The Establishment Clause as a Structural Restraint: Validations and Ramifications

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Validations and Ramifications

Carl H. Esbeck*

I.

Constantine converted to Christianity in 312 A.D. while commanding a Roman army in a complex series of civil wars. As Western Emperor, he issued the Edict of Milan in 313 A.D. which legalized Christianity and restored property taken during persecution. Constantine also dedicated Constantinople in 330 A.D. as a "second Rome" and thereby created a rival political and religious center. By late in the fourth century Christianity had slowly but surely become the official religion of the empire. While the resulting church and empire were organizationally distinct, they formed but two aspects of a single whole that we now call Christendom. It was understood that these two centers of authority, sacred and secular, would, on the one hand, cooperate in upholding and defending the church, and, on the other, Christian belief provided those presuppositional truths that unified and gave legitimacy to the empire.

A second administrative head, led by the patriarch of Constantinople, served the church in the eastern empire. In 1054 A.D., that division ripened into a doctrinal schism that severed the eastern church from both Western Civilization and the Catholic Church centered at Rome. While Eastern Orthodoxy remained the established church in eastern Europe, early on the Byzantium rite was subordinated to the princes and temporal powers. In contrast, the Church at Rome remained a co-equal power, at times dominating monarchs, absolute and constitutional, and at times being dominated by them. Through it all the Roman Church retained, more or less, the unity of Christendom within a shifting network of European geopolitical diversity. This prevailing dualism between the spiritual and the temporal authority was uniquely Western. While the period is most often remembered for the Roman Church's control over sacraments being wielded to visit

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deprivations upon civil rulers, it is more fair to say that the church preserved classical culture and nurtured the liberal arts, as well as ameliorated the harshness of peasant life, while the competing legal systems contributed immeasurably to the development of greater freedom for the masses.

In 1517, the German priest, Martin Luther, nailed his Ninety-five Theses to the door of Wittenberg Church. The resulting Reformation shattered the unity of Western Catholic Christianity. The conflagration that ensued lasted for over 130 years, a period that today we refer to as the “religious wars.” But that is imposing a modern construct on the conflict. For the combatants, there was no pronounced demarcation between the civil and the religious. Rather, what unified the political core of each state was its religious worldview. An interim settlement was reached at the Peace of Augsburg in 1555, with the adoption of the simple, if crude, principle of *cujos regio, ejus religio* (whose region, his religion). The Treaty of Westphalia in 1648, ending the Thirty Years’ War, left Catholics in control of the south and Protestants established in the north. The horror and dissipation of the wars strengthened the hand of the secular rulers at the expense of the churches, and this was especially so in the case of Protestants because of their many divisions and their greater dependence on the military protection of the prince.

The Westphalian settlement that emerged from these wars was sovereign nation-states, established churches, and religious dissenters. Dissenters were often persecuted or driven into exile, in large measure because the presence of nonconformists within the political polity was thought to destabilize the state. The persecution was always at the hands of the state, but the churches were complicit. Growing abhorrence with the violence wrought by religious persecution, as well as the emerging influence of the Enlightenment and the stubbornness of dissenters even unto death, caused the pattern to evolve yet again in the direction of sovereign states, established churches, and toleration of dissenting sects. The British Act of Toleration (1689), for example, was adopted at the time of the Glorious Revolution and extended legal protection to non-Anglican Protestants. Initially a matter of pragmatism and prudence, toleration was later invoked as a natural right. Such were the church/state patterns and adjustments brought to all the British colonies in America, in variations both strong and weak, except for the special case of Rhode Island and, partly at least, Pennsylvania.
That brings matters up to America's early nationhood period and this country's one truly unique contribution to government theory. Unlike the French Revolution that first set out to destroy the church and then settled for anti-clericalism, between the 1780s and the early 1830s the American states, each in their own way, set about disestablishing the church for the good of the church. That is, disestablishment was advanced principally by the religiously fervent seeking greater freedom, not for freedom's sake, but for the sake of purer religion. The coercion of others in matters of faith was believed to be a violation of genuine religion. Further, true religion, the disestablishmentarians taught, required the absence of government involvement—even a government's well-meaning attempts to support the church. Politics was properly of limited reach, with a voluntary church and confessional religion beyond its grasp.

So in a sharp break with all Europe, American's innovation in church/state relations took place during this roughly 50-year period, with each state proceeding along a different path and at a different pace. Once the nation had put behind it the social disruption of the Revolution, there also occurred a veritable burst in growth by Protestant denominations, notably Methodists and Baptists, during a period of religious enthusiasm, now known as the Second Great Awakening, that overlapped with disestablishment and which did not fade until the early 1840s. These newer, growing bodies were individualistic and voluntaristic, no respecters of privilege, not adverse to spinning off societies to missionize outside the church, and hence ready adapters of the new American ethos.

The American new pattern, that was disestablishment's objective, was to form limited states under written constitutions, a culture that sparked self-governing and self-supporting churches and mission societies, and the observance of voluntaryism in matters of individual belief and practice. Matters of ecclesiastical cognizance, such as creeds, forms of worship, church governance, clerical qualifications, and discipline of church members, were—in modern parlance—deregulated, no longer subject to the state's superintending control or the object of its active attention. This new pattern did not mean the states were indifferent to religion. Rather, while foreswearing any claim to coercive measures concerning doctrinal belief or observance of regular worship, the influence of churches over public affairs by way of the moral goods inculcated in their members continued to be taken for granted. Indeed, such influence was not just assumed but often welcomed, for
religion was thought central to the formation of a citizenry with the virtues and mores to sustain the republic. It was believed that the state drew legitimacy from, and operated under, a moral canopy that was not of its own making. Hence, we often see quoted the passage by Alexis de Tocqueville which memorably describes America of the 1830s, to the effect that religion was America's foremost political institution even though the churches had no regular contact with the state or any official role in it.¹

The American disestablishment—as an idea, or, better, as a movement—thus posited that political unity and stability are not dependent on the sharing of a single religious creed, or even similar creeds such as those common to Protestants. These Americans had come to believe that the higher-order truths governing human destiny—the purpose of life, the question of immortality, whether there is an ultimate cause behind the natural order—are intrinsically religious and thus outside the competence of the civil realm. While not within the state's jurisdiction, it was further appreciated that these higher-order truths do bear directly upon the formation of those second-order beliefs concerning human rights, the rule of law, self determination through the ballot, honest dealing with one's neighbors, and unselfish public service. These second-order beliefs are operative at the level of political life and necessary to build a consensus, more narrow in scope and shorter in duration, in order that the republic can function and resolve its internal policy debates. However, the nation in its better moments, at times of real testing, will draw upon the higher truth-claims and spiritual resources of its citizens, the inculcation and cultivation of which are not among the nation's constitutionally delegated powers. To be sure, the machinery of checks and balances, pitting one faction to offset another, will cancel out many of the blows from humanity's baser instincts. But if we are to have a republic that can successfully rally in times of great trial or emergency, America has to be able to rely, as in the past, on common citizens who respond with uncommon virtue. Shortly after the Constitutional Convention of 1787 had adjourned, Benjamin Franklin is said to have replied to a curious citizen, "Madam, we give you a republic, if you can keep it." Thus, from the outset, the American government was known to be an ongoing experiment dependent on the character of its people. It remains so. Os Guinness

¹ Alexis de Tocqueville, DEMOCRACY IN AMERICA 305 (Francis Bowen & Phillips Bradley eds., Knopf 1945) (1851).
wonderfully describes this system as "gravity defying," because it is dependent upon its many "unofficial faiths" to inculcate virtues, spiritually rooted, and over which the American government is constitutionally barred from any promotion or superintending control.²

II.

