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Differentiating the Free Exercise and Establishment Clauses

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The purpose of the Establishment Clause is not to safeguard individual religious rights. That is the role of the Free Exercise Clause, indeed its singular role. The purpose of the Establishment Clause, rather, is as a structural restraint on governmental power. Because of its structural character, the task of the Establishment Clause is to limit government from legislating or otherwise acting on any matter "respecting an establishment of religion."[1] The powers that fall within the scope of the foregoing clause (denied to government, hence within the sole province of religion) and the powers outside this clause (hence, authority vested in civil government) await elaboration below.

Rights and Restraints

The United States Constitution consists of individual rights and institutional structure. People (including organized groups of people) have rights. Governments do not have rights.[2] Rather, governments have powers and duties. The powers of the federal government are enumerated and limited, an original understanding later made explicit in the Tenth Amendment. Federal powers are delegated to one of three branches, shared by specified branches, denied to all three, or shared with the several states. These delegations and denials of power

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1. The Establishment Clause, along with the Free Exercise Clause, reads "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Constitution, amendment I.

2. See, e.g., Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech*, 3rd ed. (Deerfield, Ill.: Clark Boardman Callaghan, 1996), §§ 19: 2 to 19: 4, at pp. 19-2 to 19-8 (stating that although the Free Speech Clause restrains government speech in certain respects, the Clause vests no free speech rights in government).

constitute the institutional structure or architecture of the federal government.

The difference between rights and structure within the overall Constitution is commonplace.[3] For government to avoid violating an individual right is a matter of constitutional duty owed to each person within its jurisdiction. This duty is personal, running in favor of each rights holder. On the other hand, for government to avoid exceeding a structural restraint is a matter of confining legislation and the actions of its officials to the scope of its delegated powers. These restraints are impersonal, running in favor of the entire body politic.[4] Although individual rights can be waived because they are personal, institutional structure cannot.[5] The difference between rights and structure manifests itself in additional but often subtle ways that can prove definitive.[6]

A structural clause, to be sure, often has a laudable effect on individual liberty by compelling various branches of the government (legis-

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3. See, e.g., Daan Braveman, et al., *Constitutional Law: Structure and Rights in Our Federal System*, 3rd ed. (New York: Mathew Bender, 1996), v-vi, 153, 193, 257, 365-66; Gerald Gunther, *Constitutional Law*, 12th ed. (Mineola, N.Y.: Foundation Press, 1991), xxxi to xxxv (devoting chapters 2-6 to governmental structure and chapters 7-15 to individual rights; Laurence H. Tribe, *American Constitutional Law*, 2nd ed. (Mineola, N.Y.: Foundation Press, 1988), §§ 2-1 to 2-4, at pp. 18-22. See ibid. at § 7-1, at 546-48, concerning the limited protection for personal rights in the original body of the Constitution, except indirectly through the structuring of a government with limited, enumerated powers.

4. See, e.g., *Clinton v. City of New York*, 524 U.S. 417 (1998), striking down the federal line item veto act as violative of separation of powers. Justice Kennedy distinguished between rights and structure as he noted how liberty is the end result of both:

> In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used the principles of [structure] to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from [individually] intrusive governmental acts.

Ibid. at 449, 451 (Kennedy, J., concurring).

5. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) at 702-03 (contrasting personal jurisdiction as an "individual liberty" that can be waived with structural restraints, such as limits on subject matter jurisdiction, that are a "restriction on . . . power . . . as a matter of sovereignty" and thus cannot be waived); *Clinton v. City of New York*, 524 U.S. 417, (1998) at 449, 451 (Kennedy, J., concurring) (explaining that structural clauses cannot be voluntarily surrendered, yielded up, or abdicated by Congress).

6. See, e.g., *Dennis v. Higgins*, 498 U.S. 439 (1991) (holding that the Dormant Commerce Clause is a rights-securing clause rather than a power-limiting clause of the Constitution, thus actionable under 42 U.S.C. § 1983 providing for redress of rights deprivation); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) at 107-08 (holding that the Supremacy Clause is not a rights-securing clause but a power-allocating clause requiring that federal law prevail when there is a conflict with a law based on state power, thus not actionable under 42 U.S.C. § 1983 providing for redress of rights deprivation); ibid. at 116 (Kennedy, J., dissenting) (distinguishing a constitutional right from "those interests merely resulting from the allocation of power" between governmental entities).

lative, executive, and judicial) to stay within their authority.[7] Nevertheless, the immediate object of constitutional structure is the management of power: a dividing, dispersing, and balancing of the various prerogatives of sovereignty. "Separation of powers" and "federalism" are mere shorthand for familiar forms of constitutional structure running horizontally and vertically, respectively, within the three-branch federal government and the multilayered system of national, state, and local governments. Structural clauses are helpfully thought of as power conferring and power limiting, so long as it is understood that many such clauses serve both functions.[8]

A "Negative" on the Government's Power

The Bill of Rights did not confer new powers on Congress.[9] The fears of the Anti-federalists, who were prominent in the First Congress,

7. *Printz v. United States*, 521 U.S. 898 (1997) at 921-22 (explaining how individual liberty flows consequentially from the Constitution's structure); *United States v. Lopez*, 514 U.S. 549 (1995) at 552 (explaining how structure has the object of preventing the accumulation of excessive power in any single government or branch thereof, and the successful achievement of that diffusion of power consequentially ensures the protection of liberty).

