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RELIGION AND THE FIRST AMENDMENT: SOME CAUSES OF THE RECENT CONFUSION

CARL H. ESBECK*

The United States Supreme Court is surely guilty of making the matter of religion and the First Amendment harder than it ought to be. But it is others who have kept the debate over church/state relations either poisoned with culture-war rhetoric or so shrouded in mystery that seemingly only experts can untangle the jurisprudential snarls. By surrounding this venerable Amendment with a pseudocomplexity concerning the matter of religion these disinformation specialists create confusion, and confusion begets opportunities for further distortion and manipulation. Disagreements over the free exercise of religion and the no-establishment thereof are far simpler to resolve than these spin-doctors make them out to be. Bringing clarity to the juridical settlement, both in the proper ordering of church/state relations and in the protection of individual religious conscience, is best begun by first bringing to mind foundational principles.

I. THE FIRST AMENDMENT VESTED NO NEW POWER IN GOVERNMENT

A primary cause of discontent with the Constitution of 1787, adopted over stiff opposition by Anti-Federalists, was the danger that powers implied from its more open-ended phrases (the Necessary and Proper Clause was an oft-cited example) would be relied on by an overly ambitious Congress to enact legislation that infringed on individual rights.¹ The Constitution's foremost political

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1. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 341, 345, 349-50 (enlarged ed. 1992); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE*

theorist, James Madison, acknowledged as much in a June 8, 1789, speech before the House of Representatives. As he introduced his draft of a bill of rights, Madison described the bill's purpose as having "the great object . . . 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."² Federalists gave little resistance to Madison's enterprise because their position all along was that the national government had not, in the first instance, been delegated the power to interfere with fundamental rights.³ In late September of 1789, a resolution listing twelve Articles of Amendment was settled on by both congressional houses and sent to the states along with a preamble explaining that the submission was initiated because "conventions of a number of the states [had] . . . expressed a desire, in order to prevent misconstruction or abuse of . . . powers, that further declaratory and restrictive clauses should be added."⁴ The third of these Articles contained the now

INTELLECTUAL ORIGINS OF THE CONSTITUTION 267-68 (1985); BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 119-59 (expanded ed. 1992); see also *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 242, 249-50 (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).

2. 1 ANNALS OF CONG. 437 (Joseph Gales ed., 1789).

3. See MCDONALD, *supra* note 1, at 269 (quoting Alexander Hamilton to the effect that there was no point in declaring "that things shall not be done which there is no power to do"); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 142-45 (1996) (explaining the importance of an October 6, 1787 speech by James Wilson, a leading convention delegate from Pennsylvania and Federalist, defending the absence of a bill of rights in the proposed Constitution on the basis that the national government had only powers delegated to it by positive grant and therefore it would have been superfluous to declare that certain rights are reserved when the people were not, in the first instance, divested of such rights).

4. The preamble in its entirety is reproduced at 5 THE FOUNDERS' CONSTITUTION 40-41 (Philip B. Kurland & Ralph Lerner eds., 1987). In *The Legal Tender Cases*, 79 U.S. (12 Wall.) 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,

familiar passage “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁵ The ten successful Articles of Amendment, popularly referred to as the Bill of Rights, were thought to have altered the status quo very little, but they did calm the fears of many citizens while serving as a useful hedge against possible future encroachments.⁶

The foundational proposition that flows from the foregoing is that the First Amendment, indeed, each of the first eight Amendments, further limited the existing enumerated powers of the national government while adding to its powers not at all.⁷ This

or abridging the freedom of speech or of the press.

Id. at 535.

5. THE FOUNDERS’ CONSTITUTION, *supra* note 4, at 41.

6. Historian Thomas J. Curry offers sage advice concerning the state of mind of those now revered as the Framers:

In endeavoring to determine the exact significance [the First] Congress and the [ratifying] states attached to the opening segment of the First Amendment, one must bear in mind the overall context of its enactment and ratification. Its guarantees did not represent the triumph of one particular party or specific viewpoint over a clear or entrenched opposition, but rather a consensus of Congress and nation. . . .

....

Americans in 1789 . . . agreed that the federal government had no power in [religious] matters, but some individuals and groups wanted that fact stated explicitly. Granted, not all the states would have concurred on a single definition of religious liberty; but since they were denying power to Congress rather than giving it, differences among them on that score did not bring them into contention.

....

. . . The fact that Congress was not trying to resolve concrete disputes, but merely strengthening safeguards against possible future adversity, helps explain at least some of the inattentiveness and absentmindedness attendant upon Americans’ enactment of the First Amendment.

THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 193-94 (1986).

7. See *United States v. Balsys*, 524 U.S. 666, 674 (1998) (stating that the received understanding of the Bill of Rights is that the Amendments were instituted to restrict the powers of the national government); EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 105 (1957); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 104 (2d ed. 1994); Leonard W. Levy, *The Establishment Clause, in HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM?* 69, 83 (Robert A. Goldwin & Art Kaufman eds., 1987).

The First Amendment as a “negative” on existing congressional powers without vesting new powers therein was not altered when the Fourteenth Amendment was ratified in 1868. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress was not given power under section 5 of the Fourteenth Amendment to enforce rights beyond those protected by

proposition has ready application in sorting through some of the present-day pseudocomplexities. For example, it is often said that the First Amendment guarantees a "freedom from religion."⁸ This claim has a surface plausibility, at least if one purpose of the First Amendment is to hold religion in check. But we have seen that the Amendment was tasked to further limit the government, not to restrain believers, churches, a particular religion, the majority religion, or religion in general. Thus the role of the First Amendment is not to protect the nonreligious from the religious. Neither is it to protect minority religions from the majority religion. Neither is it to protect government from a particular church or cluster of churches, nor to protect government from religion in general. Rather, the Amendment is a check on government and government alone. As Richard John Neuhaus has written: "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."⁹

one of the clauses in section 1 of the Fourteenth Amendment).

Nor was this "negative" on power turned into a grant of new governmental power (federal or state) by the Supreme Court's incorporation of the provisions of the First Amendment through the Fourteenth Amendment's Due Process Clause. Although the Supreme Court's incorporation of the Establishment Clause in *Everson v. Board of Education*, 330 U.S. 1 (1947), did not grant new power to Congress to "make . . . law" concerning religion, incorporation obviously did expand the number of governments (from just the federal government to the federal government, all the states, and hundreds of local governmental entities) that were restrained by the Clause. Accordingly, it is a truism that incorporation did newly empower Congress and the federal judiciary to enforce the "make no law" restraint against state and local governments. To that extent, then, it must be conceded that incorporation of the Establishment Clause in *Everson* did vest new power at the federal level. But this new federal power is one of enforcement only, that is, the new authority is to police the state and local governments so as to keep them from transgressing the church/state boundary set down by the Establishment Clause. The essential proposition still holds that *Everson's* incorporation of the Establishment Clause did not vest new power in government (federal or state) to "make . . . law" invading that sphere of competence reserved to religion.

8. See, e.g., Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 482-89 (1996) (arguing that secular rationalism is constitutionally preferred over religion); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197-214, 222 (1992) (contending that the First Amendment's negative bar against an establishment of religion implies an affirmative establishment of a secular public order).

9. Richard John Neuhaus, *Establishment Is Not The Issue*, 4 RELIGION & SOC'Y REP., June 1987, at 1, 3. The passage in context is as follows:

The religion clause of the First Amendment is entirely a check upon

Accordingly, the First Amendment guarantees a “freedom from religion” only in the limited sense that the Amendment is a restraint on what government may do by way of either succumbing to popular agitations to sponsor religion or appropriating the authority that religion commands among people of faith and applying this power to advance the temporal aims of state.

A. Is Free Speech at War with No-Establishment?

A more pervasive pseudocomplexity is the oft-repeated claim that there is a “tension” between the Free Speech and Establishment Clauses. Given that the Establishment Clause restrains government and government alone, not private individuals, this “clash-of-the-Clauses” argument is completely nonsensical.

This false complexity developed slowly over a span of almost two decades. During the 1980s and 1990s, in an unbroken line of victories for freedom of speech, the Supreme Court held that religious expression by private individuals was entitled to the same high protection accorded nonreligious expression (e.g., speech of political, artistic, or educational content).¹⁰ No-aid

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 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.”

Id.

10. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (finding viewpoint discrimination in university’s denial of printing costs for student-initiated religious publication); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (finding content-based discrimination against religious speech in public forum not justified by Establishment Clause); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (finding viewpoint discrimination against religious speech); *Widmar v. Vincent*, 454 U.S. 263 (1981) (finding content discrimination against religious speech); see also *Board*

separationists,¹¹ who lost the ultimate judgments in these cases, framed their contention as a clash of two First Amendment Clauses: a right under the Free Speech Clause to freedom of religious expression without discrimination versus a right under the Establishment Clause to a government that does not aid religion (the aid taking the form of the use of government property to convey a religious message). With the issue so framed, no-aid separationists invited the Supreme Court to “balance” the conflicting Clauses, hoping to tip the scale in the direction of their bias for a naked public square, that is, a marketplace of ideas denuded of all religion. They lost. However, as no-aid separationists had urged, the Court did frame the issue in such a way that Establishment Clause compliance could supply a “compelling interest” for overriding the Free Speech Clause.¹²

*Capitol Square Review and Advisory Board v. Pinette*¹³ is a recent illustration of the Supreme Court’s framing of the issue in a manner that creates this “tension” between the Free Speech and Establishment Clauses. In *Pinette*, the State of Ohio created a public forum in a park by allowing citizens to erect temporary displays symbolizing each group’s message.¹⁴ But when the Ku Klux Klan sought permission to erect a Latin cross during the Christmas season, state officials balked.¹⁵ The Klan then sued for impairment of its free speech rights and ultimately won.¹⁶

of *Educ. of the Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990) (holding that the Equal Access Act, 20 U.S.C. §§ 4071-74 (1996), legislation that prohibits discrimination against religious speech at secondary schools, is not violative of the Establishment Clause).

11. As used in this Article the term “no-aid separationists” refers to those who oppose all forms of aid to religious organizations. Over the years—and notwithstanding their vigorous advocacy to the contrary—those holding to this no-aid theory have had to accept aid to religious organizations that are not “pervasively sectarian,” *see, e.g.*, *Tilton v. Richardson*, 403 U.S. 672 (1971), as well as forms of indirect aid to religious education, *see, e.g.*, *Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). Indeed, some forms of direct aid are available to schools regardless of a school’s religious nature. *See Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997).

12. The *Pinette* Court did not find that the Establishment Clause was, on the facts before it, a “compelling interest” overriding the Free Speech Clause.

13. 515 U.S. 753 (1995).

14. *See id.* at 758.

15. *See id.*

16. *See id.* at 758-59, 770.

The *Pinette* Court held that on these facts the Establishment Clause was not violated by the presence of the Latin cross in the park.¹⁷ Accordingly, the state was ordered to permit the religious display on the same basis as all other citizen displays allowed in the park.¹⁸ However, in the course of holding that religious speech by private individuals (the Klan) was protected by the Free Speech Clause from content and viewpoint discrimination, the Court indicated that on different facts the Establishment Clause could require suppressing private speech.¹⁹

This makes no sense. It is fundamental that the Establishment Clause restrains government and government alone. The Clause does not restrain the activities of nongovernmental actors, that is, private citizens. Thus, the proper question to be asked is whether the speech in question is government speech or private speech. If the speech is government speech (including private speech that has the government's imprimatur)²⁰ and the content is inherently religious, then the Establishment Clause prohibits the speech. This is borne out in the case law. The Supreme Court has found that prayer,²¹ devotional Bible reading,²² veneration of the Ten Commandments,²³ classes in confessional religion,²⁴ and teaching

17. *See id.*

18. *See id.*

19. *See id.* at 761-62. The Supreme Court said much the same in *Widmar v. Vincent*, 454 U.S. 263, 270-77 (1981).

20. There will be cases, of course, in which it is a close call whether the speech of a private individual has been adopted by the government as its own. If the facts are such that the speaker is private but the government is doing something to place its power or prestige behind the message, then the no-establishment restraint still applies. *See Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000) (striking down school policy of conducting election on whether to have prayer at football games delivered by elected student speaker); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982) (holding that statute authorizing student volunteers to lead classroom prayer in public schools violates the Establishment Clause). The remedy in cases of mixed government/private speech, however, should not aim to suppress the private speech as such. Rather, the remedy should aim to enjoy only those governmental actions that uniquely adopt the private religious message.

21. *See Santa Fe Indep. Sch. Dist.*, 120 S. Ct. at 2266; *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

22. *See School Dist. of Abington Township*, 374 U.S. at 203.

23. *See Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

24. *See McCollum v. Board of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948).

the biblical creation story as science²⁵ are all forms of inherently religious speech by the government. As such, it was correct to hold that the government's speech violated the Establishment Clause. Moreover, there could be no conflict with the Free Speech Clause because the government—unlike a private individual—has no rights.

On the other hand, if the speech is private speech, then not only is it not subject to restraint by the Establishment Clause, but the speech is affirmatively protected by the Free Speech Clause. Cases such as *Pinette* have reached the correct result in this regard,²⁶ but the Court made its resolution far more difficult than necessary had the Justices been attentive to the fundamentals of 1787-1789.

B. Is Free Exercise at War with No-Establishment?

The Free Exercise Clause cuts a different channel²⁷ than the Free Speech Clause at issue in cases such as *Pinette*. The Free Exercise Clause prohibits intentional discrimination against a particular religion or religion in general,²⁸ as well as discrimination that disfavors specific religious beliefs or practices.²⁹

25. See *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

26. In addition to *Pinette*, see cases cited *supra* note 10.

27. The Free Exercise Clause has an independent reach of its own, namely, the protection of actions that are consistent with one's expression of faith. This point was succinctly stated by Justice White in *Welsh v. United States*, 398 U.S. 333 (1970) (plurality opinion):

It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech.

Id. at 372 (White, J., dissenting).

28. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (striking down ordinances that intentionally discriminated against Santeria religious practice); *Employment Div. v. Smith*, 494 U.S. 872, 883-85 (1990) (reaffirming *Sherbert v. Verner*, 374 U.S. 398 (1963), insofar as *Sherbert* held that whenever government makes individualized accommodation determinations, officials must not refuse to consider religion-based requests for accommodation); *McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down state constitutional clause that intentionally discriminated against clerics seeking public office).

29. 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

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.³⁰ Again, this makes no sense. The Supreme Court's "pervasively sectarian" test³¹ is illustrative of this pseudocomplexity. The test causes state educational bureaucracies to discriminate against religious schools dubbed "pervasively sectarian."³² Conceding, as they must, that such intentional discrimination is prima facie violative of the Free Exercise Clause, no-

disabilities on the basis of religious views or religious status," *Smith*, 494 U.S. at 877, or regulate the conduct of slaughter of small animals "because it is undertaken for religious reasons," *Lukumi*, 508 U.S. at 532.

30. 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 Free Exercise and Free Speech Clauses are violated by Minnesota regulation that provided aid to special education students except where the student was enrolled in a religious school and that the regulatory exemption was purposefully discriminatory on the basis of religion and, as concluded by the court, not required by the Establishment Clause); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (striking down, as violative of the Free Exercise Clause, a U.S. Army regulation that extended benefits to secular day-care centers but discriminated against faith-based centers chosen by the parents on grounds that the government's discrimination was not required by the Establishment Clause); *Johnson v. Economic Dev. Corp.*, 64 F. Supp. 2d 657, 667-68 n.1 (E.D. Mich. 1999) (extolling the virtue of a county's policy on issuance of capital improvement revenue bonds without regard to religion because the religion-neutral policy avoided discrimination against sectarian institutions which would otherwise constitute a colorable violation of the Free Exercise Clause).

31. The "pervasively sectarian" test first surfaced in *Lemon v. Kurtzman*, 403 U.S. 602, 614-23 (1971). The last two cases in which the Court struck down governmental aid using the test were *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402 (1985). However, *Agostini v. Felton*, 521 U.S. 203 (1997), recently discredited and partly overruled *Ball* and overruled *Aguilar* in its entirety, *see id.* at 226-35. Therefore, the last occasion for the Court to use with invalidating effect the "pervasively sectarian" test that is still good case law was *New York v. Cathedral Academy*, 434 U.S. 125 (1977). This means that the period of dominance of the "pervasively sectarian" test is a mere six years (1971 to 1977), and that period is now over 24 years past.

32. Four Justices on the Supreme Court recently acknowledged, but left unresolved, the conflict between no-aid separationism and the Free Exercise Clause. *See Mitchell v. Helms*, 120 S. Ct. 2530, 2555 n.19 (2000) (plurality opinion). 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. This reduces the variety of school offerings in America and destroys innovation and educational pluralism. The secularization of religious schools will, over time, render some providers willing to water down their programs, causing them to become little different from the sometimes ineffectual state-operated schools. Such a rule of law can only add to America's much-heralded crisis in K-12 education.

aid separationists respond by putting the Free Exercise Clause at war with the Establishment Clause. They do so by arguing Clauses-in-conflict and suggesting that the clash be resolved by the no-establishment principle overriding free exercise. Once again 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 doubtless secures some right in others to exercise their religion. With the issue so framed, then of course the two rights will not infrequently be on a collision course.³³ 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.³⁴

Arguing a clash-of-the-Clauses is to advance the wholly improbable: that the Framers drafted an Amendment with two fundamental guarantees side-by-side, each trying to cancel out the other. The two Clauses seemingly tugging in opposite directions

33. Professor Meiklejohn notes the analytical difficulty when a single constitutional clause is invoked to do service as both protecting personal religious liberty and affording a freedom from religion: “[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.” Alexander Meiklejohn, *Educational Cooperation Between Church and State*, 14 LAW & CONTEMP. PROBS. 61, 71 (1949).

