.S. 97, 107 n.15 (1968) (dictum concerning purposes of blasphemy statutes); cf. *infra* note 106 and accompanying text.

85 *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (overturning belief in God as a condition of holding public office); *United States v. Ballard*, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men."). This is an area where the purview of the Free Speech and the Establishment Clauses overlap. Additionally, the requirement in U.S. CONST. art. VI, cl. 3, provides that there may be no religious test for federal office.

86 *McGowan v. Maryland*, 366 U.S. 420, 451 (1961) (Sunday closing law is not inherently religious and thus compelling its observance does not violate Establishment Clause); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 598 (1961) (same); *Gallagher v. Crown Koshier Super Market*, 366 U.S. 617, 624 (1961) (same).

87 *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); see *Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2488-90 (1994) (plurality opinion).

88 *Larson v. Valente*, 456 U.S. 228 (1982); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

When a law of secular purpose has a disparate effect among religious organizations, the Establishment Clause is not violated. *Larson*, 456 U.S. at 246 n.23; *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (discrimination among religions was not purposeful, but the unintended effect of the Internal Revenue Service's facially neutral, secular regulation); *Hernandez v. Commissioner*, 490 U.S. 680, 695-96 (1989).

89 "Benefit" means affirmative financial assistance in the nature of a subsidy, grant, entitlement, loan, or insurance, as well as a tax credit or deduction.

A tax exemption, such as that upheld for religious organizations in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), is to be distinguished from tax credits and deductions. Only credits and deductions are within the definition of a governmental benefit. A tax exemption is government's election to "leave religion where it found it," and thus not the extension of a benefit. See RESTATEMENT I.I.C.1. On the other hand, for First Amendment purposes a tax credit or deduction is little different from a direct grant or a cash payment. The idea that exemptions, credits, and deductions for organizations should all be regarded alike as "tax expenditures," while useful in other areas of legal policy, does not make sense in dealing with issues that arise under the Religion Clauses. Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L. J. 299, 345 (1976); Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L. J. 1285 (1969); DEAN M. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 11-13, 47-57 (1977).

90 "Burden" means a regulation, tax, or criminal prohibition.

91 *Grumet*, 114 S. Ct. at 2491-93; *Gillette v. United States*, 401 U.S. 437 (1971); see

5. Government cannot utilize classifications that single out a religious practice (as opposed to language inclusive of a general category of religious observances) thereby favoring that particular practice.⁹²
6. Government cannot regulate the private business sector so as to purposefully and unreasonably favor religious observance over competing secular interests.⁹³
7. Government cannot confer a benefit on religion if the benefit is not available to others similarly situated.⁹⁴
8. Government cannot confer a benefit directly on religious organizations where the benefit, facially or as applied, affords an opportunity for the transmission of inherently religious beliefs or practices; this is so even though the benefit may be available to others

Larson, 456 U.S. at 246 n.23 (distinguishing and explaining *Gillette*). The rationale, in part, is that the Court wants to avoid making membership in a denomination more attractive. If the rule stated in the text was not the law, then merely holding religious membership would result in the availability of a civil advantage. For example, it would violate the rule stated in the text if Congress were to confer conscientious objector draft status "on all Quakers," for that may cause conversions to Quakerism. On the other hand, the government purposefully may utilize classifications based on a person's religious belief or practice—as distinct from denomination—to lift civil burdens from those individuals. For example, Congress may confer conscientious objector draft status "on religious pacifists who oppose war in any form." *Gillette*, 401 U.S. at 447; see *Grumet*, 114 S. Ct. at 2497 (O'Connor, J., concurring in part and concurring in the judgment).

⁹² *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (striking down state law favoring Sabbath observance); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 n.11 (1987) (explaining and distinguishing *Thornton*); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion). For example, if Saturday as a day of rest is legislatively required to be accommodated by employers, all religious practices (including all religious days of rest) must be required to be accommodated. If a Kosher diet is required to be accommodated by commercial airlines, then all religious practices (including all religious dietary requirements) must be accommodated. If a student absence from public school is excused for Good Friday, then so must all religious practices (including absences for all religious holy days). Cf. *Gillette*, 401 U.S. at 450 (Congress permitted to accommodate "all war" pacifists but not "just war" inductees because to broaden the exemption invites increased church-state entanglements and would render almost impossible the fair and uniform administration of selective service system).

⁹³ *Estate of Thornton*, 472 U.S. 703; *Hobbie*, 480 U.S. at 145 n.11 (explaining and distinguishing *Thornton*); see *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

⁹⁴ *Committee for Pub. Educ. of Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (striking down state aid to education program that benefits only religious schools); see *Mueller v. Allen*, 463 U.S. 388, 394, 396 n.6, 398-99 (1983) (explaining and distinguishing *Nyquist*); *Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2491-93 (1994) (legislation favoring one particular religious sect is unconstitutional).

similarly situated.⁹⁵

C. Governmental actions not prohibited in *Restatement I, II.A*, and *II.B* are left to the judgment of legislatures and public officials.⁹⁶ Accordingly, without violating the Establishment Clause government may enforce a law as follows:

1. Government may refrain from imposing a burden on religion, even though the burden is imposed on others similarly situated.⁹⁷

95 All of the Court's cases concern aid to primary and secondary parochial schools. For cases disallowing all or some direct aid, see *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985); *New York v. Cathedral Academy*, 434 U.S. 125 (1977); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Nyquist*, 413 U.S. 756; *Levitt v. Committee for Public Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). For cases allowing some direct aid, see *Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (reimbursement for cost of state-mandated tests and reporting); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (secular textbooks).

The Court has received considerable criticism—even ridicule—for the close distinctions it has made between permissible and impermissible aid in parochial school cases. However, for present purposes these differences are best seen as disputes over whether the Court placed matters in the right category, not whether appropriate categories exist that prohibit some direct benefits to parochial schools but permit other forms of direct aid. Compare the rule stated in the text with RESTATEMENT II.C.2.

96 Between the full sweep of the Free Exercise Clause and the full reach of the Establishment Clause, there remains breathing space for the discretionary judgments of the various state and federal legislatures. For example, a legislature may exempt a religious practice from a burden imposed by neutral legislation. See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); RESTATEMENT II.C.1. This serves representative democracy, but there is a down side. Legislative exemptions are hard to secure, especially for minority or unpopular religions. And, of course, the very idea of a Bill of Rights is countermajoritarian. However, the Establishment Clause protects minority and unpopular religions in these situations much like the Equal Protection Clause safeguards racial and ethnic minorities. Accordingly, legislative exemptions cannot be granted to politically powerful religions without being extended as well to minority religions. See RESTATEMENT II.B.4 to II.B.5.

97 *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), is the leading case. *Amos* upheld a religious discrimination exemption for religious organizations in federal civil rights legislation. “[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their missions.” *Id.* at 335. See also *Gillette v. United States*, 401 U.S. 437 (1971) (religious exemption from military draft for those who oppose all war does not violate Establishment Clause); *Walz v. Tax Comm’n*, 397 U.S. 664 (1970) (upholding property tax exemption for religious organizations); *Zorach v. Clauson*, 343 U.S. 495 (1952) (upholding release time program for students to attend religious exercises off public school grounds); *Selective Draft Law Cases*, 245 U.S. 366 (1918) (upholding, *inter alia*, military service exemptions for clergy and theology students). But see *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality opinion) (disallowing sales tax exemption when available only to those who purchase religious literature).

2. Government may directly confer a benefit on religious organizations if the benefit is available to others similarly situated and if the object of the benefit, facially or as applied, does not afford an opportunity for the transmission of inherently religious beliefs or practices.⁹⁸

The rationale for the rule stated in the text is twofold. First, to establish a religion connotes that a government must have taken some affirmative action to seek to achieve the prohibited result. Conversely, for government to passively "leave religion where it found it" logically cannot be "a law respecting an establishment of religion." See Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1416 (1981) ("The state does not support or establish religion by leaving it alone."). Second, reducing civil-religious tensions and minimizing church-state interaction enhance the separation sought by the Establishment Clause.

For government to relieve religious claimants of burdens on private religious choice no more unconstitutionally favors religion than does the Free Exercise Clause unconstitutionally favor religion. As Justice White observed in *Welsh v. United States*, 398 U.S. 333, 372 (1970) (dissenting opinion), the Free Exercise Clause is itself a law that by its express terms exempts religion from certain civic burdens. Any law—such as the Free Exercise Clause—that purposefully exempts religion from a civil duty cannot possibly violate the Establishment Clause, for then the latter clause would cancel out the former. Therefore, an appropriate legislative purpose may include allowing individuals and religious organizations to make religious choices unimpeded by governmental burdens placed on others.

Amos is explicit in making the salient distinction between benefits, see RESTATEMENT II.B.7, and burdens, see the rule stated in the text. The special extension of a benefit raises a more serious Establishment Clause claim than does the lifting of a burden. The distinction is between government passively allowing an individual to freely make a religious choice, on the one hand, and government actively promoting or fostering an individual's religious choice by the enticement of a benefit, on the other. Stated plainly, government is passive when it is "not getting in the way of" religious choice (e.g., *Amos*, *Waltz*, and *Zorach*), whereas government is active when it is "paying for" religious choice (e.g., *Nyquist*).

Amos also demonstrates that for a government to "refrain from imposing a burden" is logically no different from "lifting a burden" imposed in the past. In *Amos*, a burden first imposed in 1964 was lifted in 1972. See also *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring in the judgment).

98 *Bowen v. Kendrick*, 487 U.S. 589 (1988), the leading case, upheld a federal program providing grants for teenage sexuality counseling, including counseling done by religious centers. See also *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736 (1976) (church-affiliated college); *Hunt v. McNair*, 413 U.S. 734 (1973) (same); *Tilton v. Richardson*, 403 U.S. 672 (1971) (same); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (church-affiliated hospital); cf. *Nyquist*, 413 U.S. at 782 n.38 (distinguishing the religious-only funding program struck down in *Nyquist* from cases involving public assistance generally made available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions benefitted).

Compare the rule stated in the text with Restatement II.B.8. The rationale for the stated rule is that the social service initiatives of the modern welfare state may desire to treat religious organizations in a nondiscriminatory manner to avoid influencing the religious choices of individuals through governmental financial incentives. For example, if an individual wants to obtain drug rehabilitation counseling at his or her church, rather

3. Government may confer a benefit on individuals, who exercise personal choice in the use of their benefit at similarly situated institutions, whether public, private nonsectarian, or religious, even if the benefit indirectly advances religion.⁹⁹
4. Government may purposefully benefit only governmental agencies, thereby excluding similarly situated private organizations, whether nonsectarian or religious.¹⁰⁰ However, a law that benefits all similarly situated groups, public and private, but purposefully excludes religious organizations, is *prima*

than a secular agency, he or she ought to have that choice. For that choice to be possible, church-affiliated programs must be eligible for governmental funding.

99 *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (providing special education services to Catholic student not prohibited by Establishment Clause); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding a state vocational rehabilitation grant to a disabled student who chose to use the grant for training as cleric); *Mueller v. Allen*, 463 U.S. 388, 399-400 (1983) (upholding a state income tax deduction for parents paying school tuition); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (upholding state law providing reimbursement to parents for expense of transporting children by bus to school, including parochial schools); *cf. Durham v. McLeod*, 192 S.E.2d 202 (S.C. 1972), *dismissed for want of a substantial federal question*, 413 U.S. 902 (1973) (dismissed the same day that the Court decided *Nyquist*, which struck down religious only aid to private schools). In *Durham*, the state court upheld a student loan program wherein students could attend the college of their choice, religious or secular. Similarly, the Court in *Nyquist* implied that educational assistance provisions, such as the G.I. Bill, do not violate the Establishment Clause even when some students choose to attend church-affiliated colleges. *Nyquist*, 413 U.S. at 782 n.38; *cf. Sloan v. Lemon*, 413 U.S. 825, 833-35 (1973) (holding unconstitutional state tuition reimbursement plan available to parents of all nonpublic school students).

The rationale of rule stated in the text is twofold. First, the constitutionally salient cause of any potential indirect benefit to religion is the self-determination of numerous individuals, not that of the government. Merely enabling private religious choice—where individuals may freely choose or not choose religion—cannot logically be a governmental establishment of religion. The government is largely passive as to the relevant choice. Second, the indirect nature of the aid reduces church-state interaction and oversight, enhancing the institutional separation desired from the perspective of the Establishment Clause.