There were three or four major steps in the changing church/state paradigm from Constantine through America's disestablishment period. Each step along the way always operated at two levels. The first level was the division of power as between the nation-state and the church. The second was the relationship of the civil state to people of faith. During America's formative disestablishment period, those arguing that all churches must be free of the state sought to place limits on government authority that would yield, as they saw it, the mutual good and security of both church and state. On the temporal side, the benefit was to avoid sectarian divisions erupting into violence whenever there is a clash of parties or politics. On the spiritual side, the benefit was greater autonomy for churches and related voluntary societies, including noninterference in their practices, pronouncements, polity, and personnel, and hence religion more worthy of respect.

Once disestablishment was achieved in the states, it was perhaps inevitable that the principles behind the hard-won balance of limited government, free churches, and individual voluntaryism in religious observance, would be read back into the existing matrix of the nation's founding charter. The obvious vehicle of choice was the religion text in the First Amendment, with the Establishment Clause absorbing disestablishment's settlement on the jurisdictional division between church and state,³ and the Free Exercise Clause absorbing the


³ In *McGowan v. Maryland*, 366 U.S. 420, 465-66 (1961), Justice Frankfurter summarized the matter this way in his concurrence:

The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation ... 

... The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some
settlement concerning coercion and a believer's conscious. This project of "reading into" the Amendment's text would not begin in earnest until the mid-twentieth century. Moreover, the effort behind this project would be primarily judicial, the lower federal courts following the Supreme Court's lead. With the principles of the disestablishment period being given, for the first time, their full implication, the principles often ran counter to local, typically Protestant, custom and practice.

Although the 50-year state-by-state disestablishment had little to do with the First Amendment at the time, because it's the Amendment's text later came to bear disestablishment's imprint we need to go back and briefly trace its history. In September of 1789, the First Congress reported out twelve proposed articles of amendment to the Constitution, the third article reading in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This article became the First Amendment when, in late 1791, the requisite number of states had ratified only the third through the twelfth articles. The first of the religion texts, the no-establishment clause, underwent little serious exploration by the U.S. Supreme Court until 1947, in the decision of Everson v. Board of Education, the Establishment Clause was incorporated through the Fourteenth Amendment and made applicable to state and local governments. One year later, when the no-establishment principle was

4 330 U.S. 1 (1947) (upholding law providing reimbursement to parents for cost of transporting children to religious schools).

5 In The Selective Draft Law Cases, 245 U.S. 366, 389-90 (1918), the Court summarily rejected an argument that religious exemptions from the military draft for ministers and theological students, as well as for members of certain pacifistic sects, was an establishment of religion. In Watson v. Jones, 80 U.S. 679 (1871), the Court held that courts must defer to the decrees of ecclesiastical adjudicators concerning the resolution of religious disputes. Without explicitly referencing the Establishment Clause, the Watson Court said that "the rule of action which should govern the civil courts [is] founded in a broad and sound view of the relations of church and state under our system of laws ..." Id. at 727.

157 years old, the Court found, for the first time, a violation of the clause. The case, *McCollum v. Board of Education*, involved the teaching of religion in a local public school.

The Free Exercise Clause has a longer history of serious engagement by the Supreme Court, albeit the Court has never embraced its principle with enthusiasm. In the nineteenth century, Mormons in the Utah Territory sought the protection of the clause, without success, from federal efforts to wipe out polygamy. In the first half of the twentieth century, religious pacifists, in order to avoid military service or meet the qualifications for naturalization, sought refuge, with little effect, in free-exercise arguments. First incorporated in 1940 through the Fourteenth Amendment, the Free Exercise Clause had some success against employment security laws starting with *Sherbert v. Verner*. That ended abruptly with the decision in *Employment Division v. Smith*.

Beason, 133 U.S. 333, 345 (1890). But the five references shed no light on the clause's meaning.

Hence, prior to the *Everson* decision in 1947, in only two cases had the Supreme Court squarely addressed the meaning of the Establishment Clause. In *Quick Bear v. Leupp*, 210 U.S. 50, 81-82 (1908), the Court sustained a congressional use of Indian tribal funds, held in trust by the government and disbursed to pay for expenses at a Roman Catholic mission school chosen by the parents of the Indian students. In *Bradfield v. Roberts*, 175 U.S. 291, 295-300 (1899), the Court upheld the use of federal funds for constructing a building for a Roman Catholic hospital located in the District of Columbia.

6 333 U.S. 203 (1948).

7 See, e.g., *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890) (upholding revocation of Mormon Church charter and confiscation of its property); *Davis v. Beason*, 133 U.S. 333 (1890) (upholding conviction for falsely taking oath to the effect that accused was not a member of polygamous organization); *Murphy v. Ramsey*, 114 U.S. 15 (1885) (upholding federal law disenfranchising polygamists); *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding federal law criminalizing polygamy).

8 See, e.g., *In re Summers*, 325 U.S. 561 (1945) (upholding a denial to grant admission to bar because of applicant's refusal to take an oath to effect that he was willing to serve in militia); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934) (denying right to attend state university without enrolling in required course in military training).


11 374 U.S. 398 (1963) (applying strict scrutiny to state's denial of unemployment compensation to Seventh-day Adventist who refused Saturday employment).

which held that there was no *prima facie* claim under the Free Exercise Clause when a religiously neutral, generally applicable law has a disparate effect on someone's religious practice. Apart from pure belief (as opposed to actions stemming from belief), following the decision in *Smith* the Free Exercise Clause calls for strict scrutiny only when a statute or other legal restraint intentionally discriminates against a religion, a religious practice, or against an individual because of his or her religion. The real workhorse for religious liberty has been the Free Speech Clause. Early in the last century free-speech rights protected the socially marginalized Jehovah's Witnesses, and in modern times expressional rights are the means-of-choice for challenging viewpoint and content discrimination targeted at Christian evangelicals.

As noted previously, the West, from Constantine through the American disestablishment, responded to the religion question at two levels: one, the jurisdictional struggle as between state and church; and, two, the relationship of the state to persons of faith. The historical sweep in Part I, combined with the brief survey of the case-law directly above, are prologue to twin observations about the Supreme Court's modern application of the First Amendment. First, the Supreme Court has, with respect to outcomes as distinct from its stated rationale, applied the Establishment Clause as limiting the government's authority with respect to religion and houses of worship (in the vernacular "separation of church and state") and thus applied the clause as a structural restraint on government power. Hence, no-establishment acts to circumscribe the government's power rather than to vest in individuals a personal right. This makes sense from the long historical

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perspective, with the no-establishment text becoming the juridical bearer of the division of jurisdiction between state and church as it evolved in the West. Second, the modern Court has interpreted the Free Exercise Clause as safeguarding individuals from religious harm at the hands of the government. This also makes sense from the long sweep of historical development, with the free-exercise text becoming the juridical bearer of the West’s emerging solicitude for preventing the abridgement of an individual’s religious practice when not clearly deleterious to society.

III.

It is commonplace that the United States Constitution consists of rights and structure. If the Establishment Clause is indeed regarded by the modern Supreme Court as a structural restraint—not an individual right—this should be evident in the cases. Before proceeding to several validations of that proposition, it will be useful to spend some time differentiating rights from structure.

Rights vest in individuals.16 Absent a showing of actual or threatened injury-in-fact, an individual’s right is not violated. For example, a showing of burden or impending harm to one’s faith is required to invoke the Free Exercise Clause,17 hence an individual desirous of

16 Rights also vest in aggregates of individuals, which we call groups, organizations, or associations. Thus, groups have rights in the sense that they have the aggregated rights of the group’s individual members. And, when certain conditions are met, the group has standing to assert the rights of the collective individuals. Such rules are instrumental, consonant with the jural status of groups. Individuals, on the other hand, have existence quite apart from any recognition conferred on them by the positive law. See Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 Iowa L. Rev. 1, 51-58 (1998) [hereafter cited as “Esbeck, Structural Restrain”].