34. Although the Clauses-in-conflict claim is analytical folly, the fallacy is often and uncritically repeated. A casebook widely used in law schools supplies an all-too-common example of the “tension” argument:

The two clauses . . . protect overlapping values, but they often exert conflicting pressures. Consider the common practice of exempting church property from taxation. Does the benefit conveyed by government to religion via that exemption constitute an “establishment”? Would the “free exercise” of religion be unduly burdened if church property were not exempted from taxation? Articulating satisfactory criteria to accommodate the sometimes conflicting emanations of the two religion clauses is a recurrent challenge in this chapter.

. . . .
 . . . [M]ay the Amish claim constitutional exemption from compulsory education laws? Such claims raise one of the tensions arising from the coexistence of the two religion clauses: If a state *must* grant an exemption because of the “free exercise” command, is it thereby granting a preference to religion in violation of the “establishment” provision?

KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 459 (1999).

leaves the courts broad discretion to “balance” one against the other and thereby to choose between them. But there is 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.³⁵ The judiciary, which is not so much hostile to religion as it is ignorant about it, will more often than not “balance” matters in a way that either trivializes or privatizes matters of faith.

The Clauses-in-conflict argument is neither consistent with the First Amendment’s text (neither the Free Exercise Clause nor the Establishment Clause states it has primacy over the other), nor are such conflicts intrinsic to the Religion Clauses and thereby logically unavoidable. We have seen that neither the Free Exercise Clause nor the Establishment Clause vested new powers in Congress (or the Executive or Judiciary, for that matter).³⁶ Just the opposite is true: Each provision was a “negative” on enumerated powers previously delegated to government. It is logically impossible for one Religion Clause to clash with the other if the purpose of each Clause was to independently “carve out” an exception to existing governmental power. To be sure, the two “carve outs” can overlap and thus reinforce one another,³⁷ but it is quite impossible for these Clauses to conflict when both are negating governmental power.

* * * * *

The Establishment Clause, understood as embodying the neutrality principle,³⁸ eliminates these false “tensions” among the

35. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 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.”).

36. See *supra* notes 1-7 and accompanying text.

37. There are situations when a single incident can properly give rise to meritorious claims under both the Free Exercise and Establishment Clauses. To illustrate, assume a public school adopted a regulation requiring that teachers lead students in a recitation of the Lord’s Prayer at the beginning of each class 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 make a claim under the Establishment Clause, leading to injunctive relief against continued school-wide enforcement of the prayer regulation.

38. Discussed elsewhere is the Supreme Court’s march away from no-aid separationism and, however cautiously, its movement in the direction of neutrality. See *Mitchell v. Helms*, 120 S. Ct. 2530 (2000) (plurality of four Justices embracing neutrality principle); Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 703-07 (1997); Carl H.

Clauses of the First Amendment. By not compelling the exclusion of private religious expression from public fora, the Establishment Clause is no longer in tension with the Free Speech Clause. Similarly, when government program funding is available without regard to the religious character of any school or charity, including the "pervasively sectarian," the Free Exercise Clause is no longer in tension with the Establishment Clause. Achieving this doctrinal harmony among these three First Amendment Clauses is, without more, a strong commendation for the neutrality principle.

II. THERE IS NO FREE EXERCISE OF UNBELIEF

The Free Exercise Clause confers an individual right that protects persons from many, but not all, burdens on religious belief and practice;³⁹ indeed, this is the Clause's singular role.⁴⁰ Thus, a

Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 20-39 (1997); John H. Garvey, *What's Next After Separationism?*, 46 EMORY L.J. 75, 81-83 (1997); Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1089-94 (1996); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 364-66, 369, 371-73 (1996); Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 710-17 (1996).

39. The Free Exercise Clause is violated when government enforces a restriction that intentionally discriminates against religion, religious practice, or against an individual because of his or her religion. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). However, a law's adverse discriminatory effect on a religious belief or practice is not, without more, a free exercise violation. See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

40. See *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. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 249 (1968) (holding that free exercise claim is without merit in absence of religious burden); *School Dist. of Abington Township 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 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

claimant must first profess a religion before going on to show that her exercise thereof is burdened by the government. This makes sense because the Clause is, by its terms, about “prohibiting the free exercise [of religion],” as opposed to the exercise of moral philosophy or deeply held personal convictions. Thus the Clause does not protect those who have abandoned their faith or do not have a religious faith, that is, the apostate, the atheist, or the agnostic. The absurdity of protecting abandoned faith is, as professor John Garvey has quipped, like arguing that “[a]mputation is . . . a way of exercising my foot.”⁴¹ Likewise, there is no such thing as the free exercise of unbelief.

Liberal theory would broaden free exercise into an individual right that embraces all conscientiously held belief.⁴² But the Supreme Court has rebuffed attempts to turn the Free Exercise Clause into an all-purpose conscience clause.⁴³ Conscientious

rather than religious).

Some may object because this reading leaves too little work for the Free Exercise Clause. I have two responses. First, the work of prohibiting intentional discrimination on the basis of religion is important work indeed. Second, if the reader still believes stopping intentional discrimination is a scope too small for this venerable Clause, then that is not my doing but the doing of the Supreme Court in its controversial *Smith* decision.

41. John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 276 (1996) (rejecting the contention that the Free Exercise Clause protects nonbelief as well as religious belief and stating that “the first amendment . . . protects only the free exercise ‘of religion.’ Rejecting religion is an exercise of freedom, but it is not an exercise of religion. (Amputation is not a way of exercising my foot.)”).

42. See, e.g., Kent Greenawalt, *Diverse Perspectives and the Religion Clauses: An Examination of Justifications and Qualifying Beliefs*, 74 NOTRE DAME L. REV. 1433, 1461-62 (1999); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1493 & n.77 (1999) (citing authorities).

43. See *Frazee v. Illinois Dep’t of Employment Sec.*, 489 U.S. 829, 833 (1989) (noting that only beliefs rooted in religion are protected by the Free Exercise Clause and that secular views will not suffice); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 713-14 (1981) (noting that only beliefs rooted in religion are protected by the Free Exercise Clause); *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (identifying claims that are “philosophical and personal” and those “merely a matter of personal preference” as “not ris[ing] to the demands of the Religion Clauses”); cf. *Welsh v. United States*, 398 U.S. 333 (1970) (plurality opinion) (deciding that conscientious objector status as conferred by federal legislation did not require individuals claiming draft deferment to hold beliefs based on traditional religious views). *Welsh* is not contrary to the principle set forth in the text. First, *Welsh* involved the definition of religion for purposes of legislation rather than for the Religion Clauses of the First Amendment. Second, because there was no majority opinion, *Welsh* is binding only on the narrow issue decided. Third, the *Welsh* plurality has been rejected, sub silentio, by later majorities in *Frazee*, *Thomas*, and *Yoder*.

secularists will, of course, protest. Their argument is that surely liberty in religious matters cannot end with freedom to embrace and practice a particular faith, because liberty also includes freedom to resist governmental coercion to practice the faith of others. That argument would be persuasive if the Free Exercise Clause read: "Congress shall make no law . . . prohibiting religious freedom." But that is not the text, which only reaches out to individuals who first have a religion, then safeguards their exercise thereof.

The focus of the Free Exercise Clause is religion and religion alone. This explains why the Supreme Court decides cases devoid of religious coercion not under the Free Exercise Clause, but under the Establishment Clause.⁴⁴ Hence, the Free Exercise Clause does not, as was pled in *Torcaso v. Watkins*,⁴⁵ prohibit the forced taking of religious oaths by free-thinking atheists. In *Torcaso*, an atheist who otherwise qualified for a public office refused to take an oath professing belief in God.⁴⁶ The Court held the oath requirement violative of religious freedom without stating whether it was grounding its decision in either Religion Clause of the First Amendment.⁴⁷ If an individual objects out of a religious belief that

44. See *Engel*, 370 U.S. 421; *McCullum v. Board of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948). In *Engel*, the Supreme Court considered a state program of daily classroom prayer in government schools. Students who did not want to participate were excused without penalty. See *Engel*, 370 U.S. at 423 n.2. The program was struck down despite the absence of religion being imposed on every student. See *McCullum*, 333 U.S. at 430-31. In *McCullum*, the Supreme Court considered a program that permitted persons from the community to come onto the campus of the government school and conduct elective classes in religion. Student enrollment was optional and required parental permission. See *id.* at 207 n.2. Again, the program was struck down despite the absence of religion being imposed on every student. See *id.* at 232-33 (Jackson, J., concurring); see also *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 as a restraint on academic freedom, not religious freedom); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (upholding claim of department store against need to comply with labor law that caused increased operating costs, not religious harm); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (upholding claim of tavern seeking the issuance of a liquor license that was denied to its economic injury, not religious injury); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down a state prohibition on teaching evolution in public school science classes as a restraint on academic freedom, not religious freedom); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (permitting claim of economic harm by retail stores to be free of Sunday-closing law, but ultimately ruling against the stores on the merits).