8. The Commerce Clause, for example, both confers power on Congress (*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (upholding federally issued coasting license in the face of a state-granted steamboat monopoly)), and the Clause sets limits on that power (*United States v. Lopez*, 514 U.S. 549 (1995) (striking down federal law criminalizing mere possession of firearms near a school)). A structural clause can have this dual function because, as expressed in the Tenth Amendment, powers not delegated to the federal government are reserved to the states or to the people.

9. In a speech before the House introducing his draft of the proposed amendments, James Madison described their purpose as follows: "the great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode." *Annals of Congress* 1, ed. Joseph Gales (Washington, D.C.: Gales & Seaton, 1789), 454. In *The Legal Tender Cases*, 79 U.S. 457 (1870), the Supreme Court observed:

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

Ibid., 535. The Preamble in its entirety is reproduced at *5 The Founders' Constitution*, eds. Philip B. Kurland and Ralph Lerner (Norman, Okla.: Univ. of Oklahoma Press, 1987), 40-41. See also *United States v. Balsys*, 118 S. Ct. 2218, 2223-24 (1998) (stating that the received understanding of the Bill of Rights is that it was instituted to restrict the powers of the national government); Edward Dumbauld, *The Bill of Rights And What It Means Today*, (Chicago, Ill.: Univ. of Chicago Press, 1957), 105; Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York: MacMillan Pub. Co., 1986), 84; Leonard W. Levy, "The Establishment Clause," in *How Does the Constitution Protect Religious*

drove them to just the opposite objective: to deny ("negative") power to interfere with liberties that might otherwise be implied from the more open-ended delegations in the original Constitution.[10] The Federalists gave little resistance to this enterprise because their position all along had been that the new central government had never been delegated such powers.[11] Indeed, James Madison, a Federalist and principal drafter of the Constitution proper, led the cause for a Bill of Rights. So Congress settled on the exact text of the proposed articles of amendment in late September 1789 with relative ease.[12] Twelve articles were submitted to the states, but only ten were ratified.[13] The ratified amendments were thought to change little, but they did calm the fears of citizens while serving as a useful hedge against possible future en-

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Freedom?, eds. Robert A. Goldwin and Art Kaufman (Washington, D.C.: American Enterprise Institute, 1987), 69, 83, 89-90.

10. See *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (observing that a principal source of opposition to adoption of the original Constitution was the fear that national powers might be exercised in a manner impairing liberty, thus leading to a proposed Bill of Rights limiting the powers of the national government).

11. Leonard W. Levy, "The Bill of Rights," in *Constitutional Opinions: Aspects of the Bill of Rights*, ed. Leonard W. Levy (New York: Oxford University Press, 1986), 105, 119-24; Robert Allen Rutland, *James Madison: The Founding Father* (New York: Macmillan, 1987), 59-69. Professor Rutland indicates that James Madison had trouble drawing his fellow Federalists' attention to a Bill of Rights, for they thought other tasks more pressing such as revenue bills and the judiciary act. Professor Levy is of the opinion that Madison and other Federalists worked to pass a Bill of Rights, which they thought was unnecessary, to defeat attempts by Anti-federalists to call a second constitutional convention. The absence of a Bill of Rights was the primary cause of popular discontent with the new Constitution, thus its passage all but doomed attempts to have a second convention.

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

> 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.
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> . . . 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* (New York: Oxford University Press, 1986), 193-94 (footnotes omitted).

13. Twelve articles of amendment were submitted to the states for ratification. The third of these articles contained the free exercise and no-establishment language. Only the third through the twelfth articles received the necessary approval by the states, thus the third article was denominated the "First Amendment." See generally, Levy, note 9, at 85-89 (discussing ratification debates in the states). The two failed articles of amendment, the first and second, concerned matters of structure. After languishing more than two centuries, interest revived in one of the "failed" articles of amendment and it was eventually ratified by the states in 1992 and is now denominated the Twenty-Seventh Amendment.

croachments. Moreover, the Bill of Rights as a "negative" on congressional power was not altered when the Fourteenth Amendment was ratified in 1868.[14] Nor was this "negative" on power turned into a grant of new power by the Supreme Court's incorporation of selected provisions of the Bill of Rights through the Fourteenth Amendment's Due Process Clause.[15]

A Structuralist Establishment Clause

In the hands of the U.S. Supreme Court the Establishment Clause has not been regarded as a personal right, one that protects against coercion of religiously informed conscience. Even in archetypal no-establishment cases such as those concerning religion in public schools, for example *Engel v. Vitale*[16] and *McCollum v. Board of Education,*[17] the Court applied the Establishment Clause not to relieve individual students of religious coercion or harm, but to keep two centers of authority—government and religion—in their proper relationship.[18] This

14. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress does not have the power under § 5 of the Fourteenth Amendment to enforce rights beyond those that the Supreme Court has said are: (1) protected by one of the clauses in § 1 of the Fourteenth Amendment, or (2) found elsewhere and incorporated through the Due Process Clause).

15. 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. The essential point stated in the text still holds: *Everson's* incorporation of the Establishment Clause did not vest new power in government to "make . . . law" invading that sphere of competence reserved solely to religion.

16. *Engle v. Vitale*, 370 U.S. 421 (1962). In *Engel*, the Supreme Court considered a state program of daily classroom prayer in the government schools. Students not wanting to participate were excused without penalty. Ibid. at 423, n.2. The program was struck down despite the absence of evidence that religion was being imposed on unwilling students. Ibid. at 430-31.

17. *McCollum v. Board of Education*, 333 U.S. 203 (1948). In *McCollum*, 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. Ibid. at 207, n.2. The program was struck down despite the absence of evidence that religion was being imposed on unwilling students. Ibid. at 232-33 (Jackson, J., concurring).