17 Harris v. McRae, 448 U.S. 297, 320 (1980) (denying standing to bring free exercise claim in absence of alleged religious compulsion); Tilton v. Richardson, 403 U.S. 672, 689 (1971) (rejecting free exercise claim because there was no evidence of impact on claimants’ religious belief or practice); Board of Educ. V. Allen, 392 U.S. 236, 238-49 (1968) (holding that free exercise claim ins without merit in absence of religious burden); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 221, 223 (1963) (holding that in a free exercise claim it is necessary to show governmental coercion on the practice of religion; id. at 224 n.9 ("[T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed."); Engel v. Vitale, 370 U.S. 421, 431 (1962) (stating that the Establishment Clause goes much further than to relieve coercive
stating a *prima facie* claim under the clause must necessarily profess to having, in the first instance, a religion.

Governments do not have rights. Governments have powers and duties. The federal government is one of enumerated powers. Structural clauses in the Constitution delegate powers to a government (federal or state) or to a particular branch of the federal government (legislative, executive, or judicial). Separation of powers and federalism are familiar expressions of these types of constitutional structure. Rather than affirmative grants of authority, some structural clauses deny ("negative") certain powers to the government or a particular branch thereof. The Bill of Rights did not delegate to, or vest new powers in, the federal government. Accordingly, if the Establishment Clause is pressure on religious belief and practice); McGowan v. Maryland, 366 U.S. 420, 429 (1961) (denying standing to plead free exercise claim when alleged damages were economic rather than religious).

18 State governments are not so constrained. State constitutions generally do not read as specific delegations of power, but as allocating inherent powers and imposing limitations thereon. Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 11 (7th ed. 1903).

19 The purpose of these early amendments was just the reverse of vesting new powers, namely to deny that the recently formed national government was possessed with certain powers. See Barron v. Mayor and City Council of Baltimore, 32 U.S. 243, 250 (1833) (observing that a principal source of opposition to adoption of the original Constitution was the fear that national powers might be exercised in a manner impairing liberty, thus leading to a proposed Bill of Rights limiting the powers of the national government). In a speech before the United States House of Representatives introducing his draft of the proposed amendments, James Madison described their purpose as follows: "the great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode." 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789). In The Legal Tender Cases, 79 U.S. 457 (1870), the Supreme Court observed:

The preamble to the [congressional] resolution submitting [the Bill of Rights to the states] for adoption recited that the "conventions of a number of the states had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of [federal] powers, that further declaratory and restrictive clauses should be added." . . . Most of [the proposed] amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.
indeed structural it is a clause that was intended to “negative” or deny that the government holds specified power.  

For government to avoid violating an individual right is a matter of constitutional duty owed to each person within its jurisdiction. The duty is personal, running in favor of each individual. On the other hand, for government to avoid exceeding a restraint in a constitution’s structure is a duty owed to the entire body politic—which is to say that the restraints of constitutional structure are impersonal. Another way to phrase the matter is that rights runs in favor of individuals whereas a structural “negative” runs against the government. Hence, rights, because they are personal, can be waived by the rights-holder. Whereas structure, because it is there to benefit the entire body politic, cannot be waived.

Structure, to be sure, often has the laudable but indirect consequence of enlarging the field of operation for the exercise of individual liberties. It does this by compelling the various branches of the government (legislative, executive, and judicial) to stay confined within their proper limits. However, the immediate object of structure is the management of power: a dividing, dispersing, and balancing of the various prerogatives of the nation’s sovereignty. Not every exercise of power that exceeds a structural restraint will result in an injury to an individual. Lack of injury or harm, however, does not discount the fact that a constitutional restraint was exceeded. For example, what if the Senate was to forego its power to give “advice and consent” to the President concerning a highly popular appointment to the federal bench, thus effectively permitting a judicial nominee to assume an Article III judgship without an approving Senate vote. No one is harmed beyond the generalized grievance that the law was not followed. Yet, the Advice and Consent Clause is not waivable by the Senate, for that power is vested in the Senate for the benefit of the whole American people.

Id. at 535. The Preamble in its entirety is reproduced at 5 THE FOUNDERS’ CONSTITUTION 40 (Philip B. Kurland & Ralph Lerner eds., 1987). See also United States v. Balsys, 524 U.S. 666, 674-75 (1998) (stating that the received understanding of the Bill of Rights is that it was instituted to restrict the powers of the national government).

20 A court enforcing the clause would inquire into whether a law or official’s action is one “respecting an establishment of religion.” If that inquiry is answered in the affirmative, then the no-establishment restraint was exceed and the law or official’s action is unconstitutional.
The Supreme Court’s Establishment Clause cases since *Everson* are roundly criticized as being contradictory or in hopeless disarray by parties on all sides of the First Amendment debate. That poses the question whether viewing the Establishment Clause as structural would better systematize the cases. The “proofs” or validations that follow indicate that, indeed, the Court’s cases are far more easily classified and understood when the Establishment Clause is viewed not as an individual right, but as a structural “negative” on the government’s power.

A. Relaxed Standing Rules

The Supreme Court has carved out a special exception to normal standing requirements for actions brought by federal taxpayers. The exception has been invoked successfully only when pleading claims under the Establishment Clause. The special exception would be unnecessary if the clause was a constitutional right. Rights are personal and thereby run in favor individuals, so when a right is violated someone is harmed. That means the requisite injury-in-fact would be present to satisfy ordinary standing requirements.

Not so with structure. Being impersonal, a structural violation does not always result in a harm or injury to someone. Structural violations that result in no injury-in-fact are not uncommon. When this occurs, the Supreme Court has ruled that claims pleading the constitutional violation are nonjusticiable for lack of standing. This is so whether the claimant’s asserted interest has been as taxpayer, citizen, or some other complainant raising a “generalized grievance” held in common with many others. It is not the large class of potential claimants that deters the Court; the problem is that the claimant seeks no more remedy than that the government be ordered to obey the law.

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If the Establishment Clause is structural, one would expect to find instances where the no-establishment restraint is exceeded even in the absence of someone incurring a harm or injury-in-fact. Instances are indeed found in cases such as *Flast v. Cohen*,\(^\text{23}\) where the claimant’s putative "injury" was as a federal taxpayer. Rather than dismissing *Flast* as a "generalized grievance" case and thus lacking in standing, as would be expected, the Supreme Court fashioned a legal fiction of individualized "taxpayer injury" in order that the courts could entertain the lawsuit and proceed to a resolution on the merits.\(^\text{24}\) The point here is not to debate the wisdom of the Court-fashioned exception in *Flast* to normative rules of standing. The point is that no-establishment was regarded by the Court as behaving like a structural clause, capable of having its limits exceeded and yet causing no individualized injury-in-

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\(^{23}\) 392 U.S. 83 (1968). There are additional instances of the Court relaxing standing requirements in Establishment Clause cases (see Esbeck, *supra* note 16, at 37-40), but the federal taxpayer standing cases are the most clear.