45. 367 U.S. 488 (1961).

46. See *id.* at 489.

47. See *id.* at 495-96. The Court relied on Establishment Clause cases rather than cases

forbids oath-taking, then he has a valid claim of religious burden 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 hold no religion. *Torcaso*, however, was not without a claim. There is a constitutional restraint on the official imposition of religious belief. It is found in the no-establishment restraint on Caesar taking up the symbols and authority of religion and using them as a tool of statecraft. Such a misuse of religion by the government would state a meritorious claim by any office-seeker, whether a believer, an agnostic, or an atheist.⁴⁸ In our nation's scheme of church/state separation, the confession of belief in God is a matter that remains solely in the sphere of religion and the church—hence, as the Establishment Clause makes emphatic, not within the jurisdiction of the state.

III. FREE EXERCISE IS AN INDIVIDUAL RIGHTS CLAUSE, WHEREAS THE ESTABLISHMENT CLAUSE IS A STRUCTURAL RESTRAINT ON GOVERNMENT

A. *The 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

decided under the Free Exercise Clause, thus properly implicating no-establishment as the controlling principle. In the end, however, the Court said, without implicating either Clause, that the law violates "freedom of belief and religion." *Id.* at 496.

48. Atheists and agnostics, in addition to being protected by the Establishment Clause, are sensibly protected by the Free Speech Clause. Free speech rights of those without religious beliefs are implicated in the freedom to believe as one wants and the freedom to refrain from speaking. *See West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking down public school requirement to salute flag and recite pledge as invalid when applied to Jehovah's Witnesses because requirement denied freedom of speech and of belief); MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* 156-57 (1965). In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the Court found violative of free speech a law permitting censorship of films found to be "sacrilegious." The Court could have reached the same result under the Free Exercise Clause, but only if the film producer sought to convey a belief about his own religion. Further, the Court could have struck down the law under the Establishment Clause and done so regardless of whether the film producer sought to convey a religious or secular message, for a no-establishment transgression does not have as its object the redress of personal religious injury.

Exercise Clause.⁴⁹ This is puzzling because the word "religion" appears only once in the text of the First Amendment and is applicable to both Clauses.

A common urban conflict illustrates the problem. Assume a group of parishioners, as an outworking of their faith, opens a shelter for the homeless operated out of the basement of their church. Religion as such gets only collateral mention at the shelter, the primary ministrations being food, a shower, a bed, clean clothes, and kindness. When faced with a municipal order to cease operations for noncompliance with 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 under the Free Exercise Clause.⁵⁰ Assume that a month later the city adopts social welfare legislation, opening several homeless shelters for operation by the municipality. Is the city now "establishing" religion by its engagement in religious activity? Common sense says "no," yet how can the identical activity be religious when conducted by the parish church but not religious when performed by the municipality?⁵¹ The Supreme Court's tacit response has been that the same activity is religious for purposes

49. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6, at 827-28 (1st ed. 1978); William W. Van Alstyne, *Constitutional Separation Of Church And State: The Quest For A Coherent Position*, 57 *AM. POL. SCI. REV.* 865, 873-75 (1963); Note, *Toward a Constitutional Definition of Religion*, 91 *HARV. L. REV.* 1056 (1978). But see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6, at 1186 n.53 (2d ed. 1988) (criticizing two-definitions approach advocated in the first edition) [hereinafter TRIBE, 2d ed.].

50. Ultimately the church may very well not prevail on the merits, see *supra* notes 28-29, 39, but that is beside the point for purposes of this illustration.

51. This illustration is not explained away by simply arguing that there are two purposes for operating the shelters (one religious, the other secular), not 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). Nor does the government circumvent the Establishment Clause by persuading a court that its purpose is secular. 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 unduly entangling itself therewith. See, e.g., *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

of the Free Exercise Clause but not religious for purposes of the Establishment Clause.⁵²

Jurists who have critically examined the two-definitions approach have found it an unsatisfactory hermeneutic.⁵³ However, the Court's approach is not objectionable—indeed, it seems to follow naturally—when the Establishment Clause is conceptualized as structural. The logic is tied to the difference in tasks between an individual-rights clause and a structural clause. 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 religious nonconformist. Thus, the Free Exercise Clause's meaning of "religion" is necessarily broad to account for the vast differences in human belief—the Framers fully appreciating that human hearts vary widely in spiritual matters.

In contrast, the task of a structural clause is to manage the political power of the sovereign. If the Establishment Clause is structural, it would lay down a power-limiting restraint on the 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 wide spectrum of religions dotting the land. When such inevitable but unintended effects occur, it would make no sense for the resulting burden on some religions to cause an "as applied" invalidation of

52. For example, Sunday-closing statutes were regarded as secular labor laws for Establishment Clause analysis, *see McGowan v. Maryland*, 366 U.S. 420, 442-45 (1961), but a Sunday day of rest was religious for purposes of the Free Exercise Clause, *see Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989). Likewise, a law restricting access to abortion was regarded as secular for purposes of the Establishment Clause, *see Harris v. McRae*, 448 U.S. 297, 319-20 (1980), but a woman having unrestricted access to abortion was a matter of religious conscience for purposes of Free Exercise Clause analysis, *see id.* at 320-21.

53. 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; *see also Malnak v. Yogi*, 592 F.2d 197, 210-13 (1979) (Adams, J., concurring) (rejecting two-definitions approach); *TRIBE*, 2d ed., *supra* note 49, § 14-6, at 1186 n.54.

the legislation due to the statute exceeding the government's power. This follows because intrinsic to the structure of a government as set down in a written constitution is that the powers delegated to (and withheld from) government remain fixed. If structure was not fixed it would not be a structure. Hence, a structural clause cannot be seen as varying in the scope of its delegation of (or restraint on) power. That is, a structural clause (unlike a rights clause) cannot be seen as adjusting case-by-case to the needs of different religions.⁵⁴ If the Establishment Clause is structural, then any definition of "religion" would have to remain unvarying and thereby demarcate the fixed boundary at which the government's power comes to an end and the purview of religion begins. Additionally, any definition of religion for no-establishment purposes would have to be narrow in order not to overturn social welfare and morality-based legislation.

The case law shows that this is indeed how the Establishment Clause has been construed, thus confirming that the Clause has been regarded by the Supreme Court as structural. The Court has said that legislation was not violative of the Establishment Clause just because the law had a disparate effect (beneficial or detrimental) on particular religions.⁵⁵ To the Court, it is sufficient

54. Any structural boundary that sets limits on the government's ability to act or to pass laws has to be drawn in a manner that deals uniformly with all persons and all faiths, that is, without regard to religion or lack thereof. If this was not so, the church/state boundary would be in constant flux. A fixed boundary can be accomplished only if the definition of religion remains fixed.

It would take a rights-based clause to trump otherwise valid legislation, thereby forcing the government to adjust its police power case-by-case to accommodate the personal needs of religious nonconformity. This was the stated law of the Free Exercise Clause until it was overturned in *Employment Division v. Smith*, 494 U.S. 872 (1990). See *supra* notes 28-29, 39. See also *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down congressional legislation which had sought to restore free exercise law as it existed before the *Smith* decision).

55. It is well settled that when a law of secular purpose has a disparate effect on some religions but not others, the Establishment Clause is not violated. See *Hernandez v. Commissioner*, 490 U.S. 680, 696 (1989) (holding that IRS regulation concerning deductibility of contributions having unintended impact on religious groups that rely on sales of goods or services as means of fundraising is not violative of Establishment Clause); *Bob Jones Univ. 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 v. McRae*, 448 U.S. 297, 319-20 (1980) (regarding a law restricting access to abortion as secular for purposes of the Establishment Clause); *McGowan v. Maryland*, 366

that the legislation has, *inter alia*, a secular purpose, and the criteria for what is “secular” has been answered using a narrow, fixed definition of “religion.” In summary, the difference in function of the two Religion Clauses—free exercise is an individual right and no-establishment is a structural restraint—is what causes the Supreme Court to have two definitions of religion: a broad, flexible definition for free exercise purposes, and a narrow, fixed definition for no-establishment purposes.

B. The Smith Free Exercise Case Does Not Affect How the Establishment Clause is Construed

A new and very promising construction of the Establishment Clause is the neutrality principle, also characterized in the literature as a rule of “evenhandedness,” “equal treatment,” “equal regard,” or “nondiscrimination.”⁵⁶ The principle is currently favored by religious freedom advocacy groups representing traditional Catholics, Evangelicals, and Orthodox Jews. In the main, it is also the principle behind three of the Supreme Court’s most recent pronouncements on the Establishment Clause: *Mitchell v. Helms*,⁵⁷ *Agostini v. Felton*,⁵⁸ and *Rosenberger v. Rector and Visitors of the University of Virginia*,⁵⁹ as well as the “Charitable Choice” provision in the Federal Welfare Reform Act of 1996.⁶⁰

U.S. 420, 442-45 (1961) (labeling Sunday-closing statutes as secular labor laws for Establishment Clause analysis); *see also* *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (distinguishing laws that intentionally discriminate among religions and are thereby unconstitutional from laws that have disparate impact on certain religions and thus do not violate the Establishment Clause).