Numerous familiar programs illustrate the stated rule: individual income tax deductions for contributions to charitable organizations, including those that are religious; federal aid to students attending their college of choice; the G.I. Bill; federal child care certificates for low income parents enrolling their child in preschool.

100 *Norwood v. Harrison*, 413 U.S. 455, 462 (1973); *Everson*, 330 U.S. at 16 (dictum). Accordingly, for government to decide to fund only public schools does not violate the First Amendment. However, if the government decides to fund all schools except religious schools, then the rule stated in RESTATEMENT I.B.2 is violated. Concerning the constitutionality of an educational voucher program that excluded religious schools, see CARTER, *supra* note 67, at 194, 200.

facie violative of the Free Exercise Clause.¹⁰¹

5. Subject to the prohibitions in *Restatement I* and *II*, government may protect individuals and religious organizations against discrimination on the basis of religion in, for example, employment,¹⁰² public accommodations,¹⁰³ housing,¹⁰⁴ other property holdings and contracts,¹⁰⁵ the commission of hate crimes,¹⁰⁶ and the exercise of free speech.¹⁰⁷

III. "Religion" and the First Amendment: Definition and Application

A. A religious belief or practice need not be "central" to a

101 The rule stated in the text is the logical implication of the rules in RESTATEMENT I.B.2 and II.B.8. That is, RESTATEMENT I.B.2 prohibits purposeful discrimination against religion. If applicable, however, compliance with the Establishment Clause rule stated in RESTATEMENT II.B.8, would be a compelling rationale for excluding religion.

For example, a governmental program of providing tax free bonds to finance capital improvements at institutions of higher education may not exclude church-affiliated colleges but no others. See RESTATEMENT I.B.2. However, that same program, as applied, may not be used to sell revenue bonds for the building of a new chapel at a Christian college without violating the Establishment Clause. See RESTATEMENT II.B.8; *Sloan*, 413 U.S. at 833-35 (refusing to hold violative of the Equal Protection Clause a state tuition reimbursement plan, which was available to parents of nonpublic, nonsectarian school students but not available to nonpublic sectarian school students, because the plan violated the Establishment Clause).

The stated rule is in accord with *Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring in part and concurring in the judgment) (indicating that *Aguilar v. Felton*, 473 U.S. 402 (1985), was wrongly decided; thus, it appears there are five votes on the Court to overrule *Aguilar*).

102 Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1988 & Supp. IV 1992).

103 Title II of Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (1988).

104 Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604 (1988).

105 42 U.S.C. §§ 1981-82 (1988 & Supp. V 1993); see *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (holding that § 1982, which prohibits racial discrimination in the holding and conveyance of property, may redress discrimination against Jews).

106 18 U.S.C. § 247 (1988) (criminalizing damage to religious property and the obstruction of persons in their free exercise of religion). See *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (sustaining constitutionality of legislation that enhanced the penalty for conduct motivated by class hatred); cf. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (overturning ordinance that criminalized class specific hate speech).

The Freedom of Access to Clinic Entrances Act, 18 U.S.C.A. § 248 (West Supp. Sept. 1994), enacted May 26, 1994, contains a religious freedom amendment. *Id.* at § 248(a)(2), (3). The Act's prohibitions and punishments that apply to unlawful protest activity at abortion clinics apply with equal force to those who disrupt services at houses of worship.

107 See *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (upholding The Equal Access Act, 20 U.S.C. §§ 4071-4074 (1988)).

claimant's religion.¹⁰⁸ A claimant may disagree with co-religionists, be unsure or wavering,¹⁰⁹ or be a recent convert.¹¹⁰ A claimant need not be a member of an organized religious denomination, community, or sect.¹¹¹ However, a claimant must be sincere.¹¹²

- B. The Establishment Clause is not violated when a governmental restriction (or social program) merely reflects a moral judgment, shared by some religions, about conduct thought harmful (or beneficial) to society.¹¹³ The Estab-

108 *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (rejecting free exercise test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); *United States v. Lee*, 455 U.S. 252, 257 (1982) (rejecting government's argument that free exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance"); *Heffron v. International Soc'y of Krishna Consciousness*, 452 U.S. 640, 652 (1981) (rejecting argument that solicitation of funds as part of church ritual was entitled to greater weight than religious groups that solicit money but do not ritualize the act); *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981); see *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990); *Laycock*, *supra* note 97, at 1390-91; see also *supra* note 77.

109 *Thomas*, 450 U.S. at 715-16. Additionally, it is sufficient if the practice in question is religiously motivated. It would be an impoverished notion of religion that limits it to a list of absolute do's and don'ts. For many major religious groups in America, obedience by a religious claimant is often not religiously *compelled* but religiously *motivated*. The teaching of a Sunday school class or volunteering to work in the church nursery, for example, are done out of religious motive rather than compulsion. See *Laycock*, *supra* note 97, at 1390-91. Although the text of the First Amendment reads in terms of "prohibiting the free exercise" of religion, not "making more difficult" the practice of one's religion, it is assumed that religiously motivated observances are within the ambit of the First Amendment. To do otherwise would work a significant discrimination against nonabsolutist faiths and those without mandated creeds, confessions, or codes of canon law. See RESTATEMENT II.B.4 (prohibiting such discrimination among religions). Moreover, if the Free Exercise Clause were violated only when there was a direct prohibition on a religious duty, then intentional discrimination against a religion that substantially burdened a religious practice but did not totally prohibit it, would not be a free exercise violation. Cf. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993). Such an absurd result discredits reading "prohibiting" so narrowly. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1486-88 (1990).

110 *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987).

111 *Frazee v. Illinois Dep't of Empl. Sec.*, 489 U.S. 829 (1989).

112 *United States v. Ballard*, 322 U.S. 78 (1944); see *Thomas*, 450 U.S. at 715 ("One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . .").

113 *Bowen v. Kendrick*, 487 U.S. 589, 604 n.8, 613 (1988); *Harris v. McRae*, 448 U.S. 297, 319-20 (1980); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); see *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983). Thus, overlap between a law's purpose and religious moral teachings does not, without more, render the law one "respecting an establishment of religion."

lishment Clause is violated only when such a law violates one of the rules set out in *Restatement II.A* or *II.B*.¹¹⁴

- C. Only beliefs and practices with a basis in religion are protected by the Free Exercise Clause.¹¹⁵ To avoid omitting from protection unfamiliar and emerging religions, thereby discriminating among religions,¹¹⁶ the

114 The rule stated in the text unravels the riddle of the "two definitions of religion." See *supra* notes 25-26 and accompanying text. The distinction is between a law apparently based on morality and a law that cannot have any basis except in confessional religion.

The key to resolving the definitional riddle is to distinguish between two viewpoints: (i) the individual or organizational claimant's definition of religion; and (ii) the government's definition of religion.

A Claimant's Viewpoint: For purposes of the inquiry into the "improper *hindering* of religion," the subject of RESTATEMENT I, the aim is to adjust public affairs to the rights claims of individual and organizational religionists. Therefore, the First Amendment's definition of "religion" must remain broad and indeterminate for purposes of the Free Exercise Clause.

A Government's Viewpoint: For purposes of the inquiry into the "improper *helping* of religion," the subject of RESTATEMENT II, the aim is quite different. RESTATEMENT II's goal is to prevent the danger to religious freedom that attends improper relations between the institutions of organized religion and the offices of state. Moreover, the focus is on what government cannot do. See *supra* note 44. From the government's viewpoint, the danger which the Establishment Clause seeks to avoid is not any and all governmental interaction with religion and religious organizations. That avoidance would lead to a radically secular state. Rather, the Establishment Clause is to prevent only that governmental involvement with religion that *may lead to the sort of evils that attend an establishment* of religion. That level of interaction happens when a government involves itself in the intrinsically religious matters of worship and prayer and the propagation or inculcation of matters that comprise confessional statements or creeds. The Supreme Court has labelled such matters "inherently religious." See *supra* note 78.

The necessity of a fixed boundary in church-state relations requires a uniform legal standard in drawing the line of separation between organized religion and the offices of state. The line of separation cannot be drawn differently for each religious organization based on its own unique definition of religion, for that would amount to governmental discrimination among religions (a violation of the rule stated in RESTATEMENT II.B.4). The requisite uniform line is the rule stated in RESTATEMENT III.B.

The Supreme Court has not resolved all of the problems in defining "religion" by confining Establishment Clause analysis to matters "inherently religious." The Court's determination as to what is "inherently religious" inevitably will favor the philosophy of modern rationalism (its underlying ideas will appear nonreligious) while disfavoring familiar theistic religions such as Christianity, Judaism, and Islam (their practices appearing inherently religious). See Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 834-35 (1984). The Court has yet to address this discontinuity in logic.

115 *Frazee*, 489 U.S. at 833; *Thomas*, 450 U.S. at 713-14; *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). Thus, the Free Exercise Clause is not an all-purpose conscience clause. Cf. *Welsh v. United States*, 398 U.S. 333 (1970).

116 RESTATEMENT II.B.4.

definition of religion remains broad and indeterminate,¹¹⁷ including naturalistic, nontheistic, and anthropocentric religions.¹¹⁸ The definition excludes a purely personal and philosophical way of life.¹¹⁹

Notwithstanding the many naysayers, the *Restatement of the Law of Religious Freedom* shows that the Supreme Court's case law on religious freedom is not at all in chaos. Although there are frequently sharp dissents and seriatim opinions when the Court decides a religion case, the center of the Court moves forward with remarkable coherence in the result¹²⁰ if not always in the rationale.¹²¹ Nevertheless, accurately handling the vast body of religious freedom case law can be daunting. This is not only due to the sheer number of decisions and the heavy media attention, but also because the cases are difficult and, at least on first impression, appear conflicting. Acquiring a sure-handed grasp of the cases is not possible in a short amount of time without an analytical tool like the *Restatement*.

To demonstrate the *Restatement's* utility, the third part of this article puts its systematized rules to work testing out the scholarly claim that the Supreme Court's religious freedom jurisprudence is

117 The definition of religion for purposes of the First Amendment is one of great theoretical difficulty. But in the experience of the courts, the matter rarely becomes an issue. Often the government stipulates to the claim "being religious," but then it raises other defenses.

An excellent discussion on the question appears in *Malnak v. Yogi*, 592 F.2d 197, 200 (3d Cir. 1979) (Adams, J., concurring). Judge Adams' definition was later adopted in *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982). Judge Adams was of the opinion that to be a religion for purposes of the First Amendment the putative religion must seek comprehensive answers to life's ultimate questions, as well as evince characteristics such as clergy, sacred literature, holy days, formal services, and efforts at propagation.

118 *United States v. Seeger*, 380 U.S. 163 (1965) (stating that a belief system qualifies as a religion if it occupies a place in the claimant's life parallel to that filled by an orthodox belief in God); *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (naming as nontheistic religions: "Buddhism, Taoism, Ethical Culture, [and] Secular Humanism").

119 *Yoder*, 406 U.S. at 215-16. See CARTER, *supra* note 67, at 218 (if every idea that "pretended to any organization of values or depth of commitment" is swept into the definition of religion, it is hard to see what could be omitted).

120 Conceding that the Court's cases are coherent is, of course, altogether different from agreeing with what the Court has done. See *supra* text accompanying note 55.

121 This is not to say that every modern case falls neatly into its place in the RESTATEMENT. As *supra* notes 79, 80 and 97 indicate, the results in *Lynch v. Donnelly*, 465 U.S. 668 (1984), *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), are at odds with what, in the main, the Supreme Court has done in its other cases decided from the 1940s to the present.

being taken over by an equality-based rule of law.

III. IS A NEW THEORY BASED ON EQUALITY REPLACING AN OLDER REGIME ROOTED IN SEPARATIONISM AND COERCION?

The Supreme Court's modern jurisprudence concerning religious freedom is commonly dated from *Everson v. Board of Education*,¹²² incorporating the Establishment Clause through the Fourteenth Amendment,¹²³ and from *Sherbert v. Verner*,¹²⁴ applying for the first time a test of strict scrutiny to claims involving religious dissent.¹²⁵ It can generally be said that the Court's cases beginning with *Everson* were animated by a theory of *separationism*. Sixteen years after *Everson*, *Sherbert* not only sorted out whether *coercion of conscience* was to get strict scrutiny review, but also whether claims of indirect¹²⁶ coercion were actionable. *Sherbert* answered the question in the affirmative,¹²⁷ so long as the burden on religion was "substantial."¹²⁸ By "substantial" the Court meant that the religious dissenter must be forced to make a costly and conscience-bound choice.¹²⁹ This resembles the requirement

122 330 U.S. 1 (1947)(upholding state law reimbursing parents for cost of bussing children to parochial school).