\(^{24}\) *Flast*, 392 U.S. at 101-102. Federal taxpayers have no personal, religious right to prevent monies from being disbursed to a religious organization that is providing an educational service pursuant to a general program of public aid. The reputed legal claim by such a taxpayer would be that he or she has a right not to be coerced against conscience or otherwise "religiously offended" when tax monies end up going to a religious school. The idea has a certain superficial appeal, but the law is to the contrary and for good reason. The Supreme Court has refused to recognize a federal taxpayer claim of religious coercion or other free-exercise harm. In *Tilton v. Richardson*, 403 U.S. 672 (1971), plaintiffs claimed that payment of a general federal tax, the monies of which were later appropriated to faith-based colleges, caused them religious coercion in violation of the Free Exercise Clause. Finding no plausible evidence of compulsion, the Court held that a federal taxpayer's cause of action for religious coercion failed to state a claim under the free exercise clause. *Id.* at 689. In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), plaintiffs challenged as violative of the Establishment Clause the transfer of government surplus property to a religious college. The Supreme Court rebuffed all asserted bases of standing because the plaintiffs lacked the requisite personal "injury in fact." One of the rejected assertions was that the plaintiffs had a "spiritual stake" in not having their government give away property to a religious organization or to otherwise act in a manner contrary to no-establishment values. The Court rejected that argument and held that a spiritual stake in having one's government comply with the Establishment Clause is not, on the merits of the claim a juridically cognizable injury. *Id.* at 486 n. 22. Taxes of citizens and taxpayers generally support all manner of policies and programs with which those individuals may deeply disagree. Taxes pay the salaries of public officials whose policies individuals may oppose. None of these complaints give rise to constitutionally cognizable "injuries" to federal taxpayers. There is no reason that a federal taxpayer alleging "religious coercion" or being "religiously offended" should, on the merits of the claim, be treated any differently.
fact. The educational funding program at issue in Flast was regarded as an instance of government exceeding a limit on its power, or arguably so, and yet not resulting in any pecuniary loss or other particularized injury-in-fact.

B. Non-Religious Remedies

Structure does have the consequential effect of protecting individual liberties, but that is a happy byproduct of structure's primary object of keeping government power properly checked and in its place. If the Establishment Clause is structural, there is no reason that the liberties indirectly safeguarded by the clause would be limited to religious liberty. Thus, one would expect to find no-establishment cases where someone does incur a loss of liberty but the nature of the loss is non-religious. There are cases of the type expected, such as those involving economic harm or loss of property, constraints on academic freedom, and burdens on a free-thinking atheist.


26 See Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down a state law that required teaching of creation in public school science classes if evolution is taught); Epperson v. Arkansas, 393 U.S. 97 (1968) (striking down a state prohibition on teaching evolution in public school science classes).

27 See Torcaso v. Watkins, 367 U.S. 488 (1961). In Torcaso, an atheist who otherwise qualified for a public office refused to take a required oath that professed belief in God. The Court held the oath requirement violative of the First Amendment without specifying either religion clause. If an individual objects to the oath out of a religious belief that forbids taking oaths, then he has a valid claim under the Free Exercise Clause. As an atheist, however, the claimant in Torcaso did not (indeed, by definition could not) suffer a religious injury as he professed to have no religious beliefs. Nevertheless, for a state to mandate taking of the oath would be a violation of the Establishment Clause as to all office seekers, including atheists, because confession of belief in a deity is a subject that remains in the realm of religion.

Atheists and agnostics are sensibly protected as well by the Free Speech Clause, for the rights implicated are freedom to believe and freedom to refrain from speaking. In Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), the Court found violative of free speech rights a law permitting censorship of films found to be "sacrilegious." The Court could have reached the same result under the Free Exercise Clause if the film producer sought to convey a religious belief, either about his own faith or a theological criticism of the faith of others. However, the Court also could
By virtue of these cases that grant relief for non-religious harm, it is also apparent that the Court has the Establishment Clause doing work not being done by the Free Exercise Clause. Given that there are two religion clauses in the First Amendment, it would be redundant if they were both dedicated to safeguarding individual religious rights. The presence of cases redressing economic harm or academic freedom confirms that the Court is not envisioning the no-establishment principle in the role of a constitutional right that protects individuals from religious injury. That is the role of the Free Exercise Clause, indeed its singular role. The Establishment Clause, in the Court's application, has a different role, and that role would appear to be as a structural "negative" on power.

C. Class-Wide Remedies

The remedy in no-establishment cases is typically class-wide injunctive relief. Such a remedy is aimed far more at negating the power of government than at affording victim-specific relief to the actual complainants. That makes sense only if the Establishment Clause is structural.

The school prayer and devotional Bible-reading cases of the early 1960s illustrate the point. In *Engel v. Vitale*, the Court struck down the practice of teacher-led prayer in New York public schools. Similarly, in *School District of Abington Township v. Schempp*, the Court struck down a public school practice of classroom prayer and devotional Bible reading. In both cases, the remedy ordered was to enjoin the religious exercises altogether, as opposed to more narrowly directing school authorities to permit the student/plaintiffs to opt out of the practice. Compare that relief with *West Virginia State Board of Education v. Barnette*, where the children of Jehovah's Witnesses were compelled, at

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28 By "class-wide" relief, I do not mean a remedy that follows in a successful case certified as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. I simply mean an equitable remedy that directly addresses, and provides relief to, a definable group of persons beyond the successful complainants.

31 319 U.S. 624 (1943).
the beginning of each school day, to stand next to their desks, salute the U.S. flag, and recite the Pledge of Allegiance. The *Barnette* Court held that the compulsory exercise implicated the right "not to speak" contrary to one's beliefs, a violation of the Free Speech Clause. The remedy, however, was a mere ability to opt out while remaining in the classroom as other students continued their daily performance of the patriotic exercise. The constitutional offense was "stopped," in the Court's view, when the Jehovah's Witnesses were permitted to remain in their seats. The children were not spared any humiliation or peer pressure as a result of their nonconformity. The remedy to the free-speech violation was specific to the rights holder. Not so with the Establishment Clause offenses of prayer and devotionals, which resulted in school-wide injunctions. That is, students not parties to the lawsuits were also to halt the prayer and devotional practices. Indeed, even those students who eagerly sought the refreshment of prayer and Scripture had to stop the class exercises.

The Court, following *Engel* and *Schempp*, was immediately criticized for finding a rights violation in the absence of any proof of coercion, and then compounding the mistake by awarding an unsought remedy for those students who did not seek the end of the prayer. The criticism would be well-founded if the Court was enforcing an individual right. But if the enforcement was of a structural restraint, the Court's class-wide remedy was entirely proper. If *Engel* and *Schempp* were rights violations, the focus of the remedy would have been specific to the plaintiffs. Rights run in favor of individuals. But if the violations were structural, the focus of the remedy properly would be on the government and getting its officials back within their constitutional limits. Hence, for structural violations the remedy is to grant relief to the entire class of individuals in the "zone of impact" of the structural violation—whether all those in the "zone" want the remedy or not.³²

³² Much the same observations can be made with respect to cases such as *Flast v. Cohen* and the nature of the remedy in taxpayer-standing cases. Normally the remedy for a rights violation is to "make whole" the individual claimant and nothing more. In contrast, the remedy for successful claimants in taxpayer-standing cases is not a refund of tax dollars improperly diverted in order to return the money to the taxpayer's pocket. Nor is the remedy a sum of money calculated to compensate for the religious injury incurred when the claimant had to support with their own money the religion of others. Rather, the remedy in these cases is "class-wide relief" to all within the government's jurisdiction—namely, to enjoin all future legislative violations of the no-establishment restraint. This is not the person-specific remedy of a rights violation. Rather, a class-
D. Subject Matter Jurisdiction Dismissals

Cases touching on inherently religious questions, such as doctrinal disputes or defrocking a cleric, often lead to dismissals for lack of subject matter jurisdiction; and this, when nothing in Article III of the Constitution limits the power of the federal judiciary over such cases or controversies. A jurisdictional dismissal is a concession that the subject in dispute is not within the court's constitutional power or competence. Of course, there is nothing in Article III that denies jurisdiction over religious disputes. Rather, the courts reference the First Amendment as the basis for the dismissal. That makes sense only if the Establishment Clause is structural. That also explains why state courts refrain from taking subject matter jurisdiction over disputes involving inherently religious questions. While the jurisdiction of state courts is not limited by Article III, since its incorporation in the Everson decision these courts are restrained by the Establishment Clause.