18. As the Supreme Court wrote in *McCollum*, "[T]he First Amendment rests on the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." Ibid. at 212. In reference to the Establishment Clause, the Court in *Engel* said that its "first and most immediate purpose

is why in popular discourse it is said that the Establishment Clause is about "church-state relations" or the "separation of church and state." It is in this structuralist role—when invoked to keep civil government in the right relationship with religion—that the Establishment Clause broke with older European patterns[19] and made its most unique

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rested on the belief that a union of government and religion tends to destroy government and to degrade religion." 370 U.S. at 431.

Some will be dismayed at the thought that the Establishment Clause does not have the immediate object of protecting individual religious rights. But consider *Lee v. Weisman*, 505 U.S. 577 (1992) (prayer at public school commencement ceremonies), and *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (public display of a nativity scene). Professor McConnell criticized the Court for these decisions because, "[T]hey have nothing to do with freedom of religion. There is not a single person in these cases who has been hindered or discouraged by government action from following a religious practice or way of life." See Michael McConnell, "Freedom from Religion?," *American Enterprise* (January/February 1993): 34, 36. Professor McConnell is surely correct in observing that no one in *Weisman* or *Allegheny* had their personal religious rights violated. But he wrongly assumes that a violation of an individual's religious freedom is requisite to a violation of the Establishment Clause. The Clause, as applied by the Supreme Court, is about something altogether different: limiting governmental power so as to keep in appropriate relationship religion and government. Thus, to understand *Weisman* and *Allegheny*, the cases must be viewed as structural determinations by the Court that government exceeded its power by involving itself in matters, such as prayer and religious symbolism, beyond its authority.

19. In the stream of Western civilization a structuralist Establishment Clause is the happy ending to a painful progression. In the early Middle Ages state and church, while organizationally distinct from one another, were part of a single whole. Man's moral vision derived from one source, and the state was legitimated by religious sanction. This unity of political polity and church membership was shattered by the Reformation of the sixteenth century. The resulting arrangement became state, established church, and religious dissenters. The latter were often persecuted, in large measure because the presence of dissenters within the political polity were thought to destabilize the state. Religious wars ensued in a failed attempt to restore the earlier unity. General exhaustion and abhorrence with the violence wrought by these wars, as well as the emerging influence of the Enlightenment, caused matters to evolve in the direction of limited state, established church, and toleration of dissenters. Initially a matter of pragmatism and prudence, toleration was later viewed as a natural right. See Roland H. Bainton, *The Reformation of the Sixteenth Century* (Boston, Mass.: Beacon Press, 1952), 142-44, 211-43; John Neville Figgis, *Political Thought from Gerson to Grotius, 1414-1625* (Cambridge: University Press, 1907), 128-32, 207-10. Such was the arrangement brought to all the British colonies in America (in variations both strong and weak) except for Rhode Island. The final turn, uniquely American, occurred state-by-state during the period of disestablishment, roughly the 1780s to 1830s. The American settlement was a limited state, free churches, and voluntarism in matters of religion and the exercise thereof. Thus, matters of ecclesiastical cognizance were deregulated, no longer subject to the state's jurisdiction. The state, however, was not understood as conferring on the churches their freedom. Rather, the law presupposed and thus was simply acknowledging the autonomy of churches concerning affairs within the spiritual realm. This settlement was not, of course, one of state indifference to religion. Although foreswearing any claim to coercive power, the engagement of churches in public affairs by way of persuasion and influence continued to be expected and welcomed.

and celebrated contribution to the American constitutional settlement.[20]

The Establishment Clause can be a means of redress for individual harms, but only when the injury is other than religious in nature, such as economic harm or loss of property,[21] constraints on academic inquiry by teachers and students,[22] or restraints on free-thinking atheists.[23] Even in these situations, however, the no-establishment

20. Historian Sanford Cobb has observed that America's solution to the "world-old problem of Church and State" was "so unique, so far-reaching, and so markedly diverse from European principles as to constitute the most striking contribution of America to the science of government." Sanford Cobb, *The Rise of Religious Liberty in America* (1902, reprint, New York: Cooper Square Publishers, 1968), vii. Republican government, being self-government or popular sovereignty, was believed to require a virtuous and self-disciplined people. Because survival of the state depended on civic virtue, government may properly assume a role in promoting that virtue. However, notwithstanding that religion plays a vital role in training the people in virtuous living, the American constitutional settlement was to deny to the national government a role in promoting religion. Religion was no longer to be a tool of statecraft. Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103 (1990): 1410, 1442-43. Rather, religion was left to individual choice and voluntarism. Only in this manner, the American innovation had it, could religion remain uncorrupted by government's interference, as well as a government undivided by sectarian ambitions to wield civil power. Dr. Os Guinness, in his sociological critique of America and her faiths, put the matter succinctly:

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

Os Guinness, *The American Hour: A Time of Reckoning and the Once and Future Role of Faith* (New York: Free Press, 1993), 18-19. See also ibid., 250, "The present state of intellectual division in modern pluralistic societies does not permit agreement at the level of the *origin* of beliefs (where justifications of behavior are theoretical, ultimate, and irreconcilable), but a significant, though limited, agreement is still possible at the level of the *outworking* of beliefs (where the expression of beliefs in behavior is more practical, less ultimate and often overlapping with the practical beliefs and behavior of other people).

21. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (upholding claim of department store against labor law); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (upholding claim of tavern seeking issuance of a liquor license); cf. *McGowan v. Maryland*, 366 U.S. 420, 430-31 (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); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (same).

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

23. *Torcaso v. Watkins*, 367 U.S. 488 (1961). In *Torcaso*, an atheist who otherwise qualified for a public office refused to take a required oath that professed belief in God. The Court held the oath requirement violative of the First Amendment without specifying either religion clause. If an individual objects to the oath out of a religious belief that forbids

principle is not transformed into an individual-rights clause with the assigned task of protecting, respectively, property, academic freedom, and freedom from religion. Rather, these injuries are remedied only consequentially to the operation of the Establishment Clause as it fulfills its structuralist role.[24] In such a paradigm the no-establishment principle orders, even in the absence of individual harm, the respective competencies of government and religion. Legal historian Mark DeWolfe Howe concludes:

> The First Amendment . . . would impose a disability upon the national government to adopt laws with respect to establishments whether or not their consequence would be to infringe individual rights of conscience.
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> To find this . . . purpose in the First Amendment involves, necessarily I think, the admission that the Amendment is something more than a charter of individual liberties.[25]

From time to time religious claimants have sought to enlist the Establishment Clause into serving as a rights-protecting clause, but the Supreme Court has rarely followed that course. In *Larson v. Valente,*[26] the Court did apply the no-establishment principle to entertain a claim involving discrimination among religious groups and thus to redressed

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taking oaths, then he has a valid claim under the Free Exercise Clause. As an atheist, however, the claimant in *Torcaso* did not (indeed, by definition could not) suffer a religious injury as he professed to have no religious beliefs. Nevertheless, for a state to mandate taking of the oath would be a violation of the Establishment Clause as to all office seekers, including atheists, because confession of belief in a deity is a subject that remains in the realm of religion.

Atheists and agnostics are sensibly protected as well by the Free Speech Clause, for the rights implicated are freedom to believe and freedom to refrain from speaking. Mark DeWolfe Howe, *The Garden and the Wilderness* (Chicago: Chicago University Press, 1965), 156-57. In *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952), the Court found violative of free speech rights a law permitting censorship of films found to be "sacrilegious." The Court could have reached the same result under the Free Exercise Clause if the film producer sought to convey a religious belief, either about his own faith or a theological criticism of the faith of others. However, the Court also could have struck down the censorship 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.

24. The structuralist role in the three cases of *Thornton, Edwards,* and *Torcaso* (*see* notes 21-23), is to restrain government from preferring particular religious practices over secular concerns in the spheres of, respectively, commerce, science, and qualifications for government office. Preferences of this sort, if allowed to multiply without bound, can lead to a convergence of political factions and religious denominational loyalties. Such a convergence is bad for peace within the body politic, for in extreme instances such sectarian strife can breakout into violence and destabilize the state.

25. Mark DeWolfe Howe, "The Constitutional Question," in *Religion and the Free Society* (New York: The Fund for the Republic, 1958), 49, 51. See also ibid. at 55.

26. *Larson v. Valente,* 456 U.S. 228 (1982).

allegations of religious harm.[27] But this was highly unusual[28] and probably wrongheaded, for *Larson* could just as easily—and more sensibly—have been grounded in the Free Exercise Clause.[29] Unlike the Establishment Clause, the Free Exercise Clause protects against personal religious harm and thus safeguards individual religious rights.

To illustrate, if there had never been an Establishment Clause in the Bill of Rights, a *Larson*-type claimant still could have secured relief from official persecution by filing suit under the Free Exercise Clause. But numerous other claimants, such as the department store in *Estate of Thornton v. Caldor, Inc.*, the tavern in *Larkin v. Grendel's Den, Inc.*, and the public school teacher desirous of expanding the science curriculum in *Epperson v. Arkansas*, could not have pled successfully a free exercise claim because they suffered no religious harm.[30] These claimants, absent an Establishment Clause, would not have been able to state a claim upon which relief could be granted.

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27. In *Larson*, state charitable solicitation legislation distinguished between religious groups which received over half their revenues from their membership and those that did not. The law thereby favored long-founded churches over new religious movements. The Court held that for government to intentionally discriminate on the basis of religious affiliation is a violation of the Establishment Clause. Ibid. at 244-56. The Court assumed the complainant was a church subscribing to a bona fide religion. Ibid. at 244, n.16.

28. The only other Supreme Court case utilizing the Establishment Clause as a source of redress for personal religious injury is *Gillette v. United States*, 401 U.S. 437 (1971). In *Gillette*, the Court held that exemptions from the military draft for those religiously opposed to all war but not for those willing to fight in a "just war" was not intentionally discriminatory on the basis of religious affiliation and thus did not violate the Establishment Clause. Ibid. at 450-54. Hence, *Gillette* acknowledged no-establishment as a source of redress for religious harm caused by religious discrimination but then went on to hold that this particular claim was without merit. *Larson* is thus the only Supreme Court case where personal religious injury was redressed pursuant to the Establishment Clause.

29. It is more sensible to conceptualize a government's intentional discrimination between two religious groups as injurious to the disfavored religion. If that had been done in *Larson*, the Court could have decided the case under the Free Exercise Clause. In order to resolve *Larson* under the Establishment Clause, as the Court did, one has to envision the government's discrimination as unconstitutional not because it hindered the disfavored religion, but because the discrimination brought about a preference for competing religions. This framing of the claimant's injury is conceptually awkward. Official discrimination against a religion does have the potential of helping other religions, but then again it may turn out to be of no benefit to the competition. It would be better for the Court to focus on the harm to the victimized religion rather than to speculate about benefits to competing religions. The Court did proceed in the more logical fashion suggested here in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), holding ordinances that ostensibly regulated the killing of animals but whose real object was to inhibit the practices of a particular church, were violative of the Free Exercise Clause.