123 *Id.* at 15.

124 374 U.S. 398 (1963)(refusing to accept employment due to religious beliefs may not disqualify claimant for unemployment compensation).

125 *Id.* at 406-09.

126 "Direct" coercion is governmental action that forbids or compels certain behavior. The religious claimant must choose between obeying the law or obeying his or her faith. "Indirect" coercion makes noncompliance with the law more difficult or expensive, but not impossible. The religious claimant has a choice, albeit a cruel one, but compliance with both law and faith is possible. In this sense, indirect coercion is merely a particularly harsh instance where the state's policies influence the religious choices of its citizens. See *infra* note 129.

127 *Sherbert*, 374 U.S. at 404-05. The prior law was stated in *Braunfeld v. Brown*, 366 U.S. 599, 605-07 (1961)(plurality opinion)(indirect burden on conscience not protected by Free Exercise Clause; Sunday closing law did not prohibit religious practice of Orthodox Jewish merchant, it just made it more expensive).

128 *Sherbert*, 374 U.S. at 407. *Sherbert* also established for the first time that loss of a statutory entitlement (as opposed to imposition of a criminal, tax, or regulatory duty) could qualify as a burden on religion remediable under the Free Exercise Clause. *Id.* at 405-06.

129 Although all instances of "direct" coercion were actionable under the Free Exercise Clause, only some instances of "indirect" coercion were actionable. As to the latter, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), states when indirect coercion invoked free exercise protection:

It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment This does not and cannot imply that

in standing doctrine that one's injury be both personal and concrete in order to state a justiciable claim of constitutional wrongdoing.¹³⁰

With increasing frequency during the 1980s and 1990s, the Court has applied a rule based in *equality*¹³¹ to reach some of its results thereby ameliorating undesirable (in its view) implications of the separationist and coercion-based theories.¹³² This raises the ambitious claim¹³³ that the Establishment Clause cases are best

incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification of its otherwise lawful actions.

Id. at 450-51.

130 To have standing to raise a constitutional claim, a plaintiff personally must have suffered some actual or threatened harm as a result of the putatively unconstitutional conduct of the state. Moreover, courts are to refrain from "abstract questions" which amount to "generalized grievances" shared by many others. *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 470-75 (1982).

131 In lieu of the word "equality," the courts and commentators often substitute the descriptor "neutrality." *See, e.g., infra* note 136. "Neutral," however, is not as satisfactory as the word "equal." To be "equal" offers more guidance to those who are trying to understand the law or faithfully administer it. The courts have considerable experience with what equality means in a variety of contexts.

"Neutrality" is prone to rhetoric and to other ideological exploitation. Everyone says they are in favor of a government "neutral" toward religion, but it can mean many different things. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality And The "No Endorsement" Test*, 86 MICH. L. REV. 266, 313-31 (1987); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 93 (1986). Having shunned the *Lemon* test, the Court is without a unifying doctrine for the Establishment Clause. For the Court to take up uttering "neutrality," almost as a mantra, is rhetorically safe but offers little analytical assistance.

Whenever the word "neutrality" appears in the Court's cases it is presumably a synonym for equality. When one uses "equal" to describe a law, there are four possible meanings: no discriminatory on its face, no discriminatory purpose, no discriminatory motive, and no discriminatory effect or impact.

132 *See, e.g., Employment Div. v. Smith*, 494 U.S. 872 (1990). The Court in *Smith* thought it difficult to make individualized governmental assessments concerning the impact of general law on religious practice; *id.* at 884-85; inadvisable for courts to make determinations concerning centrality of religious practice to a religion; *id.* at 886-87; and, not tolerable for each person to be a law unto himself or herself if religious-based conscience excuses obedience to general law, *id.* at 888-90.

133 Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 232, 237, 246, 249, 256, 263, 279 (1994); *see also* Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986). The scholarly endeavor at syntheses, of course, is laudable. One of the tasks of the academic is to classify, to pull together an unruly set of materials into a uniform explanation, if you will. Physicists, for example, have tried for years to arrive at a Unified Field Theory. Such a theory would tie together the four basic forces of gravity, electromagnetism, and the strong and weak nuclear forces. Proposing unifying theories of law is one of the major chores that occupies scholars.

understood as a collision of two competing theories of church-state relations. The claim is that the confusion in Establishment Clause cases manifests a larger struggle: the replacing of the old regime of separationism with a new regime of equality.¹³⁴ Moreover, the claim maintains that the unexpected adoption of a new Free Exercise Clause test in the peyote case of *Employment Division v. Smith*¹³⁵ similarly replaces a theory rooted in prohibiting coercion of conscience with a theory focused on governmental equality.

It is an intriguing proposition to say that one can drop a template of equality onto recent cases that will not only bring organization to the Court's jurisprudence but also project future trends. Using the *Restatement of the Law of Religious Freedom*, the following discussion tests the thesis that the Court is moving its Religion Clauses jurisprudence away from a separation/coercion paradigm and toward an equality-based theory.

In an equality-based model, where the word "neutral" is synonymous with "equal," the courts and commentators often say that government must be neutral as to religion.¹³⁶ That is, government must not only regard all religions equally, but also regard religion and nonreligion equally. Superficially, an equality-based theory presents certain attractions. First, it seems less anti-religious, at least to those who desire to see religious education and social services funded equally alongside government-operated schools and welfare programs. Second, it is thought to restrain successfully the judge tempted to interject his or her own biases into the resolution of a case.¹³⁷

If the claim that the Court is moving from a separation model to one of equality is correct, then this thesis should explain the evolution of the Court's cases over the last half century from *Everson* to the present. What follows are five comparisons of clus-

134 The turning point in this regard ("a key signal") is attributed to the Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981); Lupu, *supra* note 133, at 246.

135 494 U.S. 872 (1990).

136 See, e.g., *Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2487, 2491 (1994). Concerning the indeterminate nature of "neutrality" as a juridical concept, see *supra* note 131.

137 In the separation/coercion paradigm, the Court adopted balancing tests for the Religion Clauses. Balancing tests do leave more room for lower court judges to skew the outcome in close cases. An equality-based test is more mechanical in its implementation, leaving less leeway for a judge's own values to influence the outcome of First Amendment cases. It is another matter, of course, to agree that this apparent attraction is actually realized.

ters of like cases, a task made easier by use of the *Restatement of the Law of Religious Freedom*. Each comparison is structured around the equality-based theory versus the separationist paradigm.

FIRST COMPARISON

Equality as the rule of law is the norm when it comes to private speech of religious content. When the speech takes place on public property, or as the cases say "speech in a public forum," equal access is the rule.¹³⁸ The leading cases are *Widmar v. Vincent*,¹³⁹ a free speech case involving content discrimination; *Board of Education v. Mergens*,¹⁴⁰ upholding the Equal Access Act in the face of a separationist attack; and *Lamb's Chapel v. Center Moriches Union Free School District*,¹⁴¹ the recent free speech holding involving viewpoint discrimination.

When the expression is governmental speech, however, the controlling norm is separationism, not equality.¹⁴² The leading cases here are *Lee v. Weisman*,¹⁴³ *County of Allegheny v. ACLU*,¹⁴⁴ *Stone v. Graham*,¹⁴⁵ *Epperson v. Arkansas*,¹⁴⁶ *School District v. Schempp*,¹⁴⁷ *Engel v. Vitale*,¹⁴⁸ and all the way back to 1948 and *Illinois ex rel. McCollum v. Board of Education*.¹⁴⁹

138 See RESTATEMENT I.A.2.

139 454 U.S. 263 (1981).

140 496 U.S. 226 (1990).

141 113 S. Ct. 2141 (1993).

142 See RESTATEMENT II.A.

143 112 S. Ct. 2649 (1992) (striking down prayer in conjunction with commencement ceremonies at public junior high school).

144 492 U.S. 573 (1989) (disallowing display of Christmas nativity scene inside courthouse, but upholding display of Menorah outside of public building which was part of larger holiday scene).

145 449 U.S. 39 (1980) (per curiam) (striking down state law requiring posting of Ten Commandments in public school classrooms).

146 393 U.S. 97 (1968) (striking down state law prohibiting teaching theory of evolution in public schools).

147 374 U.S. 203 (1963) (prohibiting devotional reading of Bible and recitation of Lord's Prayer in public schools).

148 370 U.S. 421 (1962) (prohibiting state requirement of daily classroom prayer in public schools).

149 333 U.S. 203 (1948) (prohibiting program in which local volunteers came to public school campus to teach religion). *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Marsh v. Chambers*, 463 U.S. 783 (1983), are the two aberrations. But *Lynch* and *Marsh*, while antiseparationist to be sure, are not equality driven. Rather, in their rationale, *Lynch* and *Marsh* are driven by a desire to cling to historical practices dating from a time when America was less religiously plural.

SECOND COMPARISON

Equality is the operative principle when governmental benefits are directed to all individuals without regard to religion, who are given complete freedom of choice regarding how they may "spend" that benefit.¹⁵⁰ The leading cases are *Mueller v. Allen*,¹⁵¹ *Witters v. Washington Department of Services for the Blind*,¹⁵² and the recent decision in *Zobrest*.¹⁵³ Federal child-care vouchers for low-income parents of preschool children fall here as well.¹⁵⁴

However, when governmental aid flows directly to institutions, including religious organizations among others, then separationism is the Supreme Court's principal concern. If the organizational recipient is "pervasively sectarian," then separationism mandates no aid, even though such a result is manifestly unequal.¹⁵⁵ Most of the cases in this area involve primary and secondary parochial schools. But *Bowen v. Kendrick*¹⁵⁶ also requires a case-by-case review so that pervasively sectarian teenage counseling centers are denied government grants.

THIRD COMPARISON

Equality is the legal norm when the issue is governmental aid to religion, if the same benefit is not available to others similarly situated. The Court strikes down such aid, an arrangement favoring religion over nonreligion, as unequal.¹⁵⁷ The prominent case is *Committee for Public Education & Religious Liberty v. Nyquist*.¹⁵⁸

150 See RESTATEMENT II.C.3.

151 463 U.S. 388 (1983)(upholding state income tax deduction for parents paying parochial school tuition and other educational costs).

152 474 U.S. 481 (1986)(upholding state aid to blind individual attending sectarian school for a degree used to enter a religious vocation).

153 *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993)(providing interpreter to deaf student attending parochial high school does not violate Establishment Clause).

154 The Child Care and Development Block Grant Act of 1990, 42 U.S.C. §§ 9858-9858q (Supp. IV 1993). The act allows parents receiving child care certificates to purchase child care at a center operated by a church or other religious organization. *Id.* at §§ 9858n(2), 9858k(a), 9858c(c)(2)(A)(i)(I).

155 See RESTATEMENT II.B.8.

156 487 U.S. 589 (1988). In *Bowen*, the Adolescent Family Life Act was upheld "on its face," but the Court remanded for case-by-case reviews as to recipients of governmental grants that were religious organizations. *Id.* at 600-02, 622.

157 See RESTATEMENT II.B.7.

158 413 U.S. 756 (1973)(holding unconstitutional state aid when available to religious schools but not public and private nonsectarian schools).

However, when the issue is legislative exemptions for religious practices and organizations, exemptions not afforded the nonreligious, separation of church and state is controlling. Here, government refrains from imposing a burden on religion "to complement and reinforce the desired separation insulating each from the other."¹⁵⁹ *Corporation of Presiding Bishop v. Amos*¹⁶⁰ fits into this line of authority, as does *Walz v. Tax Commission*,¹⁶¹ *United States v. Seeger*,¹⁶² and, for example, the exemption for religious organizations in the Americans with Disabilities Act of 1990.¹⁶³

FOURTH COMPARISON

Equality is the operative principle when it comes to generally applicable social welfare regulation and taxation, including the regulation and taxation of religious organizations. Government may regulate religious organizations so long as it also regulates similarly situated secular organizations.¹⁶⁴ The principal cases are *Tony & Susan Alamo Foundation v. Secretary of Labor*¹⁶⁵ and *Jimmy Swaggart Ministries v. Board of Equalization*.¹⁶⁶ Of course, government cannot target or single out religion for regulation or taxation. That would be unequal.¹⁶⁷ The definitive cases are *Church of the Lukumi Babalu Aye v. City of Hialeah*¹⁶⁸ and *McDaniel v. Paty*.¹⁶⁹

However, the equality-based principle in *Alamo* and *Swaggart* is permissive only. It is not required of government if the legislature should want to "leave religion where it found it" by providing a statutory exemption for religion.¹⁷⁰ Under the Supreme Court's cases, the elected branches of government have a choice: to im-

159 *Walz v. Tax Comm'n*, 397 U.S. 664, 676 (1970). See RESTATEMENT II.C.1.