The Supreme Court defined the core of the government's subject matter "negation" in Kedroff v. Saint Nicholas Cathedral. Constitutional constraints on civil government, said the Kedroff Court, acknowledged "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." The jurisdictional bar to

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33 See Serbian E. Orthodox Diocese v. Millivojevich, 426 U.S. 696, 713-14 (1976) (holding that courts have no authority to decide ecclesiastical issues); Watson v. Jones, 80 U.S. 679, 732-34 (1871) (same). The Court does not always use the word "jurisdiction" in its rationale, but its language of dismissal carries the same meaning. See Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445-47 (1969) ("[I]t is] wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions," hence the First Amendment's "language leaves the civil courts no role in determining ecclesiastical questions in the process of resolving property disputes."); Bouldin v. Alexander, 82 U.S. 131, 139 (1872) ("This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership.").

34 344 U.S. 94 (1952) (holding unconstitutional a state's undertaking to transfer control of Russian Orthodox Church from central governing authorities in U.S.S.R. to authorities in New York).

35 Id. at 116.
deciding religious disputes is not limited to lawsuits between schismatic factions contending over the possession of church real estate. Rather, the jurisdictional restraint extends to all litigation whenever a question appears concerning a matter that is inherently religious, including such issues arising in lawsuits involving torts, contracts, and criminal fraud. The "ministerial exemption" from federal and state employment nondiscrimination statutes is also reflective of the reluctance of courts to thrust their jurisdictional oversight into matters wholly within the province of religious organizations. Additionally,


37 See, e.g., Gabriel v. Immanuel Evangelical Lutheran Church, Inc., 640 N.E.2d 681 (Ill. App. Ct. 1994) (holding that breach of contract claim was properly dismissed on First Amendment grounds since the matter of whether to employ plaintiff as a parochial school teacher was an ecclesiastical issue into which civil court may not inquire); McEnroy v. St. Meinrad Sch. Of Theology, 715 N.E.2d 334 (Ind. Ct. App. 1999) (dismissing claim for breach of employment contract brought by professor of theology against seminary); Basich v. Board of Pensions, 540 N.W.2d 82 (Minn. Ct. App. 1995) (holding that First Amendment prevented district court from exercising jurisdiction over action for breach of pension contract and breach of fiduciary duty); Pearson v. Church of God, 458 S.E.2d 68, 71-72 (S.C. C. App. 1995) (holding that trial court did not have constitutional authority to decide claim for breach of contract).

38 See, e.g., United States v. Ballard, 322 U.S. 78 (1944) (in trial for mail fraud, the truth or falsity of a religious belief may not be the subject of scrutiny by a jury).

39 See, e.g., EEOC v. Catholic Univ. of Am. 83 F.3d 455, 464-65 (D.C. Cir. 1996) (finding EEOC investigation into Catholic nun's Title VII gender discrimination claim was barred by Establishment Clause); Himaka v. Buddhist Churches of Am., 917 F. Supp. 698, 708-09 (N.D. Cal. 1995) (holding that minister's Title VII retaliation claim should be dismissed based upon excessive governmental entanglement with religion in violation of Establishment Clause); Van Osdol v. Vogt,
civil authorities, including the courts, are admonished to avoid classifications in legislation or case law which cause an official to determine whether a religious belief or practice is "central" (i.e., high degree of importance) to a claimant's religion.\textsuperscript{40} A doctrine's "centrality" is an inherently religious question over which courts have no jurisdiction.\textsuperscript{41}

There is some confusion by courts and commentators concerning whether these subject-matter dismissals are to be attributed to the Establishment or Free Exercise Clause, with some courts "papering over" the dilemma by not attributing either clause but citing the First Amendment generally. The confusion is excusable and certainly the free-exercise concerns of religious organizations are implicated in some of these cases,\textsuperscript{42} but the subject matter dismissals make sense only when attributed to an Establishment Clause viewed as a structural "negation" of judicial power.

\footnotesize

\textsuperscript{41} It is a violation of the Establishment Clause for courts to be compelled by legislative classification to make inquiry into the religious significance of the words or practices of religious organizations. See, e.g., Montrose Christian Sch. Corp. v. Carver, 770 A.2d 111 (Md. Ct. App. 2001) (striking down as unconstitutional civil rights employment ordinance that required determination concerning whether employee performed "purely religious functions").

\textsuperscript{42} Cases involving church splits often pit the religious freedom of the collective church against the religious liberty of a dissenting individual or individuals within the church. The Free Exercise Clause, which is about individual religious rights, cannot solve this conflict-of-rights. The courts side with the collective church by dismissing for lack of subject-matter jurisdiction. Only a structural Establishment Clause can explain that result. See Esbeck, \textit{Structural Restraint}, supra note 16, at 51-58.
E. Two-Definitions-of-Religion Puzzle

The Supreme Court has impliedly adopted two definitions of religion, one for the Establishment Clause and another for the Free Exercise Clause. This is puzzling, because the word "religion" appears only once in the text of the First Amendment, applicable to both clauses.

Assume a church, as an outworking of its faith, opens a shelter for victims of domestic violence. When faced with a municipal order to cease operation because of noncompliance with certain zoning ordinances, the church responds by asserting that the shelter's operation is protected by the Free Exercise Clause because the work is an outgrowth of its religious beliefs. The claim is obviously plausible and, if sincere, will be recognized by the courts as satisfying one of the threshold requirements for stating a claim by coming within the Free Exercise Clause's definition of "religion." Six months later the city itself opens a domestic shelter. Is the city now "establishing" religion by engaging in religious activity? Common sense says "no," yet how can the identical activity be religious when conducted by a church but not religious when performed by the municipality?

The government does not circumvent the Establishment Clause simply by claiming a secular purpose behind its actions. See, e.g., Stone v. Graham, 449 U.S. 39 (1980) (per curiam); Epperson v. Arkansas, 393 U.S. 97 (1968). Many a statutory scheme, notwithstanding a judicial finding of a secular purpose, has fallen to the clause because the statute had the effect of advancing religion or

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44 In Everson v. Board of Education, 330 U.S. 1 (1947), Justice Rutledge wrote of the text of the First Amendment:

"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).

45 This illustration is not explained by simply arguing that there are two different purposes for operating the shelters (one religious and the other secular), rather than two definitions of religion.

The government does not circumvent the Establishment Clause simply by claiming a secular purpose behind its actions. See, e.g., Stone v. Graham, 449 U.S. 39 (1980) (per curiam); Epperson v. Arkansas, 393 U.S. 97 (1968). Many a statutory scheme, notwithstanding a judicial finding of a secular purpose, has fallen to the clause because the statute had the effect of advancing religion or
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response, without specifically stating so, has been that the same activity is religious for purposes of the Free Exercise Clause but not religious for purposes of the Establishment Clause.\textsuperscript{46}

The Court's approach is not objectionable—indeed, seems to naturally follow—when the Establishment Clause is conceptualized as structural. The logic is tied to the difference in tasks between rights and structure. The task of an individual-rights clause, such as the Free Exercise Clause, is that the political majority should adjust its police power objectives to the needs of the religious minority or nonconformist. Thus, the Free Exercise Clause's meaning of "religion" is necessarily broad to account for the vast differences in religious belief—for human hearts vary widely in spiritual matters.