30. See notes 21-24.

Differentiating the Free Exercise and Establishment Clauses

The literature is often uneven when using the terms "religious freedom," "religious liberty," and "religious rights."[31] This essay equates all three, and the terms are used in the sense of an individual constitutional right that protects against personal religious burdens or injuries. Such a right is secured by the Free Exercise Clause.[32] Moreover, the redressing of a personal harm to an individual's religious belief or practice is the Free Exercise Clause's only function.[33] This makes sense

31. As used in this essay "individual" or "personal rights" includes the "group rights" of a church or other religious entity where the entity has organizational standing to assert a rights claim on behalf of its collective membership pursuant to the three-part test set out in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) at 343. See Erwin Chemerinsky, *Federal Jurisdiction*, 2nd ed. (Boston, Mass.: Little, Brown, 1994), § 2.3, at pp. 103-04. The common feature of individual rights and group rights is that in both instances there is no violation of a constitutional right in the absence of a showing of personal "injury in fact." The violation of a structural clause need not be so attended.

The term "group" is used in the sense of a collection of individuals with a common cause. When a group (association, institution, organization, society) is imbued with certain formalities, the government recognizes it as a jural entity. There are no Free Exercise Clause rights for a religious group over and above the aggregated individual rights of the entity's membership. However, the Establishment Clause with its role as a limit on governmental power, does afford religious groups institutional autonomy when acting on matters inherent to religion. See notes 48-52.

Some may be initially dismayed that the Free Exercise Clause does not protect religious organizations (beyond the aggregated rights of their members) in preserving the group's autonomy and religious character in the face of governmental intrusion. But, again, as will be seen below, religious organizations have such safeguards, but the safeguards are secured by the Establishment Clause. The well-meaning project to force such safeguards into the scope of the Free Exercise Clause under the banner of "accommodationism" has caused all manner of doctrinal confusion.

32. 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. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). However, a law's unintended discriminatory effect adverse to a religious belief or practice is not, without more, a free exercise violation. *Oregon Employment Division v. Smith*, 494 U.S. 872 (1990).

A persistent minority of the justices on the Supreme Court indicate that they would go further and recognize Free Exercise Clause protection for disparate effects on religion. Compare *City of Boerne v. Flores*, 521 U.S. 507 (1997) at 544-65 (O'Connor, J., dissenting) (*Smith* should be reconsidered), with ibid. at 537-44 (Scalia, J., concurring) (defending *Smith* decision); see also *Lukumi*, 508 U.S. at 570-71 (Souter, J., concurring) (*Smith* should be reconsidered). There is no need in this essay to take sides in the debate over whether *Smith* was correctly decided. Whatever the proper scope of the Free Exercise Clause, the one certainty is that the injury it redresses is in the nature of personal religious harm and nothing more.

33. *Harris v. McRae*, 448 U.S. 297 (1980) at 320 (denying standing to bring free exercise claim in absence of alleged religious compulsion); *Tilton v. Richardson*, 403 U.S. 672 (1971) at 689 (rejecting free exercise claim because there was no evidence of impact on claimants' religious belief or practice); *Central Bd. of Education v. Allen*, 392 U.S. 236 (1968) at 249

because the clause is, by its terms, about "prohibiting the free exercise [of religion]" rather than the exercise of nonbelief. As Professor John Garvey notes:

> [Any other] conclusion is hard to square with the language of the first amendment, which 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).[34]

The Free Exercise Clause says nothing about other injuries such as protecting against encumbrances on the use of one's property (*Thornton*) or removing hindrances to academic inquiry (*Epperson*). Nor does the clause prohibit the forced taking of religious oaths by freethinking atheists (*Torcaso*). The latter is true because to suffer a personal religious harm an individual must first profess a religion. It follows that the Free Exercise Clause is not an all-purpose conscience clause.[35] It protects religiously informed belief and practice, nothing more. People can incur injuries other than religious harms, as in economic harm, loss of academic freedom, or compulsion to profess a religious belief when they are agnostic or atheistic. These are individual

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(holding that free exercise claim is without merit in absence of religious burden); *Abington School District v. Schempp*, 374 U.S. 203 (1963) at 221, 223 (holding that in a free exercise claim it is necessary to show governmental coercion on the practice of religion); ibid. at 224. ("[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 (1962) at 431 (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 (1961) at 429 (denying standing to plead free exercise claim when alleged damages were economic rather than religious).

Some may object because this reading of the religion clauses leaves too little work for the Free Exercise Clause. I have two responses. First, the work of preventing intentional discrimination on the basis of religion is important work indeed. Second, if the reader still believes there is too little scope for this venerable clause, then that is the undoing of the Supreme Court in the controversial *Smith* decision.

34. See John H. Garvey, "An Anti-Liberal Argument for Religious Freedom," *Journal of Contemporary Legal Issues* 7 (1996): 275.

35. See *Frazee v. Illinois Department of Empl. Security*, 489 U.S. 829 (1989) at 833 (noting that only beliefs rooted in religion are protected by the Free Exercise Clause; secular views will not suffice); *Thomas v. Review Board*, 450 U.S. 707 (1981) at 713-14 (noting that only beliefs rooted in religion are protected by the Free Exercise Clause); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) at 215-16 (identifying claims that are "personal and philosophical" and those "merely a matter of personal preference" as "not ris[ing] to the demands of the Religion Clauses"). See *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 silento*, by later majorities in *Frazee*, *Thomas*, and *Yoder*.

harms, to be sure, but not religious harms.[36] Religious harms are left to be remedied, if at all, as a by-product of the Establishment Clause keeping aright the spheres of government and religion.