160 483 U.S. 327 (1987) (upholding religious discrimination exemption for religious organizations in Civil Rights Act of 1964).

161 397 U.S. 664 (1970) (upholding property tax exemption for churches).

162 380 U.S. 163 (1965) (upholding exemption from military draft for religious pacifists).

163 42 U.S.C. §§ 12101-12213 (Supp. V 1993). The religious exemption appears in § 12187.

164 See RESTATEMENT I.C (last sentence).

165 471 U.S. 290 (1985) (Fair Labor Standards Act).

166 493 U.S. 378 (1990) (sales and use taxes).

167 See RESTATEMENT I.B.2.

168 113 S. Cl. 2217 (1993) (municipal ordinances regulating ritual sacrifices of animals violates Free Exercise Clause).

169 435 U.S. 618 (1978) (disqualifying clergy from holding public office violates religious freedom).

170 See RESTATEMENT II.C.1.

pose a regulatory burden or to exempt religious institutions from the burden. It is a choice between equality or separationism. Subject to the rules protecting institutional autonomy, the Court will sustain whichever path is taken by the legislative and executive branches.

FIFTH COMPARISON

As a final comparison, when the issue concerns the civil courts being asked to take jurisdiction of ecclesiastical disputes, separationism is required by the Supreme Court.¹⁷¹ Typical examples are when a church splits or when a cleric is unhappy over a failed appointment to a religious office. The prominent cases are *Watson v. Jones*,¹⁷² *Kedroff v. Saint Nicholas Cathedral*,¹⁷³ *Presbyterian Church v. Hull Church*,¹⁷⁴ and *Serbian Eastern Orthodox Diocese v. Milivojevich*.¹⁷⁵ The principle of law is judicial deference to the adjudicatory tribunals within the church.

However, in a limited way the Court has even allowed equality to seep into these property dispute cases under the rubric of "neutral principles of law."¹⁷⁶ The neutral principles approach is best understood as the civil judge reviewing the relevant documents "religiously blind" as he or she seeks to give effect to the secular provisions thereof. If a neutral principles review is successful, neither faction is helped or hurt by religion. Rather, the ownership of the property will go to the faction as indicated by the "blinded" secular law. Legally controlling, then, is the notion of equality before the letter of the civil law.¹⁷⁷

As with the fourth comparison, the adoption of a neutral principles standard of review is by prudential choice. The Supreme Court has said that each state may apply either neutral principles or judicial deference to the appropriate church tribunal.¹⁷⁸

171 See RESTATEMENT I.C.1.

172 80 U.S. 679 (1871) (barring federal courts from interfering in matters of church doctrine, discipline, and polity).

173 344 U.S. 94 (1952) (holding that state's undertaking to transfer control of church from governing hierarchy in foreign country to local authorities in the United States violates First Amendment).

174 393 U.S. 440 (1969) (prohibiting civil court from awarding church property on basis of interpretation of doctrine).

175 426 U.S. 696 (1976) (prohibiting civil courts from probing into church polity in dispute over removal of cleric from ecclesiastical office).

176 See *Jones v. Wolf*, 443 U.S. 595, 600-08 (1979).

177 See RESTATEMENT I.C.2.

178 *Wolf*, 443 U.S. at 608.

Therefore, the appropriate lawmaker in each state (either the state's highest court or the legislature) may select a rule based on equality (neutral principles) or one based on separationism (judicial deference).

To summarize the result of these five comparisons of cases following a separationist model with cases adopting an equality-based model, three types of situations appear:

1. instances of mandated equality;
2. instances of mandated separation; and
3. instances where the First Amendment rule is to leave the matter to the discretion of the appropriate lawmaking branch.

It is apparent that going back many years there are examples of the Court following a rule of equality. Accordingly, an equality-based model was not an invention of the Court in the early 1980s.¹⁷⁹ On the other hand, right up to the Supreme Court as presently constituted, there are numerous instances where the Court is following separationism as the controlling principle—or, in the alternative, allowing the legislature to decide between a separationist-based or an equality-based rule of law.¹⁸⁰

Contrary to what was claimed, equality is not the talisman that will guide one through the thicket of cases on religious freedom. Rather, the distinction between separationism versus equality is only one of several relevant—but not controlling—considerations. As is evident from the broad framework made possible by the *Restatement*, other important distinctions are: (i) speech versus nonspeech; (ii) private speech versus government speech; (iii) individuals versus religious organizations; (iv) benefits versus burdens; and (v) laws where morality and religion overlap versus laws that are inherently religious.¹⁸¹ All of these distinctions, often lashed together in twos or threes to form a rule,¹⁸² are used by

179 Cf. *supra* note 134.

180 Like Mark Twain's famous cable from London ("Reports of my recent death are greatly exaggerated."), obviously the foregoing comparison does not bear out that separationism is either dead or dying. Cf. Lupu, *supra* note 133. However, Professor Lupu does make the useful point that separationism is no longer dominant. Separationism's flood has gone past its high-water mark, but it is still a deep current that promises to continue to shape the modern Court.

181 See *supra* text accompanying note 113.

182 For example, RESTATEMENT I.I.C.2, a complex rule of law, combines four different distinctions: the rule pertains to benefits as opposed to burdens; it pertains to such benefits being conferred directly to religious organizations as opposed to benefits paid to

the Supreme Court to decide religious freedom cases.

These various distinctions are just ripples on the surface of the Court's case law indicating the presence of deeper currents. Just what are the first principles that underlie what it means to be a nation that guarantees full religious freedom? That is the subject of the fourth part of this article.

IV. DIFFERING VISIONS OF THE FIRST AMENDMENT'S PURPOSE REGARDING RELIGION

As an analytical tool—with all the limitations implicit in that term—the *Restatement* is not able to trace its rules back to the philosophical presuppositions that underpin the Supreme Court's religious freedom case law. The systemization imposed by the *Restatement* is possible because its rules are sufficiently distant from theory so that coherence rather than conflict reigns. Once one moves beyond the facile and goes in search of philosophical underpinnings, then the contradictions appear. In such an undertaking, however, the *Restatement* is suggestive of a taxonomy of key ideas. Concerning religious freedom, the Court's opinions variously envision the purpose of the First Amendment as: (i) protecting the individual from coercion; (ii) protecting the society from religion; (iii) protecting religion from the state; (iv) protecting religious choice from being influenced by the state; and (v) protecting religious institutions that serve both as a counterweight to the power of the modern state and as communities of ultimate meaning. These five visions are sometimes complementary as they pursue the overall goal of religious freedom. Occasionally some of them overlap and thus lead, for different reasons, to the same result. And at times they conflict, thus dividing the Court.

A. *Protecting the Religiously Informed Conscience*

Protection from coercion¹⁸³ is rooted in the key idea of *conscience*, both individual conscience and the collective conscience

individuals who in turn choose to use their benefit at a religious organization, *cf.* RESTATEMENT II.C.3; the rule pertains only to social or educational services that are not inherently religious as opposed to services where the transmission of inherently religious beliefs is likely, *cf.* RESTATEMENT II.B.8; and, finally, the benefit must be available, not only to religious groups, but also secular organizations similarly situated, *cf.* RESTATEMENT II.B.7.

¹⁸³ Coercion is further broken down into "direct" and "indirect" coercion. *See supra* notes 126 and 129.

represented by the sum of the individual members of a unified religious community, society, or sect. Conscience is a psychological abstraction indicative of a person's sense of the moral good, joined with the felt duty to do that which is right or proper in a given circumstance. It is based on the widely held metaphysical belief in the inviolable dignity and incalculable worth of each human being. Compulsion of an individual to act contrary to his or her conscience is regarded as a violation of the person, something to be avoided except for the most compelling of societal interests.

A right to an avoidance of compulsion with respect to conscience must not, however, be overstated. A government that extends tolerance to religionists who find themselves at odds with generally applicable, facially neutral laws by providing exemptions from such laws is a government that has not invaded conscience. Indeed, nations that still have established churches do not violate the consciences of their dissenting citizens, so long as exemptions are made available as a matter of legislative grace.

This is not to say that tolerance and the right of conscience are the same. They do lead to the same result so far as the positive law of religious freedom. But tolerance holds that the origin of religious rights is the state's grace. The right of conscience, in contrast, is an assertion that individuals owe an allegiance to some higher authority that is prior to the duty of citizens to obey the state. The right of conscience thereby implies a limited state.

Preventing coercion of conscience is a theme that surfaces at several points throughout the Court's First Amendment case law. *Restatement I.A.1* states the rule against compelling a belief contrary to one's religion, and *Restatement I.B.1* reflects the rule against placing an individual in the position of having to prove the truth of his or her religious claims.

When faced with intrachurch disputes over property, *Restatement I.C.2* reflects the option given to the states to follow a neutral principles approach in lieu of following a rule of judicial deference to church tribunal decisions. The holding in *Jones v. Wolf*¹⁸⁴ was a concession by the Court to those wanting to protect against coercion of dissident members by their church, but at the cost of reduced protection for institutional autonomy.¹⁸⁵ As discussed below,¹⁸⁶ the notion of institutional autonomy is born of a First

184 443 U.S. 595 (1979).

185 See *id.* at 610-21 (Powell, J., dissenting).

186 See *infra* Part IV.C.

Amendment vision—not of conscience—but of protecting organized religion from the state. The neutral principles approach is more accommodating to the concerns of conscience than is judicial deference because it prevents some extreme cases where ecclesiastical authorities deal arbitrarily with the grievances of church members or dissenting clerics concerning matters of doctrinal change or interpretation.¹⁸⁷

Conscience was of foremost concern in the Court's inclusion of nontheistic, newly emerging, and evolving religions within the First Amendment's definition of "religion,"¹⁸⁸ so that individuals are free to seek spiritual refreshment wherever their conscience may lead.¹⁸⁹ Preventing the invasion of conscience was one of the Court's concerns, as reflected by the several rules in *Restatement III.A* concerning recent and uncertain converts, religious claimants without church affiliation, and the avoidance of judicial inquiry into the "centrality" of a religious belief.¹⁹⁰

The Court's protection of conscience was unquestionably weakened by the decision in *Employment Division v. Smith*,¹⁹¹ rendering nonactionable a generally applicable law's discriminatory effect.¹⁹² But even *Smith* explicitly stated that the legislative and executive branches were empowered to regard the needs of conscience by adopting exemptions directed to religious practices.¹⁹³ Indeed, the enactment of the Religious Freedom Restoration Act¹⁹⁴ was Congress's way of dispensing religious exemptions wholesale. Less sweeping examples of legislation that take into account the needs of conscience are found in the civil rights acts

187 See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 726-27 (1976) (Rehnquist, J., dissenting).

188 See RESTATEMENT III.C.

189 A secondary concern was that, by adopting too narrow a definition of religion, the courts thereby discriminate against unfamiliar and new religions. That would be contrary to the rule in RESTATEMENT II.B.4. Thus, the rationale for RESTATEMENT III.C is two fold: avoiding coercion of conscience and avoiding inhibition of religious choice. See *infra* Part IV.D.

190 The other concern reflected in RESTATEMENT III.A is safeguarding institutional autonomy. See *infra* Part IV.C.

191 494 U.S. 872 (1990). Justice Scalia, for the majority, argued that religiously informed conscience cannot be so elevated as to become a law unto itself. The needs of organized society, as reflected in uniform laws democratically enacted, place legitimate demands on citizens. Further, religion today comes in so many varieties that for the law to have to adjust to the claims of such a vast number of faiths would plunge civil authorities deeply into religious affairs. *Id.* at 886-89.

192 See RESTATEMENT I.B.2.

193 *Id.* at 890.

194 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993).

noted in *Restatement II.C.5*.