In contrast, the task of a structural clause is to manage sovereign power. If the Establishment Clause is structural, it lays down a power-limiting restraint on the proper scope of government. America's religious pluralism, however, virtually guarantees that legislation, even when nondiscriminatory in both text and purpose, will have disparate effects across the spectrum of religions dotting the land. When such inevitable but unintended effects occur, it would make no sense for the disparate impact on some religions to force an "as applied" invalidation due to the legislation in question exceeding the government's power. This follows, because intrinsic to the structure of a government, the architecture of which is set out in a written constitution, is that the powers delegated to, and withheld from, government remain fixed or constant. Hence, a structural clause cannot be seen as varying in the scope of its delegation or "negation" of power. That is, a structural clause, unlike a rights clause, cannot be seen as adjusting case-by-case to the needs of different religions. If the Establishment Clause is structural, then any definition of "religion" would have to remain unvarying and thereby help demarcate the boundary at which the government's power comes to an end and the purview of religion

\textsuperscript{46} For example, in \textit{McGowan v. Maryland}, 366 U.S. 420, 442-45 (1961) Sunday closing statutes were regarded as secular labor laws for Establishment Clause analysis. But a Sunday day of rest was determined to be religious for purposes of the Free Exercise Clause in \textit{Frazee v. Illinois Department of Employment Security}, 489 U.S. 829 (1989). Likewise, a law restricting access to abortion was regarded as secular for purposes of the Establishment Clause in \textit{Harris v. McRae}, 448 U.S. 297, 319-20 (1980), but a woman having unrestricted access to abortion was a matter of religiously informed conscience for purposes of Free Exercise Clause analysis. \textit{Id.} at 320-21.
begins. Were that not so, the church/state boundary would be in constant flux.\footnote{In addition, any definition of religion for Establishment Clause purposes would have to be narrowed to inherently religious matters, lest the clause overturn social welfare and moral-based legislation. For example, in the foregoing illustration it would be absurd to regard a city's domestic violence shelter as "an establishment of religion." While domestic violence shelters can be operated out of religious motive, the shelters also have a moral or humanitarian basis and thus are not inherently religious.}

The case law shows that this is indeed how the Establishment Clause has been construed, as if it is structural in character. The Supreme Court has said that legislation was not violative of the Establishment Clause just because the law had a disparate impact, beneficial or detrimental, on particular religions.\footnote{It is well-settled that when a law of secular purpose has an adverse impact on some religions but not on others, the Establishment Clause is not violated. \textit{See e.g.}, Hernandez \textit{v. Comm'r of Internal Revenue}, 490 U.S. 680, 696 (1989) (holding IRS regulation concerning deductibility of contributions having unintended impact on religious groups that barely rely on sales of goods or services as means of fund raising is not violative of Establishment Clause); Bob Jones Univ. \textit{v. United States}, 461 U.S. 574, 604 n.30 (1983) (finding that preference for religions whose tenets do not oppose interracial marriage was the unintended effect of neutral IRS regulation about racially discriminatory schools, hence the regulation did not violate the Establishment Clause); Harris \textit{v. McRae}, 448 U.S. at 319-20 (a law restricting access to abortion was regarded as secular for the purposes of the Establishment Clause); McGowan \textit{v. Maryland}, 366 U.S. at 442-45 (Sunday closing statutes were regarded as secular labor laws for Establishment Clause analysis); \textit{see also} Larson \textit{v. Valente}, 456 U.S. 228, 246 n.23 (1982) (distinguishing laws that intentionally discriminate among religions and are thereby unconstitutional from laws that merely have a "disparate impact" on certain religions and thus do not violate the Establishment Clause).} For the Supreme Court, it has been sufficient that the legislation has had, \textit{inter alia}, a secular purpose, and the criteria for what is "secular" has been answered using a narrow, fixed definition of "religion."

\textit{F. Protecting Religion From Itself}

The Supreme Court has struck down aid to religious schools reciting, as one of its rationales, that government aid would be harmful to the schools. This occurs although the religious schools themselves actively seek the aid and insist that they will gladly waive any supposed constitutional right to not be harmed in this way. For example, in \textit{Lemon v. Kurtzman\footnote{403 U.S. 602 (1971).}} the Court warned about what can happen if a
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A religious school qualifies for state aid and thus must comply with the accompanying regulation:

This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted "the hazards of government supporting churches" in *Walz v. Tax Commission*... and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with Religion Clauses.50

That government regulation sometimes can be harmful to a school, including a religious school, is unremarkable. However, that no-aid separationists, suing as taxpayers who otherwise have no involvement with, or interest in, the religious schools, are allowed to seek an injunction against the government program on the basis that the aid will be harmful to the schools is, at first blush, counterintuitive. Counterintuitive, that is, if the Establishment Clause is a constitutional right protecting the plaintiff/taxpayers. If no-establishment is a rights clause, then the object of the lawsuit has to be preventing the government from harming the plaintiffs—the only harm plaintiffs have standing to raise—not harming the schools.

If no-establishment is structural, however, then the Court's concern for harming the religious schools is entirely proper. A structural violation means that the government has exceed its power. In this context, it means that the government has transgressed into domain solely within the competence of religion and religious organizations. When government exceeds its authority, it is entirely possible that program regulations undermine religious autonomy.

We see that it may be that no one is harmed when there is a misbalance in the roles of church and state, as in *Flast v. Cohen*. Or, as we also have seen, the harm may be non-religious, such as the abridgement of academic freedom in *Epperson v. Arkansas*.51 Or, the

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50 Id. at 620 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970)).
51 393 U.S. 97 (1968) (striking down a state law prohibiting the teaching of the theory of
harm may be in the nature of a religious "offense" and befall either the plaintiff, as in *Lee v. Weisman*,\(^5\) or the third-party/school, as indicated in the quote above from *Lemon v. Kurtzman*. That is characteristic of structural violations: the resulting harm can befall no one, result in harm that is non-religious, or produce a remedy for those in the "zone of impact" whether or not they consider themselves harmed. From the viewpoint of the *Lemon* Court, religious schools are in the "zone of impact" protected from the government's over regulation of the schools' religious briefs and practices. This conception of the constitutional wrong makes sense, but only if the Establishment Clause is structural. The remedy—which may be quite unrelated to plaintiff's actual harm—is aimed at getting the government back within the bounds of its competency.

**G. The Non-Delegation Rule**

The Establishment Clause can be analogized to a Separation of Powers clause, except that the no-establishment restraint runs only against the state rather than a two-way balance, one both checking and empowering the church and the state. In cases such as *Kedroff v. Saint Nicholas Cathedral*, the Establishment Clause worked to keep the prerogatives vested in religious organizations from being undermined by legislation that purported to shift ecclesiastical control from one church hierarchy to another. The logical corollary is the rule of non-delegation that emerges from *Larkin v. Grendel's Den, Inc.*\(^3\) In *Larkin*, the Establishment Clause operated to keep certain sovereign powers from being delegated to a church. It is, of course, far more common for government to exceed its power (e.g., as in *Kedroff*) than it is to improperly delegate away its power (e.g., as in *Larkin*).