This is not to say that the Establishment Clause has nothing to do with religious liberty writ large, a matter taken up later in this essay. Structural clauses, as noted previously, do indirectly bear on the protection of individual rights, including religious rights. By delimiting and qualifying governmental sovereignty, structure often redounds to further secure personal rights. Conversely, although rights clauses have as their immediate purpose the protection of individual freedom, they have a consequential impact on governmental power. But this happy symmetry between structure and rights is no reason to conflate them.[37] The object of a structural clause is to set compensating checks on the powers of a modern nation-state, checks that must be honored whether or not individual complainants suffer concrete "injury in fact."[38] Because the Establishment Clause is a structural clause rather

36. When the religious harm is to speech of religious content or to religious viewpoint, it has long been the practice of the Court to protect the free exercise of religion under the Free Speech and Free Press Clauses. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981) (striking down restrictions on student religious groups wanting to meet in state university buildings designated as limited public fora as violating of the Free Speech Clause); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (overturning ordinance prohibiting distribution of literature of any kind as abridging right of Jehovah's Witnesses to freedom of the press); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (holding that compulsory flag salute at public school denies freedom of speech and freedom of belief as applied to Jehovah's Witnesses). By subsuming where possible protection from religious harm under the Free Speech and Free Press clauses, the Court has given religious rights a broader and hence more secure base.

The Free Speech and Free Press Clauses are unable, of course, to protect religious activity that has no appreciable expressional content. Concerning such activity, the Free Exercise Clause alone must be looked to as the source of constitutional protection from personal religious injury. Justice White, dissenting in *Welsh v. United States*, 398 U.S. 333 (1970) (plurality opinion), stated the matter well:

> 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.

Ibid. at 372.

37. See Akhil Reed Amar, "The Bill of Rights as a Constitution," *Yale Law Journal* 100 (1991): 1131. Professor Amar argues that constitutional rights also impose an organizational structure on government. Ibid. at 1132-33. The point in this essay, however, is that the structuring of government that comes from the enforcement of a rights clause is not the immediate object of the clause but derivative of it. Conversely, the protection of individual rights that comes from the enforcement of a structural clause is not the immediate object of the clause but derivative of it. Hence, the immediate object of enforcement of the Establishment Clause is not religious freedom, but religious freedom is derivative of it.

38. This is why federal taxpayers, without any showing of personal "injury in fact," are sometimes granted special standing to pursue Establishment Clause claims challenging

than a rights clause, it is vital that it be understood as such and be so applied.

THE CLAUSES-IN-CONFLICT FALLACY

In the hands of the Supreme Court, then, the task of the Establishment Clause is independent of the Free Exercise Clause's protection of individual religious rights. Neither clause is subordinate or instrumental to the other.[39] Nor is there "tension" between the clauses, as if they sometimes pulled in opposite directions leaving it to the courts to "balance" one against the other and thereby having to choose between them. The clauses-in-conflict contention makes no sense.[40] It is neither consistent with the First Amendment's text (neither clause

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spending programs. See *Bowen v. Kendrick*, 487 U.S. 589 (1988) (granting taxpayer standing); *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982) (denying taxpayer standing); *Flast v. Cohen*, 392 U.S. 83 (1968) (granting taxpayer standing); *Doremus v. Board of Education*, 342 U.S. 429 (1952) (denying taxpayer standing).

39. Grammatically there is but one First Amendment clause (with two prepositional phrases) that explicitly concerns religion. The existence of a single Clause has been turned into an argument that one religion clause has but one purpose, and that purpose is the protection of individual religious freedom. Thus, it is argued, the no-establishment of religion is but a means to serve the free exercise of religion. The consequence, should the argument prevail, is that the rule of no-establishment becomes a tool in aid of free exercise. See Richard John Neuhaus, "Proposing Democracy Anew—Part One," *First Things* 96 (1999): 87, 90; Richard John Neuhaus, "The Most New Thing in the Novus Ordo Seculorum," *First Things* 85 (1998): 75-78; and Richard John Neuhaus, "Establishment Is Not The Issue," *The Religion and Society Report* (June 1987): 4; [hereinafter "Neuhaus, *Not The Issue*"].

The claim that no-establishment does not operate separate and independent of free exercise leads not only to confusion, but—as implied in the text—has dire consequences for the law. The argument's adoption would lead not just to conflation of an individual right with a structural restraint, but to destruction of the structuralist meaning of no-establishment. Notwithstanding the grammatical correction, the single religion clause consists of two prepositional phrases. Historically each prepositional phrase carried its own operative meaning, for both the Senate and House in the First Congress debated and amended the text of the first Clause of the First Amendment as having two independent phrases. See Walter Berns, "Religion and the Founding Principle," in *The Moral Foundations of the American Republic*, 3rd ed. (Charlottesville, Va.: University Press of Virginia, 1986), 204, 206-10 (making the point that freedom of conscience as embodied in the Free Exercise Clause was not opposed by anyone, but the ideas embodied in the Establishment Clause divided Congress over the role, if any, government had in fostering religion and, if there was a role, whether that role was entirely at the state level).