B. *Protecting the Society from Religion*

The protection of domestic society from an aggressive religion co-opting the state and seizing the levers of civil power is one of the key ideas behind *separationism*. As Chief Justice Warren stated the matter in *McGowan v. Maryland*,¹⁹⁵ certain arrangements between organized religion and the offices of state are “feared because of [their] tendencies to political tyranny and subversion of civil authority.”¹⁹⁶ Religion is viewed as potentially divisive within the body politic.¹⁹⁷ Although “establishments” are instinctively thought of as causing harm to religious minorities, a collusion of church and state can cause injury to nonreligious interests as well. Therefore, those suffering purely economic or commercial harm also have standing to challenge violations of the Establishment Clause.¹⁹⁸ Separationism makes it a First Amendment value to prevent religion from exercising political power that disrupts the domestic peace.¹⁹⁹

The other key idea behind separationism is called “voluntarism,” meaning that religious societies are most genuine when their supporters arise from responding hearts and minds unassisted as well as undeterred by government. The term comes from the separationist insistence that an authentic church must be a voluntary church. The use of the term “voluntarism” can be confusing, for it is not used narrowly in the sense of uncoerced

195 366 U.S. 420 (1961).

196 *Id.* at 430. Of course, the First Amendment—indeed, the entire Bill of Rights—protects individuals, not the government. *See supra* note 44 and accompanying text. Hence, strictly speaking, the First Amendment cannot protect the state from religion, but it can protect individuals within the society from a religion that has grasped civil power.

197 *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (“[T]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools.”) (citation and internal quotation omitted); *Board of Educ. v. Allen*, 392 U.S. 236, 254 (1968) (Black, J., dissenting) (“[A]id to religion and religious schools generates discord, disharmony, hatred, and strife among our people, and that any government that supplies such aids is to that extent a tyranny.”)

198 366 U.S. at 430-31.

199 As a result of their concern, separationists focus on religious *conduct* that disrupts the domestic peace. However, they cannot properly seek to suppress *speech* that is politically disruptive or divisive. The latter is protected by the Free Speech Clause. *See infra* text accompanying notes 241-46.

faith.²⁰⁰ Nor is the term used broadly in the sense of a positive freedom for religious choice.²⁰¹ Rather, "voluntarism" means freedom from active governmental involvement in religious affairs.

The story of disestablishment in America is in substantial part an account of the efforts of Protestant dissenters who sought separation—not just for the sake of conscience—but also to avoid theological corruption.²⁰² Thus, the separation of church and state also prevents government's misguided desire to favor a religion in ways that end up having the unintended result of harming it.²⁰³

For separationists, an active involvement by government in religion can corrupt religion in several ways. Religion worthy of respect must come about through the appeal of its doctrine rather than through the attraction of its adherents to the advantages secured by civil privilege.²⁰⁴ Moreover, to accept governmental

200 See *supra* Part IV.A.

201 See *infra* Part IV.D.

202 McConnell, *supra* note 109, at 1437-43, 1445-49; Michael J. Sandel, *Freedom of Conscience or Freedom of Choice? in ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY* 74, 83-84 (James D. Hunter & Os Guinness eds., 1990); see MARK D. HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 7-19 (1965); see generally WILLIAM G. McLOUGHLIN, *NEW ENGLAND DISSENT: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE, 1633-1833* (1971).

203 *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2474 (1993) (Blackmun, J., dissenting) ("[T]he provision of a state-paid sign-language interpreter may pose serious problems for the church as well as for the state. Many sectarian schools impose religiously based rules of conduct To require public employees to obey such rules would impermissibly threaten individual liberty, but to fail to do so might endanger religious autonomy The Establishment Clause was designed to avert exactly this sort of conflict."); *Aguilar v. Felton*, 473 U.S. 402, 409-10 (1985) ("The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters."); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (explaining that the purpose of the Establishment Clause goes beyond prevention of coercion, for "[i]ts first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion").

204 *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) (The First Amendment embraces "the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful."); *School Dist. v. Schempp*, 374 U.S. 203, 259-60 (1963) (Brennan, J., concurring) ("It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government. It has rightly been said of the history of the Establish-

assistance is to concede the government's jurisdiction over the affairs of the church.²⁰⁵ Professing and practicing religion out of civic convention confuses the traditions of the nation with the sacred and confounds religious symbols and holy days with the patriotic.²⁰⁶ This can soon drift into the corruption known as civil religion, where culture and nationalism go hand-in-hand with spirituality.²⁰⁷ Finally, when churches become unduly involved with the agencies of government, they risk being subverted because their ministries are redirected to meet ends chosen by government.²⁰⁸ Having lost their independence by allying with gov-

ment Clause that our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism . . . of a Roger Williams.") (footnote, internal quotation and citation omitted); *Engel*, 370 U.S. at 431-32 ("The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.") (footnotes omitted).

205 Justice Jackson, dissenting in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), wrote:

Nor should I think that those who have done so well without this aid would want to see this separation between Church and State broken down. If the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political controls with it. Indeed this Court has declared that [i]t is hardly lack of due process for the Government to regulate that which it subsidizes.

Id. at 27-28 (Jackson, J., dissenting) (citation and internal quotation omitted). See also *Wolman v. Walter*, 433 U.S. 229, 266 & n.7 (1977) (Stevens, J., concurring in part and dissenting in part) (aid to religious schools results in harm to both the public and the religion that the aid is meant to serve).

206 *Lynch v. Donnelly*, 465 U.S. 668, 727 (1984) (Blackmun, J., dissenting) ("The creche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part . . . Surely, this is a misuse of a sacred symbol.").

207 *Lee v. Weisman*, 112 S. Ct. 2649, 2659 (1992) (rejecting argument that ecumenical prayers at school commencement ceremony are *de minimis* because of their "civic or non-sectarian" character; civil religion is religion nonetheless, or its confederate); *Schempp*, 374 U.S. at 284-87 (Brennan, J., concurring) (warning against "watering down" of religious practices).

208 Justice Blackmun states the point as follows:

When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being "taint[ed] . . . with a corrosive secularism." *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985). The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government

ernment, churches become compromised in their efforts to define and follow their calling, and they lose in the bargain the ability to speak critically of the state to which they are now beholden.

The foregoing is a fully flowered description of voluntarism, the idea that separationism erects a barrier to government involvement in religious concerns.²⁰⁹ No coercion of conscience need be shown to state a claim that voluntarism is violated.²¹⁰ Indeed, the Court has devised a special rule of justiciability such that even federal taxpayers have standing to bring actions claiming that the principle of separationism is violated.²¹¹ The constitutional harm is not defined by personal damages suffered by the party before the Court.²¹² The Court struck close to the heart of separationist

largesse brings government regulation. Keeping religion in the hands of private groups minimizes state intrusion on religious choice and best enables each religion to "flourish according to the zeal of its adherents and the appeal of its dogma." [*Zorach v. Clauson*, 343 U.S. 306, 313 (1952)].

Weisman, 112 S. Ct. at 2666 (footnote omitted); *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971) (State aid "is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches [W]e cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses."); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 775 (1976) (Stevens, J., dissenting) ("I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it.").

209 See Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517 (1968):

Religious voluntarism . . . is an important aspect of the freedom of conscience guaranteed by the free exercise clause. But a broad interpretation of the establishment clause also gives vent to the social dimension of this value by restricting the use of political power in shaping the ideological and sociological forces which give social form to religion. The growth and advancement of a religious sect must come from the voluntary support of its membership. Religious voluntarism thus conforms to that abiding part of the American credo which assumes that both religion and society will be strengthened if spiritual and ideological claims seek recognition on the basis of their intrinsic merit.

Id. at 517 (footnote omitted).

210 *School Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (a free exercise claim must be predicated on coercion whereas the no-establishment provision is not so constrained); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (same). Coercion is no doubt present in many separationists cases, but it is not an element of the claim. This is illustrated by *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), where the Court struck down a Kentucky statute requiring public schools to post the Ten Commandments in classrooms, provided that private donations paid the expense. The student and teacher complainants suffered no coercion, nor did taxpayers or others suffer economic harm as a result of the displays. Students were free to ignore the Commandments. At most students were exposed to unwelcomed ideas. Nevertheless, the Court held that the principle of separationism was violated by the state's religious message.

211 See *supra* note 19.

212 See Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*,

values when it said that "the three main concerns against which the Establishment Clause sought to protect [were] sponsorship, financial support, and active involvement of the sovereign in religious activity."²¹³ Nevertheless, the outer boundaries of separationism's reach are difficult to ascertain, especially when the issue is framed in terms of civic divisiveness and the point at which government has violated the concept of voluntarism.²¹⁴ But the centering postulates of separationism are not in doubt: domestic peace inures from government's disengagement from religious

60 GEO. WASH. L. REV. 645 (1992), for one lawyer's frustration with two of voluntarism's implications: (a) that religious organizations seeking governmental funds should be protected from bringing theological harm upon themselves; and (b) that taxpayers are empowered to complain of vicarious harm to religious groups in general just because some religious groups receive governmental funding.

The central component of the constitutional argument levied against allowing religious institutions access to public programs and governmental funds is that denial of access is somehow consistent with preserving the religious liberty of all religious groups, not just those who oppose access [to funding] but those who seek it as well . . . !

. . . .

For those who choose to become a part of the governmental program, the principle *volenti non fit injuria* ("He who consents has no injury or complaint") would seem to apply.

Id. at 660, 663 (footnote omitted).

213 *Tilton v. Richardson*, 403 U.S. 672, 677 (1971) (internal quote omitted).

214 This point is expanded upon by Professor John Garvey:

This is why we have had a succession of difficult establishment clause standing cases Though the plaintiffs usually get into court, they do so only because the Court has relaxed the usual rules. School prayer plaintiffs can sue even if they are not coerced School aid plaintiffs can sue as taxpayers These claimants have a distinctly non-Hohfeldian character. Their role is to bring problems to the Court's attention. But the Court does not resolve those problems by asking what are the contours of the plaintiffs' rights . . . what kind of performance is due to them. Instead it asks whether, all things considered, we want the government doing this.

Those who complain that the Supreme Court has not been consistent about forbidding prayer and school aid sometimes lose sight of this point. If the Court is not constrained by some principle like the rights of the parties before it, it has discretion to draw lines in arbitrary places

. . . The occurrence of [some recognizable] harm is what entitles the [normal] claimant to complain. This is how rights are violated.

. . . But in most of the modern [establishment clause] cases it is hard to identify the individual harm caused by a violation. Suppose that public school officials call for voluntary prayer initiated by students. Or suppose the government offers chapter I aid to students in religious schools. These practices are clearly unconstitutional under the current rules But it is not clear that they cause harm to the claimants who complain about them.

Garvey, *supra* note 8, at 278-79.

affairs, and organized religion flourishes best when it is free of the adulterating patronage of government. These twin aims mean that religious organizations must be barred from certain types of governmental support because, paradoxically, the support is harmful to the religion's continued vitality.

Implicit in separationism's aim to avoid social divisiveness along religious lines is that there are, as a matter of political philosophy, mutually exclusive spheres of operation for the institutions of church and state.²¹⁵ Each is to operate independent of the other and in its own domain. Voluntarism, as well, insists on this ordering of church and state, but as an article of faith rather than of secular politics, tenets originating within eighteenth century Protestant dissent.

This raises the question as to how this "natural ordering" of these two institutions was codified into the First Amendment. The usual answers resorted to are threefold: it was the intent of the drafters of the Bill of Rights in the Congress of 1789; or it was generally set down by the American founders; or more generally still, it arises from the political philosophy and Protestant dissenter traditions of America's early nationhood. But the literal meaning of the text of the amendment is not self-evident.²¹⁶ The record left by the founding fathers is mixed and, in places, contradictory.²¹⁷ And lastly, tradition, as binding on successor generations, is

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

216 Compare Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 885-902 (1986) (theory of nonpreferentialism is wrong) with MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* 40 (1978) (concluding that nonpreferentialism is consistent with the original intent of the Religion Clauses). The Senate wrote the version closest to the final text of the First Amendment, but it left only sketchy notes as to what the majority in the Senate had in mind. The record of the debate in the House of Representatives is more extensive and there were several amendments, some rejected and others adopted, but still without full explanations. See T. JEREMY GUNN, *A STANDARD FOR REPAIR: THE ESTABLISHMENT CLAUSE, EQUALITY AND NATURAL RIGHTS* 41-67 (1992).