In *Larkin*, a state enacted a zoning statute that sought to protect houses of worship, schools, and hospitals from the tumult of close proximity to taverns and bars. Under the statute, when a proprietor applying for a liquor license selected a site within 500 feet of a house of worship, the affected church, synagogue, or mosque was notified and

\(^{52}\) 505 U.S. 577 (1992) (holding unconstitutional public school sponsorship of clergy-led prayers during graduation ceremonies and granting class-wide relief to graduating student and her family, who's attendance was voluntary, and who were "offended" by recital of any and all prayer).

permitted to veto the license’s issuance. By granting a veto over licenses, the law placed into ecclesiastical hands a civil power over a matter of commerce. The immediate harm to the tavern owner was pecuniary, not religious. In a larger sense, however, church and state must be in right balance to the mutual benefit of both the church and the body politic. Here, said the Court, the transfer of civil power, if not arrested at this early stage, could evolve over time into “political oppression through a union of civil and ecclesiastical control.” This rule of non-delegation, which is about preventing religious organizations from acquiring powers properly vested in government alone, is possible to explain only if the Establishment Clause is regarded as structural in nature.

H. Conflict in the Clauses

The Free Exercise Clause prohibits intentional discrimination against a particular religion or religion in general, as well as targeting specific religious beliefs and practices. The current practice in the courts is to regard compliance with the Establishment Clause as a duty that, if applicable, is a "compelling interest" overriding the commands of the Free Exercise Clause. This makes no sense. The Supreme Court's

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54 Id. 117-21.
55 Id. at 127 n.10.
57 The Free Exercise Clause prohibits more than just intentional discrimination on the basis of religion or religious affiliation. The clause also prohibits intentional discrimination on the basis of a particular religious belief or practice. Government may not "impose special disabilities on the basis of religious views or religious status," Employment Div. v. Smith, 494 U.S. 872, 877 (1990), or regulate the slaughter of small animals "because it is undertaken for religious reasons," Lukumi, 508 U.S. at 532.
58 For examples of lower federal courts confronting this clauses-in-conflict argument, see Peter v. Wedl, 155 F.3d 992, 996-97 (8th Cir. 1998) (affirming lower court’s ruling that both the Free Exercise and Free Speech Clauses are violated by a Minnesota regulation that provided aid to special education students except where the student was enrolled in a religious school; the court concluded that the regulatory exemption was purposefully discriminatory on the basis of religion and not required by the Establishment Clause); Hartman v. Stone, 68 F.3d 973 (6th Cir. 1995) (striking down, as violative of the Free Exercise Clause, a United States Army regulation that extended benefits to secular day-care centers but discriminated against faith-based centers chosen
"pervasively sectarian" test\(^{59}\) is illustrative of the problem. The test causes state educational bureaucracies to discriminate against religious schools found to be "pervasively sectarian."\(^{60}\) Conceding, as they must, that such intentional discrimination is \textit{prima facie} violative of the Free Exercise Clause, no-aid separationists respond by putting the Free Exercise Clause at war with the Establishment Clause. They do so by arguing clauses-in-conflict and urge that the clash be resolved by the no-establishment principle overriding free exercise. The imagined conflict is brought about by conceptualizing the Establishment Clause as securing an individual right to a "freedom from the religion" of others. And the Free Exercise Clause doubtlessly secures some constitutional right in these "others" to exercise their religion. With the issue so framed, then of course the two rights will not infrequently be on a collision course.\(^{61}\) The resulting "conflict," no-aid separationists propose, is to be relieved by tipping the "balance" in the direction of their view of the Establishment Clause. One could just as easily—and just as arbitrarily—assume that the duty to comply with the Free Exercise Clause overrides the no-establishment principle.

Arguing a clash-of-the-clauses is to advance the wholly improbable: that the First Congress drafted the First Amendment with two

\(^{59}\) The "pervasively sectarian" test first surfaced in \textit{Lemon v. Kurtzman}, 403 U.S. 602, 614-22 (1971). The last two cases where the Court struck down governmental aid using the test are \textit{Grand Rapids Sch. Dist. v. Ball}, 473 U.S. 373 (1985), and \textit{Aguilar v. Felton}, 473 U.S. 402 (1985). However, \textit{Ball} was recently discredited and partly overruled in \textit{Agostini} and \textit{Aguilar} was overruled in its entirety. \textit{Agostini v. Felton}, 521 U.S. 203, 226-35 (1997).

\(^{60}\) Such discrimination pressures faith-based educational providers to compromise their spirituality to prevent losing opportunities for state funding. Hence, the current system makes comprehensive government funding programs relentless engines of secularization.

\(^{61}\) Professor Meiklejohn notes the analytical difficulty when the religion text of the First Amendment is invoked to do service as both protecting religious liberty and affording a freedom from religion:

\begin{quote}
[A]ll discussions of the First Amendment are tormented by the fact that the term "freedom of religion" must be used to cover "freedom of nonreligion" as well. Such a paradoxical usage cannot fail to cause serious difficulties, both theoretical and practical.
\end{quote}

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fundamental provisions side-by-side each trying to cancel out the other. The two clauses seemingly tugging in opposite directions leaves broad discretion to the courts to "balance" one right against the other, thereby having to choose between them. There is, however, no principled basis on which the courts can create a sliding scale of constitutional values, with free exercise less "valuable" than no-establishment or vice versa.62

The clauses-in-conflict argument is neither consistent with the First Amendment's text (neither the Free Exercise Clause nor Establishment Clause states it has primacy over the other), nor are such conflicts intrinsic to the clauses and thereby logically unavoidable. The Free Exercise Clause is a right running in favor of individuals, which, on a case-by-case basis, has the effect of limiting government power. The Establishment Clause, if viewed as structural, is a restraint running against the government, which has the direct object of limiting government power. To be sure, the two clauses overlap at certain points and thus compliment one another,63 but the supposed "tension" goes away when the Establishment Clause is not viewed as a right to be "free from the religion" of others.

To systematize the Supreme Court's cases around a view of the Establishment Clause as a structural "negative" on government power over inherently religious subject matters will reduce considerably the confusion in legal doctrine. This will yield a more clear and consistent application of the law, and citizens will better understand their rights and government officials their limits.

62 See Valley Forge Christian Coll. v. Americans United, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values ... to invoke the judicial power of the United States.").

63 There are situations when a single incident can properly give rise to meritorious claims under both the Free Exercise and Establishment Clauses. But this is a complementary situation, and not a clash of the clauses. To illustrate, assume a public school adopted a regulation requiring that the Lord's Prayer be led by teachers and recited by students at the beginning of each classroom day. A third grade Islamic student, along with all others, is compelled to recite the prayer. As a Muslim, the student has suffered a personal religious harm for which the Free Exercise Clause gives individual relief. The student could also bring a cause of action under the Establishment Clause, leading to injunctive relief against continued school-wide enforcement of the prayer regulation.
There is also a strategic value to such a realignment. A structural no-establishment, as it labors to keep government within its bounds, does lead to more open space for the exercise of everyone’s liberties, including religious liberty. Thus, the Establishment Clause, properly understood, affords another constitutional argument on behalf of religious freedom. Given the cut-back in free-exercise protection as a consequence of the decision in Employment Division v. Smith, this should be welcomed by civil libertarians. An example of where this may be happening already is with developments in tort and employment nondiscrimination law. Cases such Watson v. Jones and Serbian E. Orthodox Diocese v. Milivojevich, taught in law school curricula as a backwater line of precedent labeled “intra-church disputes,” are newly being applied to defend religious organizations sued in “clergy malpractice” or raised as explaining the “ministerial exemption” to employment nondiscrimination lawsuits. This is encouraging, and it is only regrettable that it took the Smith decision trimming back on free-exercise rights to cause a rediscovery of how no-establishment restraints protect religion.

Then there is the conceptual problem of explaining why a religious exemption to general regulatory or tax legislation is not a “religious preference” violative of the Establishment Clause. Our nation has a long history at all governmental levels of exemptions from general regulations that expressly exclude religious practices or religious organizations. With increasing frequency these exemptions are

64 80 U.S. (13 Wall.) 679 (1871) (holding that court will not interfere in disputes over religious doctrine, discipline, or polity, but will defer to the resolution by the highest church adjudicative body).