40. 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.

states it has primacy over the other)[41] nor are such conflicts inherent to the religion clauses and thereby logically unavoidable.[42] Conflict is not possible, for each clause in its own way was a "negative" on powers that might have been implied from the original Constitution. Two "negatives" cannot conflict. The religious rights of individuals and the ordering of relations between government and religion—while complementary, not contradictory—are altogether different enterprises.

A Restraint On Government and Government Alone

Proper relations between religion and government (or "church and state") are codified in the text "make no law respecting an establishment of religion." This limitation casts the Establishment Clause in the role of boundary keeper. In setting out to locate that boundary, it is a useful reminder that the "keeper's" task is to restrain government, not private individuals, not churches, and not religion. Thus the role of the no-establishment principle is not to protect people from other people. Nor is it to protect minority religions from majority religions. Nor is it to protect the nonreligious from the religious. Nor is it to protect the government from the churches. The Establishment Clause's sole object is to limit government, including, of course, to restrain government when it improperly allies with religion. Richard John Neuhaus writes:

> The religion clause of the First Amendment is entirely a check upon government, not a check upon religion. Even if a particular religion were to agitate successfully to have itself officially established, it is the government that would have to do the establishing. And that is what the government is forbidden to do. As wrongheaded as it would be, religions are perfectly free to agitate to have themselves established, for that too is part of religious freedom. What is prohibited by the First Amendment is the [use] of government power in giving in to such agitations. . . . 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 "bal-

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Kathleen M. Sullivan and Gerald Gunther, *First Amendment Law* (New York: Foundation Press, 1999), 459.

41. See *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982) at 484. ("We know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit [plaintiffs] to invoke the judicial power of the United States.")

42. Some academics still think that the "tension" between the Free Exercise and Establishment Clauses is inherent and irreconcilable. See, e.g., Suzanna Sherry, "*Lee v. Weisman*: Paradox Redux," *Supreme Court Review* (1992): 123, 123-25, 129-30. However, when a claimed "freedom from religion" is removed from the religion clauses as a constitutionally protected right, the supposed "tension" falls away. Such a move does not leave a claimed "freedom from religion" without constitutional protection. It does mean, however, that to the extent that the First Amendment does protect a "freedom from religion," it does so as a by-product of the structural restraint on governmental power found in the Establishment Clause.

anced" 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."[43]

Secular modernists are prone to assume that religious ideologies are more intolerant and violent than secular ideologies. Thus they assume that the Establishment Clause is there to protect them from the excesses of religion. But the Clause can protect them only from the excesses of government.

Locating the Boundary between Religion and Government

During America's founding period, the Establishment Clause deregulated matters concerning religious belief and practice. Commenting on the Founders' attitudes, Historian Jack Rakove writes:

[James] Madison and [Thomas] Jefferson were not mere tolerationists; they countenanced a constitutional solution to the religion question, renouncing the authority of the state to regulate the one aspect of behavior that had most disrupted the peace of society since the Reformation. For at the heart of their support for disestablishment and free exercise lay the radical conviction that nearly the entire sphere of religious practice could be safely deregulated, placed beyond the cognizance of the state, and thus defused as both a source of political strife and a danger to individual rights.[44]

What still remains in play is not so much the task of maintaining a double-sided "wall of separation," as it is answering the question of where the boundary between government and religion lies and, hence, what individuals and religious groups may do on the sacerdotal side of this boundary free from government's interference with—as well as freedom from government's misplaced attempts to boost—religion. The task thereby resolves itself down to a question of jurisdiction. As Professor Max L. Stackhouse aptly concludes:

[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, not 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,

43. Neuhaus, "Establishment is Not The Issue," 3.

44. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1997), 311-12.

this means that at least one association may be brought into being in society that has a sovereignty beyond the control of government.[45]

When government acts in excess of the Establishment Clause, religion may be helped or hindered. But any such act, whether it ends up helping or hindering religion, is a transgression of the clause.

Identification of the precise subject matters that fall within the meaning of the restraint on "making . . . law respecting an establishment of religion" necessarily entails substantive choices. The boundary has been disputed for over two thousand years,[46] so it would be naive to suppose that there is an easy formula for determining "what is Caesar's and what is God's." From the perspective of an elder statesman after a full life of public service, James Madison said, "I must admit moreover that it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collision & doubts on unessential points."[47]

On the other hand, the difficulty should not be exaggerated. The differences are often, as Madison said, on "unessential points." In the vast number of cases, a ready reference to the historic Western tradition as received on this side of the Atlantic and later altered here will yield a ready solution. It is the hard cases, of course, that get most of the attention (e.g., aid to K-12 religious schools), thereby leaving the impression that the overall task of boundary keeping is hopelessly conflicted. But the very fact that Americans are endlessly struggling over the location of the boundary actually confirms one of the central points of this essay—namely, nearly everyone presumes that there are two spheres of competency and, hence, a sphere of religious autonomy where the state has no juridical cognizance.

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45. Max L. Stackhouse, "Religion, Rights, and the Constitution," in *An Unsettled Arena: Religion and the Bill of Rights*, eds. Ronald C. White, Jr. & Albright G. Zimmerman (Grand Rapids, Mich.: Wm. B. Eerdmans, 1990), 92, 111.

46. Professor Duesenberg has observed:

> Civil church law is in essence a study of the relationship between competing powers. . . . The word competition is chosen to denote the active interplay between church government and civil government which flows from the indecision existing within and between them as to the proper scope of their respective domains. There is not now nor has there ever been in the two thousand year history of the Christian church common agreement over where to draw the line.