217 See, e.g., ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* (1990); ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982); THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); WILLIAM R. ESTEP, *REVOLUTION WITHIN THE REVOLUTION: THE FIRST AMENDMENT IN HISTORICAL CONTEXT, 1612-1789* (1990); EDWIN S. GAUSTAD, *NEITHER KING NOR PRELATE: RELIGION AND THE NEW NATION, 1776-1826* (1993); GUNN, *supra* note 216; LEVY, *supra* note 82; WILLIAM L. MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* (1986).

not compelling to those who arrived later or who do not care for the results of separationist theology.²¹⁸

The two ideas behind separationism, voluntarism and preventing political abuse at the behest of religion, are evident in the Court's rules that prohibit government from confessing inherently religious beliefs and from urging that individuals do the same.²¹⁹ Justice O'Connor's "no-endorsement test," first advanced in the Christmas nativity case of *Lynch v. Donnelly*,²²⁰ retains separationist sympathies. However, no-endorsement focuses on how an "objective observer" would respond to the government's speech by asking if the symbol "sends a message to nonadherents that they are outsiders, not full members of the political community" and if the speech is regarded as favoring religions that have "access to government or governmental powers not fully shared by nonadherents of the religion."²²¹ Accordingly, no-endorsement appears to divert part of its attention to preventing coercion of conscience.²²² The no-endorsement test thereby weakens separationism. Separationism focuses primarily on patrolling the boundary between church and state regardless of whether an individual (the reasonable, objective observer or otherwise) either resents or welcomes the government's sponsorship of religious symbols.

218 For example, John Courtney Murray states the traditional Roman Catholic view in conciliatory tones. Catholics accede to the separation of church and state as a practical solution to the problem put by the American plurality of conflicting religions within one body politic. However, Catholics do not assent to the deeper theological principles imputed to the no-establishment provision by some separationists, particularly Protestants. Thus, the Religion Clauses are to be understood as articles of peace, not articles of faith. MURRAY, *supra* note 1, at 55-85. For Protestant views of the First Amendment, see Franklin H. Littell, *The Basis of Religious Liberty in Christian Belief*, 6 J. CHURCH & ST. 132 (1964); Niels H. S e, *The Theological Basis of Religious Liberty*, 10 ECUMENICAL REV. 40 (1958). A range of perspectives within the Jewish communities is found in AMERICAN JEWS & THE SEPARATIONIST FAITH: THE NEW DEBATE ON RELIGION IN PUBLIC LIFE (David G. Dalin ed., 1992).

219 See RESTATEMENT IIA.

220 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

221 *Id.* at 688.

222 Although the no-endorsement test does not require coercion of conscience, it does focus on unwanted exposure to religious speech and whether a fair-minded individual would reasonably take offense to the government's expression about a religion that he or she does not share. Thus, an additional problem with no-endorsement is that heretofore the Court has never recognized a right to be free of exposure to religiously offensive speech. See *supra* note 59. A government that is careful not to give religious offense may be acting virtuously, but such is not a First Amendment right. See also *County of Allegheny v. ACLU*, 492 U.S. 573, 668-69 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (criticizing no-endorsement test as subjective in application and thus unworkable in practice); Smith, *supra* note 131 (same).

The Free Exercise Clause is normally regarded as the text for safeguarding religiously informed conscience. A proposal by Justice Kennedy would collapse the Establishment Clause into the Free Exercise Clause by having the former protect against coercion of conscience and very little else.²²³ Termed the "coercion test,"²²⁴ the proposal accedes to separationism only when it agrees that government cannot give benefits to religion in such a degree that "it in fact 'establishes a [state] religion or . . . tends to do so.'"²²⁵ In the later case of *Lee v. Weisman*,²²⁶ striking down public school commencement prayer, Justice Kennedy adopted an expansive notion of coercion of conscience, one that essentially equates coercion with state endorsement of religion by exposing school children to unwanted or religiously offensive communication. In quasi-captive audience situations such as commencement ceremonies, Justice Kennedy's "expanded coercion test" comes very close to Justice O'Connor's no-endorsement test.²²⁷ Like no-endorsement, the coercion test weakens separationism by concentrating on the psychological reaction of an "objective observer," rather than on policing the boundary between the institutions of church and state.

The rules set forth in *Restatement II.B.1* through *II.B.8* are the Court's most formidable array of requirements born of

223 *County of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part).

224 The coercion test had some early support. See, e.g., Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

225 *County of Allegheny*, 492 U.S. at 659 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). Justice Kennedy's coercion test in its entirety reads:

Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact establishes a state religion or religious faith, or tends to do so. These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.

Id. at 659-60 (internal quotation and citation omitted).

226 112 S. Ct. 2649 (1992) (striking down nondenominational prayer at voluntary commencement exercises conducted under auspices of public school).

227 Not only is there a confluence of the no-endorsement test and the expanded coercion test in the context of a quasi-captive audience, but the principle of religious choice unhindered by state influence would reach the same result in these cases. See *infra* Part IV.D.

separationism and its two underlying ideas: voluntarism and avoidance of political abuse that is religiously driven. *Restatement II.B.1* and *II.B.2* protect believers and nonbelievers alike from punishment for blasphemy and from the loss of public benefit for refusal to profess a religious belief or observe a religious practice. The most obvious illustration of political abuse occurs in delegations of legislative power to a church.²²⁸

In order to give a more concrete definition to the twin aims of voluntarism and the prevention of political abuse, the Court has incorporated notions of equality into its rules on separationism. These notions are evident in four of the Court's prohibitions: religious classifications that favor some religions over others;²²⁹ classifications that favorably single out particular religious observances;²³⁰ laws requiring the private sector to unreasonably accommodate religious employees over competing secular demands;²³¹ and laws that extend benefits to the religious, but not to others similarly situated.²³²

In *Restatement II.B.8*, one encounters the Supreme Court's line of cases most extolled by separationists and most reviled by nonseparationists. Many of these cases involve governmental aid to primary and secondary religious schools. Direct aid to church-related schools is prohibited if the purpose of the benefit program or its effect affords an opportunity for the transmission of inherently religious beliefs or practices.²³³ An unvarnished statement of the Court's rationale is that a religion, to be authentic and full of vitality, should be ministrated by a voluntary church and that a religion lacks that integrity if it is paid for from the public treasury. Although a few forms of direct aid (e.g., bussing and secular textbooks) have been permitted,²³⁴ most forms of direct aid have been disallowed because the Court regards parochial schools as "pervasively sectarian." This perspective is both separationism in its most virile form and, as discussed below,²³⁵ the sharpest point of disagreement with a vision of the First Amendment as enhancing religious choice. However, the Court has said that church-affiliated

228 See RESTATEMENT II.B.3.

229 See RESTATEMENT II.B.4.

230 See RESTATEMENT II.B.5.

231 See RESTATEMENT II.B.6.

232 See RESTATEMENT II.B.7.

233 See RESTATEMENT II.B.8.

234 See cases cited *supra* note 95.

235 See *infra* Part IV.D.

colleges, hospitals, and teenage counseling centers are not necessarily "pervasively sectarian." Thus, it permits most church-related social service organizations and colleges to receive direct governmental aid.²³⁶

The Supreme Court has ameliorated separationism by the rule stated in *Restatement II.C.3*. In cases such as *Mueller*,²³⁷ *Witters*,²³⁸ and *Zobrest*,²³⁹ the Court has upheld state aid directed to persons who, as a matter of individual choice, elect to use their public assistance at a religious school. As developed more fully below,²⁴⁰ such rulings clearly weaken separationism while enhancing the notion of the First Amendment's purpose as safeguarding religious choice.

Perhaps in its most pernicious form, separationism was behind the Court's doctrine termed "political divisiveness." This test arose as a subpart of the Court's "excessive entanglement" inquiry—the third prong of the three-part *Lemon* test.²⁴¹ Because the evidence marshalled to show the divisive nature of challenged legislation was the private speech of religious individuals,²⁴² political divisiveness analysis is inimical to the Free Speech Clause.²⁴³ Persons, whether religious or not, have the same free speech right to enter into public debate over proposed legislation. Simply because some give voice to their religious convictions in heated debate is not a reason to conclude that the legislation violates the Establishment Clause. As a constitutional doctrine, political divisiveness so enshrines the value of civic tolerance as to require the silencing of religious citizens. This result is ironic, since political divisiveness as legal doctrine is thereby intolerant of religious expression by religious people.²⁴⁴ The Court has recognized its error in this regard

236 See RESTATEMENT II.C.2.

237 *Mueller v. Allen*, 463 U.S. 388 (1983).

238 *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986).

239 *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993).

240 See *infra* text following note 275.

241 See *Lemon v. Kurtzman*, 403 U.S. 602, 622-24 (1971).

242 See *Clayton ex rel. Clayton v. Place*, 884 F.2d 376, 380 (8th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990): "[T]his approach to constitutional analysis would have the effect of disenfranchising religious groups when they succeed in influencing secular decisions [r]eligious groups have an absolute right to make their views known and to participate in public discussion of issues" (internal quotation and citation omitted).

243 Edward Gaffney, Jr. *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205 (1980).

244 Such a result would have the Establishment Clause negating the Free Speech Clause on the basis of the content of private speech being religious, thereby disenfranchising those with religious convictions concerning the formulation of public policy

and cabined political divisiveness analysis.²⁴⁵ Justice O'Connor was the first to see the problem clearly when she said that "the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself."²⁴⁶

C. *Protecting Religion from the State*

The protection of organized religion from the state is rooted in the key idea of *institutional autonomy*.²⁴⁷ Institutional autonomy is separationism's second side: the principle that government may not intervene in the internal affairs of religious organizations. In a fully mature separationist model, there is more to be done than just preventing government from improperly helping religion. Borrowing from the familiar metaphor of Roger Williams, later used by Thomas Jefferson, the "wall of separation between church and state" prohibits overreaching from either side of the divide.²⁴⁸

Doubtless there is overlap here with separationism's notion of voluntarism. Whereas institutional autonomy is focused on freedom from governmental interference, voluntarism is concerned with avoiding governmental involvement even when the government's purpose is intended to benefit religion. There is no sharp divide between the two concepts, however; nor is there an

through vigorous public debate. Fidelity to the Court's rule set out in RESTATEMENT I.A.2 would not permit this to happen.

245 See *Bowen v. Kendrick*, 487 U.S. 589, 617 n.14 (1988) (rejecting political divisiveness alone as a basis for invalidating governmental aid program); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 n.17 (1987) (stating that political divisiveness is only applicable to parochial aid cases); *Mueller v. Allen*, 463 U.S. 388, 403-04 n.11 (1983) (agreeing that political divisiveness is confined to cases where "direct financial subsidies are paid to parochial schools . . ."). Because political divisiveness analysis continues to confuse lower courts, the Supreme Court should look for an opportunity to expressly bury it as unsustainable under longstanding free speech doctrine.

246 *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring). See Michael J. Perry, *Toward an Ecumenical Politics*, 60 GEO. WASH. L. REV. 599, 617-18 (1992) (urging prudential restraints but not constitutional prohibitions on politically divisive religious speech).

247 See sources cited *supra* note 7; see also Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99 (arguing for less intervention in affairs of churches because they are unique instruments of personal meaning and community). "Institutional autonomy" is defined *supra* note 72. See generally Laycock, *supra* note 97.

248 HOWE, *supra* note 202, at 1-10; see ADAMS & EMMERICH, *supra* note 217, at 97 (reprinting letter of Roger Williams).

apparent need for one. Both voluntarism and institutional autonomy are concepts that aim to protect religious freedom.

Conscience alone is inadequate to protect the independence of religious organizations. Religious organizations need an arena of operation free from governmental hinderance, regardless of whether coercion of the collective conscience of the membership is present.²⁴⁹ This sphere of autonomy, however, has its limits. A rule that would totally insulate the operations of religious institutions from law would be open to the criticism that it gives insufficient weight to important societal norms enforced by the state.

The most obvious line of cases where the Supreme Court has protected institutional autonomy is found in those decisions prohibiting detailed judicial inquiries into religious doctrine and the cases barring civil adjudication of disputes entailing the interpretation of doctrine.²⁵⁰ As mentioned above,²⁵¹ the Court mildly weakened institutional autonomy in favor of individual conscience in *Jones v. Wolf*,²⁵² which gave states the option of applying a rule of neutral principles in disputes over ownership of property. Nevertheless, the Court said that the neutral principles approach was an option only when the civil magistrate does not need to interpret religious doctrine.²⁵³ The Court thus clearly acknowledged that institutional autonomy is the more weighty principle in intrachurch dispute cases.²⁵⁴

The Court's rule permitting government to exempt religious practices and organizations from regulatory and tax burdens that apply to all others similarly situated,²⁵⁵ is also born of the idea of institutional autonomy. *Amos*²⁵⁶ is the leading case where the Court upheld such an exemption. In *Amos*, the Court exempted

249 See *supra* note 7. Because the Supreme Court has held that coercion of conscience is required to state a claim under the Free Exercise Clause, see *supra* note 210, those who have argued for a fully developed protection of institutional autonomy have relied on the Establishment Clause as well. See Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347 (1984). The concept of voluntarism as one of separationism's two key ideas makes this plausible. See *supra* Part IV.B. The alternative is to urge that the Supreme Court abandon its requirement of coercion as an element of every Free Exercise Clause claim. See Laycock, *supra* note 97.