65 426 U.S. 696, 715-17 (1976) (holding that civil courts generally may not probe into disputes over church polity or the removal of ecclesiastics).


67 See, e.g., EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 800-02 (4th Cir. 2000) (dismissing Title VII gender discrimination claim by minister of music filed against church); Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184, 186-87 (9th Cir. 1994) (dismissing Title VII gender discrimination claim by minister for failure of church to appoint her as elder and for removal of her ministerial status).
challenged as "preferences" that advance religion, but the Supreme Court has rebuffed the argument. Corporation of the Presiding Bishop v. Amos, is the most recent in a long line of cases in the high court.

From the perspective of a structural Establishment Clause, these exemptions are the government merely refraining from imposing a regulatory burden with respect to a subject matter arguably in the sole competence of religion or religious organizations. Seen in that light, the government does not prefer or establish religion by leaving it alone. For government to not impose on religious claimants legal burdens on private religious choices no more unconstitutionally favors religion than does the Free Exercise Clause unconstitutionally favor religion. Indeed, these religious exemptions are desirable because they reinforce a healthy separation of church and state.

68 See, e.g., E. Bay Asian Local Dev. Corp. v. California, 13 P.3d 1122 (Cal. 2000) (finding that ordinance landmarking historic properties that exempted historic sites held by churches and other religious organizations was not violative of the Establishment Clause).

69 483 U.S. 327 (1987). 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. Amos also makes it clear 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).

70 See Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding property tax exemption for religious organizations); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding release-time from compulsory education laws for students to attend religious exercises off public school grounds); The Selective Draft Law Cases, 245 U.S. 366 (1918) (upholding, inter alia, military service exemptions for clergy and theology students); 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); but see Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (plurality opinion) (disallowing sales tax exemption which was available only on purchases of sacred religious literature).

71 To establish a religion connotes that a government must have taken some affirmative action to seek to achieve the prohibited result ("...shall make no law... "). Conversely, for government to passively leave religion where it found it logically cannot be making a law respecting an establishment of religion. See Amos, 483 U.S. at 337 ("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."). Additionally, to reduce civil and religious tensions and minimize church and state interaction, both consequences of exemptions, are matters that enhance the separation sought by the Establishment Clause.

72 As Justice White observed while dissenting in Welsh v. United States, 398 U.S. 333, 372 (1970),
The no-endorsement test has long been criticized as indeterminate and subjective.\textsuperscript{73} The censure is well deserved. More fundamentally, however, the endorsement test fails because it attempts to turn the Establishment Clause into an individual right to be "free from the religion" of others. That "right" is said to be a freedom not to feel alienated in one's civic standing on account of religion.\textsuperscript{74} Setting up a right, protected by the Establishment Clause, from civic alienation due to a perceived lessor status in the political community invites inevitable conflict with the Free Speech and Free Exercise Clauses.\textsuperscript{75} As described above, this \textit{pseudo} "conflict-in-the-clauses" is one of the principal reasons for confusion in First Amendment case law and cannot be remotely justified by the text or canons of construction. The no-establishment principle as a structural clause avoids all those problems, and has the added virtue of giving yet one more powerful reason to bury, once and for all, the no-endorsement test.

Finally, a structural Establishment Clause explains and reinforces a long series of cases by the Supreme Court to the effect that government authorities must avoid classifications that cause officials to probe into the religious meaning of words, practices, and events.\textsuperscript{76} Typical would

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\bibitem{Smith} See Steven D. Smith, \textit{Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test}, 86 MICH. L. REV. 266 (1987); Jesse Choper, infra, this symposium issue of J. of Law & Politics.


\bibitem{Corporation} See Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987) and \textit{id. at} 344-45 (Brennan, J., concurring) (recognizing a problem when government attempts to divine which jobs are sufficiently related to the core of a religious organization so as to merit exemption from statutory duties); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (avoiding potentially entangling inquiry into religious practice); Thomas v. Review Bd., 450 U.S. 707, 715-16

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be Rosenberger v. Rector and Visitors of the University of Virginia,\footnote{515 U.S. 819 (1995) (university should avoid distinguishing between evangelism, on the one hand, and the expression of ideas merely approved by a given religion).} where the majority observed that a state university should avoid public forum access policies that cause school authorities to have to distinguish between evangelism, on the one hand, and the expression of ideas merely approved by a given religion, on the other.\footnote{Id. at 843-44.} Similarly, in Widmar v. Vincent\footnote{454 U.S. 263 (1981).} the Court rejected a suggestion that civil authorities could, consistent with the First Amendment, distinguish between speech as worship and all other types of religious speech.\footnote{Id. at 269-70 n.6, 272 n.11 (holding that inquires into the religious significance of words or events are to be avoided).} The concern is threefold: the lack of judicial competence to resolve doctrinal questions, the potential for interference by the state in religious affairs, and the potential for "establishment" when a court favors one religious interpretation of words or events over others. Certainly these restraints on the power of officials to classify inherently religious matters are far easier to explain if the Establishment Clause is viewed as structural. This also explains the plurality's opinion in Mitchell v. Helms,\footnote{530 U.S. 793 (2000) (plurality opinion) (upholding federal aid to education programs at K-12 schools, including religious schools).} to the effect that the "pervasively sectarian" test is both offense to religious sensibilities and in conflict with another line of
the Court's cases. The "pervasively sectarian" test, said the plurality, results in civil magistrates "trolling through" the activities of religious organizations.\(^{82}\) Behind this line of cases that prohibit officials from attributing religious meaning to the words and activities of religious organizations is the idea that the government is restrained from dealing with subject matter that is inherently religious. This is a healthy conceptualization of church/state separation, and should be encouraged.

**CONCLUSION**

For the most part this paper looks only at what the modern Supreme Court has actually done with the Establishment Clause. There is no attempt here to divine what the First Congress in 1789 meant by the words "make no law respecting an establishment of religion," or what the ratifying state legislatures thought was the text's meaning during their debates in 1789-1791. However, history is referenced in one respect, namely, that church/state relations in the West have responded to the religion question at two levels: the scope of state power vis-a-vis the church and the state's regard for religious persons. Accordingly, it is not surprising that the two religion clauses in the First Amendment came to shoulder the jurisprudence that answers these two relationships, with no-establishment bearing the law of the state's relationship to organized religion and free-exercise bearing the law of the state's relationship to individuals of faith.

The U.S. Supreme Court, at least since the 1947 decision in *Everson v. Board of Education*, has treated the Establishment Clause as a structural restraint on governmental power. This is evident, not from the Court's stated rationale in its cases, but from how it actually regards the clause—as one running against the government and limiting its power when it comes to treading on subject matters that are inherently religious. The validations or "proofs" compile a tidy list, from special standing rules for federal taxpayers to making sense of how the Court can think it unconstitutional for a religious organization to receive state

\(^{82}\) See id. at 827-29. The "trolling through" perspective as limiting governmental jurisdiction was followed in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir., 2002), holding that the NLRB does not have jurisdiction over a religious college and that the Board may not apply the "substantial religious character" test to determine that the college is or is not sufficiently religious to be protected by First Amendment.
aid because the aid will, in the long run, undermine the religious autonomy of the organization.

Although there are a few outlier decisions, if one looks only at results rather than rationale, most of the Court's no-establishment decisions fit within this manner of systemizing the cases. That is progress, enabling both practitioner and commentator to move beyond tossing in the air one's hands and announcing the cases in hopeless disarray. The outcome of litigation can become more predictable and uniform, and, equally important, thereby more acceptable to the public.

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