56. *See* sources cited *supra* note 38.

57. 120 S. Ct. 2530 (2000) (plurality opinion) (upholding federal program where educational equipment such as computers and library books were supplied to K-12 schools, including religious schools).

58. 521 U.S. 203 (1997) (upholding federal education program where government employees deliver remedial services to students at the campus of the students’ primary or secondary school, including religious schools deemed “pervasively sectarian”).

59. 515 U.S. 819 (1995) (holding that a university’s denial of funding for printing of student newspaper, because of paper’s religious viewpoint, was discrimination contrary to Free Speech Clause).

60. 42 U.S.C.A. § 604a (West Supp. 2000). Charitable Choice appears in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 104, 110 Stat. 2105, 2161-63 (1996). The Act was signed by President Clinton on August 22, 1996, but its most important provisions did not go into effect until July 1, 1997.

Yet another pseudocomplexity is the conflation of the neutrality principle, applicable to equal-funding cases decided under the Establishment Clause, with the "religion neutral" principle adopted in *Employment Division v. Smith*,⁶¹ the Native American peyote case that established a rule of religion-blind equality for measuring violations of the Free Exercise Clause. The neutrality principle construes the Establishment Clause as permitting governmental aid programs for education, social services, and health care where the benefits are available to all qualified organizations without regard to religion. By making religious schools, charities, and hospitals, along with all other service providers, public or private, eligible to participate in the benefit programs, the government expands the number and diversity of service providers available to students, the poor, the needy, and the infirm.

Critics of neutrality seize on the rule of equality. They argue that if the Establishment Clause rule is one of religion-blind equality when it comes to governmental benefits, then consistency requires acceptance of a rule of religion-blind equality when it comes to the Free Exercise Clause. It follows, it is argued, that proponents of neutrality theory must also accept the result in *Smith*.⁶² As these critics well know, *Smith* is regarded as a bitter pill in most religious liberty circles. The bitter must come with the sweet, insist the critics, or else neutrality should be abandoned as the Establishment Clause rule for government benefit programs.

These critics err by linking the operation of one Religion Clause to the other. Such linkage makes no sense. The Free Exercise Clause operates separate and independent of the Establishment

61. 494 U.S. 872, 888-90 (1990).

62. See, e.g., Alan Brownstein, *Constitutional Questions About Charitable Choice*, in WELFARE REFORM & FAITH-BASED ORGANIZATIONS 219, 246-47 (Derek Davis & Barry Hankins eds., 1999); Angela C. Carmella, *Everson and Its Progeny: Separation and Nondiscrimination in Tension*, in *EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS* 103, 116-17 (Jo Renée Formicola & Hubert Morken eds., 1997); *Contemporary Challenges Facing The First Amendment's Religion Clauses*, 43 N.Y.L. SCH. L. REV. 101, 104-05 (1999) (statement of Steven Green) (reporting conference proceedings at which one of the invited speakers conflated the "neutrality principle," applicable to equal-funding cases under the Establishment Clause, with the generally applicable, religion-neutral rule in *Smith*, applicable to cases decided under the Free Exercise Clause); J. Brent Walker, *Religious Equality's Level Playing Field Levels Religion, Harms Liberty*, REPORT FROM THE CAPITAL (Baptist Joint Comm., Washington D.C.), Apr. 18, 2000, at 7.

Clause. Hence, it is entirely logical to reject *Smith* because it incorrectly construes the Free Exercise Clause, while embracing the neutrality principle for purposes of the Establishment Clause.

Each Religion Clause goes about the objective of securing religious freedom in a manner very different from the other and seeks to protect discrete interests. The Establishment Clause, on one hand, is about the proper ordering of church/state relations. Like other structural restraints in the Constitution, it acts as a boundary-keeper. Here the structure separates those matters within the power of civil government from those matters within the purview of religion. The Establishment Clause thus recognizes a jurisdictional distinction between two orders of competence. Caesar, so to speak, is restrained from “mak[ing] . . . law” or otherwise acting on matters that are reserved for the sphere of religion and the church. As the late editor of *Commonweal*, William Clancy, has observed, “Surely this is one of history’s more encouraging examples of secular modesty.”⁶³ The Free Exercise Clause, on the other hand, is not there to structurally separate two spheres of competence. Rather, the Clause secures an individual right vested in each person to be free of most religious burdens imposed at the hand of government. It makes no sense to link the two Religion Clauses any more than it does to link the Free Speech and Free Exercise Clauses or the Free Speech and Establishment Clauses. Claims under the Free Exercise Clause are cognizable only upon a showing of individual religious harm and, after *Smith*, only upon a showing of intentional discrimination. It is an analytical mistake to lock step the free-exercise right to the no-establishment restraint because the Clauses are fundamentally different in nature.⁶⁴

63. William Clancy, *Religion as a Source of Tension*, in RELIGION AND THE FREE SOCIETY 23, 28 (1958). Clancy aptly frames the constitutional settlement embodied in the Establishment Clause this way:

[T]he “wall of separation” metaphor is an unfortunate and inexact description of the American Church-State situation. What we have constitutionally is not a “wall” but a logical distinction between two orders of competence. Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God’s. (Surely this is one of history’s more encouraging examples of secular modesty.) The State realistically admits that there are severe limits on its authority and leaves the churches free to perform their work in society.

Id. at 27-28; see also sources cited *infra* note 81.

64. Additionally, in these days of weakened free exercise protection, it would be poor

C. A False Symmetry: Exemptions from Burdens and the Conferring of Benefits

The critics distort the rule of “equality” in the neutrality principle in a second respect. They argue that if the rule is one of religion-blind equality concerning the receipt of government benefits, then consistency requires that the rule be one of religion-blind equality when it comes to regulatory burdens.⁶⁵ The case law on legislative burdens, as those critics well know, is to the contrary. Namely, exemptions from burdens have not been considered violative of the Establishment Clause even when the exemption extends only to religious organizations or only to religious practices. Consider, for example, the Supreme Court cases of *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*,⁶⁶ upholding exemptions for religious organizations from employment nondiscrimination laws, and *Wisconsin v. Yoder*,⁶⁷ exempting the Amish from compulsory education laws. Although such exemptions from general regulatory legislation may give the appearance of a preference, the Court has concluded that they do not favor religion and hence do not violate the Establishment Clause.⁶⁸ This is

strategy indeed to forfeit the considerable autonomy afforded churches *via* the Establishment Clause by “linking” no-establishment to the Free Exercise Clause. Whether the *Smith* case was right or wrong concerning its weakening of free exercise protection, the reach of the Free Exercise Clause is separate and independent of its sister Clause.

65. See, e.g., Melissa Rogers, ‘Equality Principle’ is Dangerous Yardstick For Church-State Relations, REPORT FROM THE CAPITAL (Baptist Joint Comm., Washington D.C.), Feb. 22, 2000, at 3.

66. 483 U.S. 327 (1987).

67. 406 U.S. 205, 234 n.22 (1972) (sustaining constitutionality of requirement that the religious practices of parents of school-aged children be accommodated).

68. *Amos* and *Yoder* are the leading cases. See also *Gillette v. United States*, 401 U.S. 437 (1971) (finding that 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); *Arlan’s Dep’t Store v. Kentucky*, 371 U.S. 218 (1962) (per curiam) (holding that religious exemption from Sunday-closing law was not violative of Establishment Clause); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding release-time program that permitted students to be excused from compulsory education law in order 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).

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), is not contrary to the principle stated in the text. In *Caldor*, the Court struck down a state law favoring Sabbath observance for employees working in the private sector. See *id.* at 710-11. First, the law conferred a

because to establish a religion connotes that government must take some affirmative step ("Congress shall *make* no law . . .") in furtherance of the prohibited result. Conversely, for government passively to leave religion "where it found it," logically cannot be a "law respecting an establishment." Professor Douglas Laycock stated the common sense of the matter when he wrote, "The state does not support or establish religion by leaving it alone."⁶⁹ The Supreme Court in *Amos*⁷⁰ made this rationale central to its analysis when it said:

[R]eligious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster: for example, the property tax exemption at issue in *Walz v. Tax Comm'n* . . . 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.⁷¹

benefit; it was not an exemption from a state-imposed burden. *See id.* at 708-10. Second, as explained in *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987), the Sabbath law in *Caldor* was struck down because the state cannot utilize classifications that single out a specific religious practice, as opposed to language inclusive of a general category of religious observances, thereby favoring that particular practice. *See id.* at 145 n.11. 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's absence from school is excused for Good Friday, then so must absences for all religious holy days be accommodated. The special needs of national defense make *Gillette v. United States*, 401 U.S. 437 (1971), distinguishable from *Caldor*. In *Gillette*, Congress was 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 the Selective Service System. *See id.* at 460.

69. 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).