250 See RESTATEMENT I.C.1 and III.A.

251 See *supra* text accompanying notes 184-87.

252 443 U.S. 595 (1979).

253 *Id.* at 604-05, 608.

254 See RESTATEMENT I.C.2.

255 See RESTATEMENT II.C.1.

256 *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

religious organizations from federal civil rights legislation prohibiting employment discrimination. Congress recognized the importance of limiting hiring to co-religionists so that a religious organization maintains control over the direction of its ministries and is faithful to its defining doctrines.²⁵⁷ In the Court's fully mature model of separationism, *Restatement II.C.1* is the "wall" preventing the state from overreaching into the precincts of the church.²⁵⁸

The principle of institutional autonomy correlates to the postulate implicit in voluntarism.²⁵⁹ Namely, if religious belief is genuine, it must be the product of organizations with self-integrity and vitality.²⁶⁰ The parallel principle is that civil government has no competence to weigh matters of creed, nor is the state equipped to determine if one system of religious doctrines is more true than another. Theistic religion necessarily implies a limit on the authority of the state because sincere religious faith refuses to recognize the government's sovereignty as ultimate.²⁶¹ Theism posits another sovereignty—a God or gods—that is above, beyond, and before the state. Since the state's authority is thereby limited, government is understood to have no jurisdiction over the confessional beliefs that comprise the very core of a religion.

Institutional autonomy frees religious organizations from becoming instruments of state and prevents their ministries from being diverted to the dictates and vagaries of governmental policy. There are times when government sets out to help religion but, despite a purity of motive, ends up injuring and debasing the

257 *Id.* at 335 ("[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."); *id.* at 342-43 (Brennan, J., concurring in the judgment); see generally Laycock, *supra* note 97.

258 For a few strict separationists (those holding to a one-sided separationism that acts to restrict the state when it improperly helps religion but not to prohibit government from interfering with religious organizations), the rule in *RESTATEMENT II.C.1* is a source of irritation. See Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1990); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990).

259 See *supra* text accompanying notes 200-18.

260 See Giannella, *supra* note 209, at 517 ("Institutional independence of churches is thought to guarantee the purity and vigor of their role in society, and the free competition of faiths and ideas is expected to guarantee their excellence and vitality to the benefit of the entire society.") (footnotes omitted).

261 Peter L. Berger, *The Serendipity of Liberties*, in *THE STRUCTURE OF FREEDOM: CORRELATIONS, CAUSES, AND CAUTIONS* 1, 15-16 (Richard J. Neuhaus ed., 1991).

church.²⁶² The institutionally subservient church inevitably is reduced to mere chaplaincy, echoing the political rhetoric of either the left or the right. Whenever the churches are seen as closely attached to a particular political party or partisan agenda, they risk being discredited by the turn of historical events.

The Court's decisions in *Alamo*²⁶³ and *Swaggart*²⁶⁴ doubtlessly weakened the protection of institutional autonomy. So far as the First Amendment goes, *Alamo* and *Swaggart* subject religious organizations to the same regulation and taxation as any business.²⁶⁵ The First Amendment only requires that the state act without purposeful discrimination.²⁶⁶ Thus, religious organizations, to remain free from state interference, must appeal to the legislative and executive branches for exemptions from regulatory and tax burdens. Such exemptions, although permitted by the Establishment Clause, are a matter of legislative grace.²⁶⁷ *Alamo* and *Swaggart*, along with the weakening of protection for conscience in *Employment Division v. Smith*,²⁶⁸ leave religious organizations with no recourse but to petition the elected branches for statutory exemptions.

D. Protecting Religious Choice from State Influence

Behind the Court's recognition that the legislative and executive branches of government are permitted to confer some benefits on religion as part of a comprehensive social welfare program is the key idea of *religious choice*.²⁶⁹ The central premise is that government should act in a manner that minimally influences the religious choices of its citizens.²⁷⁰ The desire for greater freedom

262 See *supra* notes 202-14 and accompanying text.

263 *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985).

264 *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990).

265 See RESTATEMENT I.C (last sentence).

266 See RESTATEMENT I.B.2.

267 See RESTATEMENT II.C.1.

268 494 U.S. 872. See *supra* text accompanying notes 191-94.

269 Notwithstanding its wide usage, avoidance of the term "accommodation" to describe this key idea is intentional. "Accommodationism" as a legal concept obscures more than it explains. It suggests that government is making adjustments to account for religious sensibilities as a matter of legislative grace rather than constitutional right. When it comes to eligibility for education and social welfare benefits, the core value that is being promoted is equal treatment between religious and secular organizations so that the governmental program does not unduly influence individual religious choices. Because free-choice as a legal right is the centering idea, it makes sense to use the term "religious choice" rather than the less helpful word "accommodation" to describe the concept. See RESTATEMENT II.C (introductory sentence) and II.C.3.

270 When it comes to eligibility for education and social welfare benefits that govern-

of choice is the natural result of individualism and the nation's increased religious pluralism. America has always been religiously diverse, but religious pluralism is rapidly expanding. Of course, accelerating pluralism's expansion is not itself the goal or ultimate value. Rather, the expansion of religious choice as a key idea facilitates religious freedom.

Proponents of religious choice begin by arguing that the juridical order must change with changed circumstances. Two hundred years ago, when government was small and much of society was in the private sector, separationism was a plausible ordering of American society. At that time, the social and educational ministries of religious organizations could be deeply involved in societal life while still avoiding much contact with government. Accordingly, in the eighteenth century it made sense to say that government was "neutral" when it left religion alone. Separationism continues to insist that church and state, each with its own operational sphere, should remain as uninvolved with one another as possible.

With the arrival of "big government" and the modern welfare/regulatory state, enforcing absolutist separationism would require confining religious schools and social ministries to ever smaller enclaves of private life. Thus, the argument that a hermetic separation of church and state is "neutral" toward religion is no longer plausible. If religious social and educational ministries are to participate with government by operating schools and providing welfare services, separationist theory demands that religious ministries either secularize their operations or go out of existence. Either course eliminates choices that would otherwise be available to religious citizens and thereby diminishes social and religious pluralism. Governmental noninvolvement with religion is no longer "neutral" if by neutral one means minimal influence on the religious choices of individuals.

Separationism's key idea of voluntarism is a freedom *from*

ment has conferred on similarly situated secular organizations, religious choice advocates insist that religion be treated with equality, eligible to receive benefits conferred on others. See, e.g., RESTATEMENT II.C.2 and II.C.3. When it comes to religious exemptions from regulatory burdens imposed on similarly situated secular organizations, religious choice advocates insist that religion be treated with exceptionalness, relieved of burdens placed on others. See, e.g., RESTATEMENT II.C.1. Because religious choice proponents argue for equality when it comes to eligibility for benefits but for exceptionalness when it comes to avoidance of burdens, to their critics they appear either confused or duplicitous. From the proponents vantage, however, they are not inconsistent. The common thread in the religious choice position is keeping the government's influence on religious choices to a minimum.

government's involvement in religious concerns, not a freedom for an expansion of religious choice. Advocates of religious choice maintain that requiring religious social and educational ministries to secularize in order to participate in governmental programs on an equal basis with their secular counterparts is a penalty the Establishment Clause does not demand.²⁷¹ Indeed, proponents of religious choice argue, although as yet unsuccessfully, that this denial of equal participation is invidious discrimination and thus a violation of the religious freedoms guaranteed by the First Amendment.²⁷²

In any event, religious choice advocates argue that eighteenth century separationism can continue to be applied to the conditions of the modern world only by clinging to two myths. First, the modern state has only limited control over societal resources available for diversion to education and charity.²⁷³ Thus to ask parochial school parents to pay both tuition to support the parochial schools and taxes to support the government schools is fair. Second, church-related social services and schools are so "pervasively sectarian" that their inherently religious practices and teachings cannot be separated from the secular aspects of their programs which serve the public good.²⁷⁴ As to the first "myth," religious choice advocates reply that government with its high taxes has a near monopoly over the resources for charity and education. This suffocates social and religious diversity by creating a monolithic, state-monopolized structure for the delivery of educational and welfare services, thus further limiting individual religious choice. Concerning the second "myth," choice proponents argue that the idea of subsidiarity permits a juridical distinction between

271 Chopko, *supra* note 212; McConnell, *supra* note 109; Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978); Richard J. Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 628-29 (1992); Neuhaus, *supra* note 44, at 1-3; see RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 246-51, 254-70 (1993) (economic analysis of governmental programs favors religious choice so long as subsidy is distributed to a class of institutions sufficiently broad to ensure there is little risk of favoring religious institutions over nonreligious charitable and benevolent recipients).

272 *But see* Peter K. Rofes, *Public Law, Private School: Choice, the Constitution, and Some Emerging Issues*, 21 J.L. & EDUC. 503 (1992).

273 FREDERICK M. GEDICKS & ROGER HENDRIX, *CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE* 168-69 (1991) ("[R]eligion cannot be relatively free in a country in which government regulates, subsidizes, or taxes virtually every aspect of life unless affirmative action is taken to create nongovernmental space in which religion . . . can grow and flourish."); see Giannella, *supra* note 209, at 522-26.

274 *See* Giannella, *supra* note 209, at 554-60.

the church, the "core" religious institution, and its auxiliary agencies, schools and charities, which meet temporal needs.²⁷⁵

The principle of religious choice is reflected in the Court's rule, set out in *Restatement II.C.2*, permitting direct government grants to church-related colleges, hospitals, and teenage counseling centers. By not regarding these auxiliary agencies as being "pervasively sectarian," the Court impliedly subscribes to subsidiarity. At the level of church-related primary and secondary schools, the Court has held that subsidiarity is inapplicable.²⁷⁶ Nevertheless, the Court has upheld state benefits that are paid directly to individuals who in turn may choose to "spend" the benefit at a religious school.²⁷⁷ Additionally, the Court's allowance of civil rights laws that require the private sector to reasonably accommodate the religious practices of employees is yet an additional means of safeguarding religious choice.²⁷⁸

E. Protecting Religious Institutions as Counterweights to State Power and as Sources of Ultimate Meaning

A government that administers public justice among all individuals and institutional structures in society, including the many different confessional communities, represents the key idea of *structural pluralism*. Primarily developed through the work of scholars in the disciplines of political science, history, sociology, and religious studies,²⁷⁹ as opposed to the Supreme Court's jurisprudence, the basic principles of structural pluralism are twofold: first, the mediating institutions in society are a needed buffer between the growing power of the state and the lone individual;²⁸⁰ and second, churches are communities of memory that serve as an essential framework to explain life's ultimate purpose and meaning.²⁸¹

275 Bernard J. Coughlin, *Toward a Church-State Principle for Health and Welfare*, 11 J. CHURCH & ST. 33, 42-46 (1969).

276 See RESTATEMENT II.B.8.

277 See RESTATEMENT II.C.3.

278 See RESTATEMENT II.C.5.

279 See ROCKNE MCCARTHY ET AL., *SOCIETY, STATE & SCHOOLS: A CASE FOR STRUCTURAL AND CONFESSIONAL PLURALISM* (1980); STEPHEN V. MONSMA, *POSITIVE NEUTRALITY: LETTING RELIGIOUS FREEDOM RING* 178-209 (1993).

280 See PETER L. BERGER & RICHARD J. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* (1977).

281 See PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 26-52 (1967); Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672 (1992).

Structural pluralists envision the state as only one of many societal structures within the natural order. Families, businesses, churches, universities, unions, neighborhoods, and other institutional structures exist and should be allowed to flourish in accord with how they understand their providential calling. Although government properly has an affirmative role in society, it is limited because it must not impose a single ideology or theological confession on nongovernmental associations. The state must be animated, not by majoritarian domination, but by the principle of pluralism. The state is not the sole or final authority concerning human behavior. Individuals acquire rights from, and owe responsibilities to, institutions other than the state, and the state is bound to respect the integrity of these diverse nonpolitical communities.

Unlike the key ideas of conscience and institutional autonomy, which seek to contain government, structural pluralists envision an active role for government. They seek to balance the positive contributions of an affirmative state with the positive contributions to human well-being through the nongovernmental sectors.

Structural pluralists argue vigorously for the legal rights of all groups, not just churches, even when that means lessening some individual rights so as to protect the autonomy of these mediating structures. This expansive view of associational rights, they argue, ultimately enhances individual freedom by challenging liberal political theory which postulates that all rights are held by the individual. Radical individualism leaves the citizenry defenseless in the face of the all too powerful state. If one is genuinely concerned about preserving human rights, there is more to fear from a state whose power is checked only by claims of personal autonomy than there is to fear from granting associations certain rights. Moreover, radical individualism is inconsistent with the social nature that we observe in all humankind. Acknowledging institutional rights, including group rights in the many communities of faith, permits these nongovernmental societies not only to check the state's power, but also to provide a meaningful context for each person's exercise of freedom within a community that teaches duty and responsibility.

Structural pluralists have a heightened awareness of the subtle influences that occur when the state fails to support all institutions, governmental and nongovernmental, representing the range of world and life views. Thus, for example, structural pluralists support equal governmental aid to all schools, thereby enabling parents to select education from a school that reflects and teaches

their beliefs or philosophy.²⁸²

The Supreme Court's case law, as reflected in the *Restatement*, does not codify structural pluralism as such,²⁸³ albeit there is language occasionally supportive of churches as mediating institutions.²⁸⁴ The key idea of institutional autonomy is consistent with structural pluralism in so far as the Court protects churches from state intrusion into their internal affairs. But institutional autonomy cases stop with religious organizations, whereas structural pluralists would also acknowledge First Amendment rights in families, universities, neighborhoods, and other such associations. Further, structural pluralists would go beyond protection from coercion of conscience and support religious choice when it comes to state-funded schools and welfare services. Structural pluralists support this result, not because individual religious choice is for them the ultimate value, but because they value the role of independent associations within a differentiated society.²⁸⁵ Structural pluralism is most at odds with one-sided separationism.²⁸⁶

The key ideas of *conscience*, *separationism*, and *institutional autonomy* were at their high-water mark at the end of the 1970s. Thereafter, with the decision in *Smith* concerning conscience, the decisions in *Widmar*, *Mueller*, and *Bowen* bearing on separationism, and

282 See ROCKNE MCCARTHY ET AL., *DISESTABLISHMENT A SECOND TIME: GENUINE PLURALISM FOR AMERICAN SCHOOLS* (1982).

283 Compare *Grove City College v. Bell*, 465 U.S. 555, 575-76 (1984) (summarily rejecting claim by private college to institutional autonomy) with *Farrington v. Tokushige*, 273 U.S. 284 (1927) (invalidating overbearing state regulation of private, nonsectarian schools).

284 See Howard M. Friedman, *Rethinking Free Exercise: Rediscovering Religious Community and Ritual*, 24 SETON HALL L. REV. 1800 (1994); Glendon, *supra* note 281, at 683 nn.52-56 (citing examples from cases); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991); MONSMA, *supra* note 279, at 206-09.

285 For example, structural pluralists would note that some confessional communities do not conceptualize religion as a matter of choice, but more as a "yoke" which conscience has caused them to put on. Religion is powerful precisely because it is not a choice, but a commanding obligation. See Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, in ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 74, 87 (James D. Hunter & Os Guinness eds., 1990). Still others understand religion as a "binding vision," emphasizing social practices and identity with a group which enable people to situate themselves within the larger society. Thus, deeply personal spirituality, faith, and the private conscience as defining religion are incomplete. See generally MICHAEL PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982). Conceptions of religion as duty or as binding community, as well as all others, argue structural pluralists, should be recognized and protected in the law.

286 See *infra* note 258.

the decisions in *Alamo* and *Swaggart* concerning institutional autonomy, the importance of all three principles has receded in the Court's case law. Trenching into ground previously occupied by separationism is the key idea of religious choice. Despite the efforts of its proponents, however, religious choice is not protected as a First Amendment right. Rather, the Supreme Court has held that the democratically elected branches are permitted, but not required, by the First Amendment to protect religious choice from being influenced by educational and social welfare policy. A parallel development is the Court's permitting, but not requiring, the political branches to adopt statutory religious exemptions to account for concerns of conscience and institutional autonomy.

In summary, the First Amendment story since the late 1970s is not one of the paradigm of conscience/separationism being supplanted by an equality-based regime.²⁸⁷ Rather, religious freedom's modern storyline is of conscience, separationism, and institutional autonomy being partially eclipsed by the Court's deference to the legislative and executive branches. As a consequence, in many instances the Court has thrown these matters into the political arena. This is a clarion call to religious citizens, churches, and other religious organizations to get more involved in politics, not less—a development of unknown merit bound to be received with ambivalence in many quarters.

V. CONCLUSION

The Supreme Court's cases on religious freedom cannot be captured in a single equation. The forms of religion are too varied and the juridical protection of religious freedom too multidimensional for such a project to succeed. The more promising approach is to compile a slate of case law principles and arrange them according to those rules that concern government improperly *hindering* religion and those rules that concern government improperly *helping* religion. This approach led to the *Restatement of the Law of Religious Freedom*.

As an analytical tool, the *Restatement* reveals that in reaching its decisions the Court takes into account several distinctions: (i) cases involving religious speech versus those not involving speech; (ii) cases involving private speech versus those involving government speech; (iii) cases involving individuals versus those involving

287 See *infra* Part III.

religious organizations; (iv) cases involving the imposition of burdens versus those involving the conferring of benefits; (v) cases involving challenges to laws where morality and religion overlap versus those involving laws that are inherently religious; and (vi) cases where government must treat religion and those similarly situated with equality versus those where religion may be singled out for special dispensation. Further, although certain rules focus on governmental purpose,²⁸⁸ neither the motive of a legislator²⁸⁹ nor a law's discriminatory effect²⁹⁰ are relevant.

No single, unifying vision of First Amendment religious freedom can adequately account for the various rules found in the *Restatement*. Rather, the Supreme Court has applied an assemblage of key ideas encapsulated in the words conscience, separationism, institutional autonomy, and religious choice. On occasion these four principles are complimentary as they pursue the agreed-upon goal of religious freedom, albeit not out of the same underlying rationale. At other times they conflict, resulting in disharmony and sharp division within the Court.

None of these key ideas is "neutral" as to either religion or political philosophy. Within the interstices of each idea is a variant on a vision of the Good Society. Each responds differently to the question poised at the outset of this article: How is a religiously diverse people to live together, despite our deepest differences, under a common civil polity? It is unlikely that a final answer, good for all time, will be forthcoming. Rather, we can expect a continuing dialogue that only incrementally responds to the foregoing question, just enough to move beyond the issue of the moment. Given these two complex institutions, church and state, that the conversation will be perpetually ongoing is probably inevitable. The law of church and state may never come to a resting place that will not provoke a new rejoinder. Yet it is possible to discern some order in this multiplicity, to halt the conversation, as it were, and lay down some markers where the Court's center has held to a consistent path. The *Restatement*, hopefully, fulfills that modest task.

288 See, e.g., RESTATEMENT I.B.2, II.B.4, and II.C.4.

289 See *supra* note 67.

290 See RESTATEMENT I.B.2; *supra* note 88.

Appendix

Restatement of the Law of Religious Freedom

I. When Government May Not *Hinder* Religion

A. The Free Speech Clause protects the expression of an individual or religious organization from governmental restrictions as follows:

1. Individuals and religious organizations cannot by word or symbolic act be forced to profess a belief contrary to their religion.
2. An individual or a religious organization is entitled to protection of religious expression to the same extent as nonreligious expression, such as political, artistic, or educational speech. The Free Exercise Clause grants no more than equal rights to religious expression, and the Free Speech Clause requires no less.

Governmental expression is treated differently than speech by a private individual or a religious organization, for the focus shifts to one of government helping religion.

B. The Free Exercise Clause protects an individual's religious belief or practice from governmental restrictions as follows:

1. Government cannot place an individual in the position of having to prove the truth of his or her religious beliefs, but sincerity is required when invoking protection.
2. Government cannot enforce a restriction that purposefully discriminates against religion, religious practice, or against an individual because of his or her religion. However, a restriction's discriminatory effect is not, without more, unconstitutional. Even in the face of purposeful discrimination, government may proceed to enforce a restriction upon proof that it furthers a compelling state interest that cannot be achieved by means less restrictive to the religious practice.

- C. The Religion Clauses protect a religious belief or practice of a religious organization from governmental restrictions as follows:
1. A religious organization is protected from restrictions that invade its institutional autonomy. Restrictions that generate a detailed inquiry into religious doctrine or that entail a civil resolution of a dispute over doctrine violate an organization's institutional autonomy.
 2. Concerning litigation over the ownership of church property, states have the option of following either the rule of judicial deference or of neutral principles of law, so long as the prohibitions in *Restatement I.C.1* are followed.

Apart from the prohibitions in *Restatement I*, the Religion Clauses are not violated by the regulation or taxation of religious organizations, so long as similarly situated non-religious organizations are subject to the same law.

II. When Government May Not *Help* Religion

- A. Concerning governmental expression, government may neither confess inherently religious beliefs nor advocate that individuals profess inherently religious beliefs or that individuals observe such practices. Government may acknowledge the role of religion in society and teach about its contributions to, for example, history, literature, music, and the visual arts. But the Establishment Clause is violated when the expression places government's imprimatur on a religion or on an inherently religious belief or practice.
- B. Concerning governmental action that is not expressional, the Free Speech and Establishment Clauses are violated as follows:
1. Government cannot penalize "blasphemy," the "sacrilegious," or other activity that does no more than speak ill of a religion.
 2. Government cannot compel an individual, upon pain of material penalty, inconvenience, or loss of public

benefit or advantage, to profess a religious belief or to observe an inherently religious practice.

3. Government cannot delegate civil authority to a religious organization.
 4. Government cannot purposefully discriminate among religions, nor utilize classifications based on denominational or sectarian affiliation to extend benefits or to impose burdens.
 5. Government cannot utilize classifications that single out a religious practice (as opposed to language inclusive of a general category of religious observances) thereby favoring that particular practice.
 6. Government cannot regulate the private business sector so as to purposefully and unreasonably favor religious observance over competing secular interests.
 7. Government cannot confer a benefit on religion if the benefit is not available to others similarly situated.
 8. Government cannot confer a benefit directly on religious organizations where the benefit, facially or as applied, affords an opportunity for the transmission of inherently religious beliefs or practices; this is so even though the benefit may be available to others similarly situated.
- C. Governmental actions not prohibited in *Restatement I, II.A*, and *II.B* are left to the judgment of legislatures and public officials. Accordingly, without violating the Establishment Clause government may enforce a law as follows:
1. Government may refrain from imposing a burden on religion, even though the burden is imposed on others similarly situated.
 2. Government may directly confer a benefit on religious organizations if the benefit is available to others similarly situated and if the object of the benefit, facially or as applied, does not afford an opportunity for the transmission of inherently religious beliefs or

practices.

3. Government may confer a benefit on individuals, who exercise personal choice in the use of their benefit at similarly situated institutions, whether public, private nonsectarian, or religious, even if the benefit indirectly advances religion.
4. Government may purposefully benefit only governmental agencies, thereby excluding similarly situated private organizations, whether nonsectarian or religious. However, a law that benefits all similarly situated groups, public and private, but purposefully excludes religious organizations, is *prima facie* violative of the Free Exercise Clause.
5. Subject to the prohibitions in *Restatement I* and *II*, government may protect individuals and religious organizations against discrimination on the basis of religion in, for example, employment, public accommodations, housing, other property holdings and contracts, the commission of hate crimes, and the exercise of free speech.

III. "Religion" and the First Amendment: Definition and Application

- A. A religious belief or practice need not be "central" to a claimant's religion. A claimant may disagree with co-religionists, be unsure or wavering, or be a recent convert. A claimant need not be a member of an organized religious denomination, community, or sect. However, a claimant must be sincere.
- B. The Establishment Clause is not violated when a governmental restriction (or social program) merely reflects a moral judgment, shared by some religions, about conduct thought harmful (or beneficial) to society. The Establishment Clause is violated only when such a law violates one of the rules set out in *Restatement II.A* or *II.B*.

- C. Only beliefs and practices with a basis in religion are protected by the Free Exercise Clause. To avoid omitting from protection unfamiliar and emerging religions, thereby discriminating among religions, the definition of religion remains broad and indeterminate, including naturalistic, nontheistic, and anthropocentric religions. The definition excludes a purely personal and philosophical way of life.