70. 483 U.S. at 327.

71. *Id.* at 336-37.

It is not a difficult concept to understand; a legislature may elect to not burden religion by not imposing regulation.⁷² The legislature thereby reduces civic/religious tensions and minimizes governmental intrusions into religious matters, both objectives that help maintain the separate spheres of church and state so sought after by the Establishment Clause.⁷³

For government to spare individuals of regulatory burdens on their religious practice no more unconstitutionally privileges religion than does the Free Exercise Clause. As Justice White reminded us in *Welsh v. United States*,⁷⁴ the Free Exercise Clause is itself a law that by its express terms exempts religion from certain civic burdens.⁷⁵ Laws that exempt religion from civic duties borne by others—such as the Free Exercise Clause does—cannot possibly violate the Establishment Clause, for then the latter Clause would cancel out the former.⁷⁶

The critics have set up a false symmetry. The neutrality principle is consistent, but along an axis different than the one they propose. In following an equality-based rule for faith-based groups to access benefit programs, equality is not an end in itself but a means to something more fundamental, namely, minimizing the government's influence over the religious choices of its citizens.⁷⁷ Likewise, by providing exemptions from regulatory burdens, the

72. *Amos* also makes it clear that for a government to refrain from imposing a new 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) ("[The Free Exercise] clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues Free Exercise Clause values when it lifts a government imposed burden on the free exercise of religion.").

73. See *Walz*, 397 U.S. at 676 (recognizing that it is desirable when government refrains from imposing a burden on religion so as "to complement and reinforce the desired separation insulating each from the other").

74. 398 U.S. 333 (1970) (plurality opinion).

75. See *id.* at 372 (White, J., dissenting).

76. A religious exemption may be broader in scope than that required by the Free Exercise Clause. For example, in *Amos* it was assumed that the Title VII exemption might well be broader in scope than that required by the Free Exercise Clause, and still the Court upheld it. See *Amos*, 483 U.S. at 336.

77. See Esbeck, *supra* note 38, at 23-27. "[W]hether pondering the constitutionality of exemptions from regulatory burdens or of equal treatment as to benefit programs, in both situations the integrating principle is neutralizing the impact of governmental action on personal religious choices." *Id.* at 26.

government—by leaving religion alone—refrains from influencing religious choices. In both instances the common thread is in minimizing the government's impact on individual religious choices.

D. Distinguishing Between Pervasively and Nonpervasively Sectarian Providers is Inconsistent with the Supreme Court's Case Law Elsewhere

No-aid separationists acknowledge that the Supreme Court's cases permit direct funding of faith-based educational providers, but only as long as the schools are not dubbed "pervasively sectarian."⁷⁸ The daunting task of screening out "pervasively sectarian" schools from those which are merely "church-affiliated" means that state officials will have to apply a religious test to all church-affiliated schools, culling those eventually determined to be "too religious." Merely to draw the "too religious" versus "secular enough" distinction, however, requires state educational bureaucracies—and ultimately the courts—to probe into the nature and practices of all faith-affiliated schools and to attribute religious meaning to their beliefs, words, and actions. Such inquiries by civil magistrates into the religious significance of tenets and spiritual observances violates the most fundamental aim of church/state separation: to keep these two centers of authority, God and Caesar, so to speak, within their respective spheres of competence.

To be "pervasively sectarian," explained an earlier Supreme Court, means that a church-affiliated provider's "secular activities cannot be separated from [its] sectarian ones."⁷⁹ This, of course, just rephrases the question. Now the test requires officials to ask what is "secular" and what is "sectarian" about each specific school, and when are the two so blended that the secular alone cannot be separately funded. Further complicating the matter, this inquiry is to operate in the context of a wide variety of government-supported educational services (preschools, primary schools, secondary schools, vocational schools, and colleges) and in the face of a broad and complex diversity of pedagogy employed by these educational providers.

78. See *supra* note 31 for a discussion of the "pervasively sectarian" test.

79. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755 (1976) (plurality opinion).

In other contexts, the Supreme Court has refused to permit state bureaucracies to probe into the religious meaning of an organization's words, practices, and events.⁸⁰ A parallel concern with limiting the actions of government to matters within its power is behind the Supreme Court's determination that it lacks subject matter jurisdiction over property disputes internal to an ecclesiastical organization.⁸¹ Rather, this jurisdictional bar to deciding intrachurch issues is not limited to conflicts implicating ownership of church real estate. The bar on judicial power extends to all civil and criminal litigation whenever dispute turns on matters that are inherently religious, including torts,⁸²

80. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 844-45 (1995) (cautioning a state university to avoid having to distinguish between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); *Amos*, 483 U.S. at 336 (recognizing a burden on religious freedom when government attempts to divine which ecclesiastical appointments are sufficiently related to the "core" of a religious organization to merit exemption from statutory duties); *id.* at 344-45 (Brennan, J., concurring); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (avoiding potentially entangling inquiry into religious practice is desirable); *Widmar v. Vincent*, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981) (noting that inquiries into significance of religious words or events are to be avoided); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) (stating that a petty official is not to be given discretion to determine what is a legitimate "religion" for purposes of issuing permit).

81. Concerning disputes over doctrine, ecclesiastical polity, the selection or promotion of clerics, and dismissal from church membership, the Supreme Court has said that civil courts are essentially without subject matter jurisdiction. See, e.g., *Serbian E. Orthodox Diocese for the U.S.A. and Canada v. Milivojevic*, 426 U.S. 696, 709 (1976) (finding that permitting civil courts to probe into church polity would violate the First Amendment); *Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (*per curiam*) (stating the courts should avoid doctrinal disputes); *Presbyterian Church in the U.S. v. Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969) (stating that civil courts are forbidden to interpret and weigh church doctrine); *Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church of N. Am.*, 363 U.S. 190, 191 (1960) (*per curiam*) (holding that the First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church of N. Am.*, 344 U.S. 94, 119 (1952) (holding that the First Amendment prevents legislature from interfering in ecclesiastical governance of Russian Orthodox Church); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 725-33 (1872) (rejecting implied trust rule because of its departure-from-doctrine inquiry).

82. See, e.g., *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732 (D.N.J. 1999) (granting a motion for subject matter jurisdiction dismissal of libel and slander claim filed against rabbinical association); *Farley v. Wisconsin Evangelical Lutheran Synod*, 821 F. Supp. 1286 (D. Minn. 1993) (dismissing defamation action against church where the

contracts,⁸³ civil-rights employment legislation,⁸⁴ and criminal fraud.⁸⁵

Judge-made classifications along pervasively and nonpervasively sectarian lines are no less hazardous to administer. The inevitable result is that theologically liberal providers of educational services will be deemed "secular enough" and thus acceptable recipients of government assistance, whereas theologically traditional providers of educational services will be found "too religious" and thus denied

offensive statements arose out of a church controversy); *Downs v. Roman Catholic Archbishop*, 683 A.2d 808, 811-12 (Md. Ct. Spec. App. 1996) (holding that trial court lacked subject matter jurisdiction over defamation claim against church hierarchy); *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997) (dismissing claim against Roman Catholic Diocese for negligent supervision of priest); *Tidman v. Salvation Army*, 1998 WL 391765 (Tenn. Ct. App. 1998) (dismissing privacy and outrageous conduct tort claims brought by former employees of faith-based organization discharged for having extramarital affair); *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85 (Tex. Ct. App. 1998) (dismissing for lack of subject matter jurisdiction claim based on impermissible First Amendment inquiry into negligence claims brought by parishioner against church and youth pastor); *Korean Presbyterian Church of Seattle Normalization Comm. v. Lee*, 880 P.2d 565, 570 (Wash. Ct. App. 1994) (holding that ecclesiastical abstention doctrine precluded recovery for tort of outrage); *L.L.N. v. Clauder*, 563 N.W.2d 434, 440-41 (Wis. 1997) (holding that the First Amendment prohibited negligent supervision claim).

83. *See, e.g.*, *Gabriel v. Immanuel Evangelical Lutheran Church, Inc.*, 640 N.E.2d 681 (Ill. Ct. App. 1994) (holding that breach of contract complaint 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. Saint Meinrad Sch. of Theology*, 713 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, Evangelical Lutheran Church in Am.*, 540 N.W.2d 82 (Minn. Ct. App. 1995) (holding that the 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, 72 (S.C. Ct. App. 1995) (holding that trial court did not have constitutional authority to decide claim for breach of contract arising from ecclesiastical matters).

84. *See, e.g.*, *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 464-65 (D.C. Cir. 1996) (finding that EEOC investigation into nun's gender discrimination Title VII claim filed by faculty member at Catholic university was barred by Establishment Clause); *Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 709 (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*, 908 P.2d 1122, 1132-33 (Colo. 1996) (en banc) (holding that Establishment Clause insulated a religious institution's choice of minister from judicial review; Title VII claim against church was properly dismissed); *Geraci v. Eckankar*, 526 N.W.2d 391, 399-401 (Minn. Ct. App. 1995) (stating that a gender discrimination claim by pastor against her church is barred by Establishment Clause).

85. *See, e.g.*, *United States v. Ballard*, 322 U.S. 78, 85 (1944) (holding in a trial for mail fraud, the truth or falsity of a religious belief or profession may not be subject to scrutiny by a jury).

assistance.⁸⁶ A more discriminatory rule privileging some theological beliefs over others could hardly be devised.

The immediately foregoing discussion cited Establishment Clause cases. In the course of deciding Free Exercise Clause cases, the Supreme Court likewise has had occasion to consider limits on its power. For example, it has held that a religious belief or practice need not be central to (and therefore more important than) a claimant's faith as a prerequisite to receiving the protection of the Clause.⁸⁷ This is because civil magistrates are not competent to decide which practices are at the "core" of a given religion and which are peripheral. Moreover, the Court has said that a religious claimant may disagree with co-religionists or be unsure or wavering and still receive full free exercise protection.⁸⁸ This is because a civil magistrate has no juridically intelligible means for resolving doctrinal disputes or gauging the relative degree of a claimant's

86. Meaningful denominational divisions among religions are no longer along the old alignments of Protestant versus Catholic versus Jewish. The realignment is now orthodox (Protestant, Catholic, and Jewish) versus progressive (Protestant, Catholic, and Jewish). See JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 42-46 (1991). Professor Hunter, a sociologist of religion, has identified the pervasively sectarian groups as "orthodox" and the theologically liberal groups as religious "progressives." See generally *id.* Hunter explains that the religious orthodox are devoted "to an external, definable, and transcendent authority," whereas progressives "resymbolize historic faiths according to the prevailing assumptions of contemporary life." *Id.* at 44-45. Religious organizations most willing to conform to contemporary culture will appear to the government as less sectarian. Conversely, those organizations more conservative in theology and that have resisted acculturation will inevitably appear to civil courts as more sectarian. To exclude from government aid programs those groups that are more sectarian is to punish those religions that resist conformity to culture while favoring those religions willing to evolve and conform to secular culture. Hence, the "pervasively sectarian" test is discriminatory against the religiously orthodox.

87. See *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims."); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449-51 (1988) (rejecting Free Exercise Clause 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").

This rule was recently reaffirmed in *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997), as helping to explain the decision in *Smith*. The compelling-interest balancing test, abandoned in *Smith*, required a judge to weigh the importance of a religious practice against a state's interest in applying a neutral law without any exceptions for religious burdens.

88. See *Thomas v. Review Bd. of the Ind. Employment Div.*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation.").

religious fervency. The “too religious” versus “secular enough” test casts the civil magistrate into just as uncharted a water as the questions avoided in the immediately foregoing Establishment Clause cases.

The problem is not that government officials are, without more, interacting with religious organizations. Some regulatory interaction between government and religious associations is inevitable, more so as government has gotten bigger and society more complex. Thus, the argument is not that regulatory fact-finding into the operation of religious organizations is in some sense an invasion of ecclesiastical “privacy,” or that the net increase in administrative probing will “entangle” government with faith-based schools beyond some threshold thought “excessive.”⁸⁹ Rather, the problem is that the government is being asked to adjudicate matters beyond its constitutionally delegated powers, that is, it is being asked to adjudicate subject matters reserved to the cognizance of religion and religious organizations.⁹⁰ This explains

89. Entanglement analysis is taken up *infra* Part III.E.

90. Professor Stackhouse notes just how remarkable was the American church/state settlement in that a government should go beyond the protection of the personal free exercise rights of individuals and to limit its sovereignty by acknowledging another center of competence when it comes to matters of spiritual cognizance:

[The First] Amendment to the Constitution acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority. It is a remarkable thing in human history when the authority governing coercive power limits itself. . . . However much government may become involved in regulating various aspects of economic, technological, medical, cultural, educational, and even sexual behaviors in society, religion is an arena that, when it is doing its own thing, is off limits. This is not only an affirmation of the freedom of individual belief or practice, nor only an acknowledgment that the state is noncompetent when it comes to theology, it is the recognition of a sacred domain that no secular authority can fully control. Practically, this means that at least one association may be brought into being in society that has a sovereignty beyond the control of government.

Max L. Stackhouse, *Religion, Rights, and the Constitution*, in *AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS* 92, 111 (Ronald C. White, Jr. & Albright G. Zimmerman eds., 1990). Richard John Neuhaus takes the analysis to the next logical step with this observation:

In the constitutional order rightly understood, the state acknowledges a sovereignty higher than itself, and acknowledges that sovereignty is defined by the people. . . . [T]he institution that bears witness to that higher sovereignty is the church. . . . The state recognizes the integrity of the church, not simply as a voluntary association of individuals, but as a communal bearer of the

why the Supreme Court states the foregoing rules, not as an individual right to free exercise of religion, but in terms of the civil courts lacking subject matter jurisdiction: “[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith.”⁹¹

The problem of exceeding constitutional power arises when government is called on to weigh doctrinal questions or to otherwise intrude into that sphere of inherently religious matters reserved to religion and religious organizations. The “pervasively sectarian” test requires administrative—and eventually judicial—discovery into the self-understanding, creed, ecclesiology, mission, pedagogic motivation, and other beliefs and activities of the “too religious” schools and differentiating them from the “secular enough” schools. Government simply is not competent to scour the organic documents, mission statements, textbooks, and classrooms of faith-related schools and place its own interpretation on what this pedagogy means in terms of being “too religious.” Such bureaucratic rummaging will unmask all manner of ecclesiastical “facts” over which state educational personnel will be the first to admit they have no training, no experience, and no theological insight. The possibilities for misunderstandings, spiritual insensitivity, and outright sectarian bigotry wrought by the “too religious” test are breathtaking. Bureaucratic divining into the “pervasively sectarian” question tramples any notion that God and Caesar must—for the benefit of both—stay separate and within their respective spheres.

In a promising recent development, a four-Justice plurality, without any reservations, adopted the neutrality principle in

witness to a higher sovereignty from which, through the consent of the governed, the legitimacy of the state itself is derived.

Richard John Neuhaus, *Proposing Democracy Anew—Part One*, 96 *FIRST THINGS* 87, 90 (1999).

91. *Thomas*, 450 U.S. at 716; see also *Lee v. Weisman*, 505 U.S. 577, 616 (1992) (Souter, J., concurring) (rejecting nonpreferentialism because its application “invite[s] the courts to engage in comparative theology”); *Smith*, 494 U.S. at 887 (stating that inquiries into religious belief are not within the “judicial ken”); *County of Allegheny v. ACLU*, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in part and dissenting in part) (courts are “ill equipped to sit as a national theology board”); *Lyng*, 485 U.S. at 457-58 (stating that religious belief inquiries would go beyond any conceivable judicial role); *Lee*, 455 U.S. at 257 (stating that religious belief inquiries are not a judicial function).

Mitchell v. Helms,⁹² a decision upholding federal aid to an education program. Justice O'Connor, joined by Justice Breyer, wrote separately, also desiring to uphold the program but without fully embracing the neutrality principle.⁹³ The aid to education program provided educational equipment, such as computers and audio-visual aids, as well as secular library books, to all K-12 schools, including religious schools, with the aid distributed on a per-student basis. The plurality, written by Justice Thomas, said that the "pervasively sectarian" test was "born of [anti-Catholic] bigotry, [and] should be buried now."⁹⁴ In her separate opinion, Justice O'Connor did not use or give mention of the "pervasively sectarian" test except in reference to cases she would overrule.⁹⁵ Rather, O'Connor said that even with a neutral program of aid, if there were actual diversion of the government aid to religious indoctrination, the Establishment Clause is violated.⁹⁶ In this view, if there is actual diversion, the Clause would be violated whether the school receiving the aid is pervasively sectarian or not. Because O'Connor was unwilling to presume diversion if the aid was to a pervasively sectarian school, she rendered irrelevant the "pervasively sectarian" category as a juridical device in aid of the Court's analysis. Accordingly, between the plurality and the concurrence, there are now six Justices that have decided to abandon the "pervasively sectarian" test.

Unlike no-aid separationism, neutrality in program assistance avoids the judicial lack-of-competence problem by placing the focus not on the character of the school, but on what the program actually provides. If the program, out of secular purpose, purchases educational equipment and passes it on to schools without regard to religion, the Establishment Clause is honored, not violated. Periodic on-site visits are performed to monitor all independent schools and ensure that the educational object of the aid is realized. In this manner, the government keeps its eye on whether students are actually being helped and thus whether the secular purpose of

92. 120 S. Ct. 2530 (2000) (plurality opinion).

93. See *id.* at 2536 (O'Connor, J., concurring).

94. *Id.* at 2552 n.3.

95. See *id.* at 2563-64.

96. See *id.* at 2565 (rejecting dissent's divertibility rule); *id.* at 2567-68 (requiring proof of actual diversion).

the program is being fulfilled. Additionally, neutrality empowers the ultimate beneficiaries (students and their parents) by enabling them to choose from a plurality of educational providers, including, if they so desire, a faith-based school.

E. Entanglement Analysis Masks What is Properly an Inquiry Concerning Governmental Intrusion into Inherently Religious Matters

The second prong of the Supreme Court's Establishment Clause test requires that the primary effect of a law not be the advancement of religion.⁹⁷ In 1971, the Court's test acquired a third prong—in *Lemon* called "excessive government entanglement"⁹⁸—only to have entanglement analysis absorbed back into the effect prong in 1997.⁹⁹ Although entanglement is once again just a factor to consider as part of the overall "effect" inquiry, the Supreme Court has not said that such analysis is to be abandoned altogether.

Entanglement analysis appears wildly uneven, strictly scrutinized by the Court in some opinions,¹⁰⁰ while in others receiving only cursory review.¹⁰¹ Clearly these cases are not turning on the aggregate number of administrative contacts with religion, or even on the intensity of such contacts. My belief, developed below, is that the Court is instinctively varying its entanglement analysis based on whether the regulatory intrusion is into matters that are inherently religious.

In a modern, complex nation with extensive regulation and massive subsidization of the independent sector, some interaction between government and religion is inevitable, often useful, and sometimes in the interest of both.¹⁰² Even in the absence of

97. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

98. *Id.* at 613.

99. See *Mitchell*, 120 S. Ct. at 2539 (2000) (noting that entanglement analysis is now just a factor under "effects" prong of the test); *id.* at 2559-60 (O'Connor, J., concurring) (same); *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997).

100. See, e.g., *Aguilar v. Felton*, 473 U.S. 402, 409-14 (1985); *Lemon*, 430 U.S. at 614-22.

101. See, e.g., *Agostini*, 521 U.S. at 232-34; *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985).

102. When government appropriates tax monies it has a duty, of course, to reasonably account for how the funds are utilized. Regulatory controls that "trace" funds appropriated

government funding, the state can and does impose reasonable regulation on the educational, health care, and charitable activities of religious organizations.¹⁰³ If regulatory entanglement *qua* entanglement was the real concern of the Supreme Court, there would be entanglement analysis regardless of the presence of government funding any time a religious organization claimed it was the victim of excessive regulation. Instead, entanglement analysis is rarely performed when government regulates but does not fund religious organizations.

The Establishment Clause does indeed place limits on the government's regulatory power, but only when the regulation interferes with inherently religious matters. To refocus the inquiry onto subject matters that are inherently religious makes sense because elsewhere the Court has said that government does not exceed the restraints of the Establishment Clause unless it is acting on, or intruding into, such matters or topics.¹⁰⁴ As previously noted, the Court has found that prayer, devotional Bible reading, veneration of the Ten Commandments, classes in confessional religion, and the biblical creation story taught as science are all inherently religious.¹⁰⁵ Hence, by virtue of the Establishment Clause, these topics are off limits as objects of any legislation, purposeful action by executive branch officials, or judicial oversight.

The cases bear out that the Supreme Court's sensitivity to entanglement is proportional to the examined law's proximity to subject matters that are inherently religious. For example, the Court has deemed the entanglement excessive when the regulation

under neutral educational programs via grants or in-kind services are entirely proper in order that the monies actually benefit students and needy parents as intended. The required accounting should be evenhanded for all service providers, whether religious or secular, so that no class of providers is singled out for greater scrutiny.

103. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). *Pierce* is regarded as a charter of religious liberty, not only of the freedom for faith communities to operate religious schools, but also for the freedom of parents to direct the religious upbringing of their children. See *id.* at 535-36. Nonetheless, before acknowledging these freedoms, the Court in *Pierce* took care to first stake out the government's power to reasonably regulate religious schools and their teachers, as well as acknowledge some governmental interest in minimal curricular standards. See *id.* at 534.

104. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 605, 612-13 (1988) (counseling teenagers to remain chaste is not an inherently religious activity, even when the counseling takes place at religious counseling centers).

105. See *supra* notes 21-25 and accompanying text.

in question intrudes on inherently religious matters.¹⁰⁶ In parallel with the cases in the foregoing note, when upholding legislation that exempts religion from a regulatory burden where the regulation would otherwise interfere with inherently religious matters, the Court has expressly welcomed the exemption as a means of avoiding entanglement.¹⁰⁷

Conversely, when the subject matter being regulated does not touch upon inherently religious matters, the Court has played down the importance of entanglement analysis. For example, the Court has minimized its entanglement analysis when the legislation in question addresses commercial, public health, or similar matters otherwise unrelated to subjects that are inherently religious.¹⁰⁸ In

106. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 709 (1976) (holding courts are without competence to adjudicate essentially doctrinal disputes for, inter alia, avoidance of entanglement); *Espinosa v. Rusk*, 634 F.2d 477, 478 (10th Cir. 1980) (striking down charitable solicitation ordinance that required officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations), *aff'd mem.*, 456 U.S. 951 (1982); cf. *Mueller v. Allen*, 463 U.S. 388, 403 (1983) (holding entanglement not excessive when only governmental task is review of secular instructional materials); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 660-61 (1980) (upholding reimbursement to religious schools of the cost of state-mandated tests because the tests were wholly secular and not part of regular teaching program, hence entanglement not excessive).

107. See, e.g., *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335-36 (1987) (religious exemption from regulatory burden is a permissible legislative means to alleviate significant governmental interference with ability of religious organizations to define and carry out their religious mission); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (property tax exemption for religious organizations has the laudable effect of avoiding entanglement when tax authorities evaluate the worth to the community of faith-based social welfare programs); see also *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981) (construing unclear religious exemption in tax legislation in a manner that broadened the scope of the exemption and thereby avoiding First Amendment issue administrative entanglement); *NLRB v. Catholic Bishop*, 440 U.S. 490, 501-04 (1979) (desiring to avoid significant risk of entanglement, Court employed unusual rule of construction that thereby exempted religious schools from federal regulation).

108. See, e.g., *Bowen*, 487 U.S. at 615-18 (holding that because faith-based social services are not inherently religious, some regulation attendant to administration of program does not amount to excessive entanglement); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985) (stating that regulation of commercial operations of religious organization undertaken for a commercial purpose does not amount to excessive entanglement); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 762-65 (1976) (plurality opinion) (holding that because religious colleges are not pervasively religious, regulatory entanglement attendant to state funding is not excessive); *Hunt v. McNair*, 413 U.S. 734, 745-49 (1973) (same); *Tilton v. Richardson*, 403 U.S. 672, 684-89 (1971) (same).

parallel with the cases in the foregoing note, when upholding ordinary commercial or labor-law legislation that has no exemption for religious organizations or practices, the Court has remarked that the absence of an exemption is commendable because it avoids the regulatory entanglement that administering an exemption would entail.¹⁰⁹

Entanglement analysis has thus been masking what is really a proper scrutiny by civil courts concerning regulatory intrusion into inherently religious matters. The straightforward question for the Court to be asking is whether the regulatory oversight brought about by the legislation in question causes government to intrude into that sphere of activities that the Establishment Clause has consigned to religion and religious organizations. If so, then the Establishment Clause is violated. Calling it “excessive entanglement” adds nothing to proper analysis.

CONCLUSION

The Supreme Court has, by and large, achieved the right results in matters of church/state relations—but not always for the right reasons. Acknowledgment of a few foundational rules could set the case law in this area aright as to rationale as well as result: the Religion Clauses were a “negative” on existing governmental power, not a vesting of new power to restrain religion; it is impossible for the Establishment Clause to conflict with and, hence, override either the Free Speech or Free Exercise Clauses; the Free Exercise Clause protects religious belief and practice, not unbelief; the Free

109. *See, e.g., Hernandez v. Commissioner*, 490 U.S. 680, 696-97 (1989) (rejecting interpretation of statute requiring the government to distinguish between secular and religious benefits as fraught with entanglement); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (noting that uniform application of statute to all religious schools avoids entangling inquiry by IRS officials); *see also Board of Educ. of the Westside Community Schs. v. Mergens*, 496 U.S. 226, 252-53 (1990) (upholding Equal Access Act because, *inter alia*, attempting to exclude religious speech would create greater entanglement problems); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 20-21 (1989) (plurality opinion) (overturning religious exemption is a laudable rule of law because it reduces possible entanglement); *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 272 n.11 (1981) (preventing public university from excluding religious worship or religious speech from designated public fora is a laudable rule of law because it reduces possible entanglement); *Jones v. Wolf*, 443 U.S. 595, 603 (1979) (employing, whenever possible, neutral-principles approach to resolve religious disputes avoids entanglement with religious doctrine, polity, or practice).

Exercise Clause is an individual right, whereas the Establishment Clause is a structural restraint on governmental power; the Religion Clauses not only have their own scope, but operate independently of each other; and the separation of church and state is a separation of government from involvement in matters that are inherently religious. It behooves us to adhere to these simple but foundational rules so as to resist those who would create confusion as a prelude to altering the First Amendment.