Richard W. Duesenberg, "Jurisdiction Of Civil Courts Over Religious Issues," *Ohio State Law Journal* 20 (1959): 508.

47. Letter from James Madison to the Reverend Adams (1832), in *The Writings of James Madison*, ed. Gaillard Hunt (New York: G.P. Putnam's Sons, 1910), IX: 484, 487. See also *McCollum v. Board of Education*, 333 U.S. 203 (1948) at 237-38 (Jackson, J., concurring) ("The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. . . . It is idle to pretend that this task is one from which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education.")

The Supreme Court has not left the lower courts, legislators, and litigants without guidance on the all-important question of boundary keeping. The cases indicate that government does not exceed the restraints of the Establishment Clause unless it is acting on topics that are inherently religious. The Supreme Court has found that prayer,[48] devotional Bible reading,[49] veneration of the Ten Commandments,[50] classes in confessional religion,[51] and the biblical story of creation taught as science[52] are all inherently (or "exclusively") religious. Hence, by virtue of the Establishment Clause, these topics are off limits as objects of legislation or any other purposeful action by civil officials. Likewise, when government is called on to resolve doctrinal questions, or related matters bearing on ecclesiastical polity, clerical office, or church discipline and membership, these subject matters are outside the cognizance of government.[53] Finally, the Court has acknowledged as beyond the competence of government those issues involving the religious meaning of religious words, practices, and events,[54] as well as questions concern-

48. *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

49. *Abington School District v. Schempp*, 374 U.S. 203 (1963).

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

51. *McCollum v. Board of Education*, 333 U.S. 203 (1948).

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

53. Concerning matters that touch on doctrine, 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 without subject matter jurisdiction. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) at 708-24 (stating that civil courts may not probe into church polity); *Maryland & Va. Churches of God v. Church at Sharpsburg*, 396 U.S. 367 (1970) at 368 (per curiam) (urging the avoidance of doctrinal disputes); *Presbyterian Church v. Hull Mem'l Church*, 393 U.S. 440 (1969) at 451 (holding that civil courts are forbidden to interpret and weigh church doctrine); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960) at 191 (per curiam) (holding that the First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) at 119 (holding that the First Amendment prevents legislature from interfering in ecclesiastical governance of Russian Orthodox Church); *Watson v. Jones*, 80 U.S. (15 Wall.) 679 (1872) at 725-33 (rejecting implied trust rule because of its departure-from-doctrine inquiry). Cases dismissing for lack of subject matter jurisdiction do not reference Article III of the Constitution, for there is nothing in Article III that limits federal court jurisdiction concerning these matters. Rather, the cases reference the First Amendment and the necessity to keep a proper separation of church and state.

54. *See Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995) at 844-45 (cautioning state university to avoid distinguishing between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) at 336 (recognizing a problem when government attempts to divine which ecclesiastical appointments are sufficiently related to the "core" of a religious organization to merit exemption from statutory duties); ibid. at 344-45 (Brennan, J., concurring) (same); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) at 604, n.30 (avoiding potentially entangling inquiry by courts into religious practice is desirable); *Widmar v. Vincent*, 454

ing the centrality of a particular belief or practice to a given religion.[55]

Closely related to these case-by-case designations of what is inherently religious and what is "arguably non-religious,"[56] is the rule that

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U.S. 263 (1981) at 269-70 n.6, 272 n.11 (holding that inquiries into significance of religious words or events are to be avoided); *Walz v. Tax Commission*, 397 U.S. 664 (1970) at 674 (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 (1940) at 305-07 (stating that petty officials are not to be given discretion to determine what is a legitimate "religion" for purposes of issuing a permit); see also *Espinosa v. Rusk*, 456 U.S. 951 (1982) (aff'd mem.) (striking down charitable solicitation ordinance that required officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations); *United States v. Christian Echoes Ministry*, 404 U.S. 561 (1972) at 564-65 (per curiam) (holding that IRS could not appeal directly to Supreme Court the ruling of a federal district court to the effect that the IRS's redetermination of § 501(c)(3) exempt status was done in a manner violative of rights of an admittedly religious organization; district court had prevented IRS from examining all of religious organization's activities and characterizing them as either "religious" or "political" and, if political, then "non-religious").

55. *Oregon Employment Division v. Smith*, 494 U.S. 872 (1990) at 886-87 ("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 Association*, 485 U.S. 439 (1988) at 449-51, 457-58 (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 (1982) at 257 (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"). The rule stated in the text was recently reaffirmed in *City of Boerne v. Flores*, 521 U.S. 507 (1997) at 513, as explaining, *inter alia*, the decision in *Smith*. The compelling-interest test, abandoned in *Smith*, was thought to require a judge to weigh the importance of a religious practice against a state's interest in applying a neutral law without any exceptions.

The Supreme Court has similarly held that legislative classifications based on denominational affiliation are not permitted. See *Kiryas Joel Board of Education v. Grumet*, 512 U.S. 687 (1994) at 702-08; *Gillette v. United States*, 401 U.S. 437 (1971) at 448-51; see *Larson v. Valente*, 456 U.S. 228 (1982) at 246 n.23 (distinguishing and explaining *Gillette*). The Court wants to avoid making church membership of legal significance for two reasons. First, membership, as well as denial of or removal from membership, are inherently religious decisions. Second, if this was not the rule of law, then merely holding religious membership could result in a civic advantage. For example, if Congress were to confer conscientious objector draft status "on all Quakers," that may induce conversions (real or *pseudo*) to Quakerism. On the other hand, the government purposefully may utilize classifications based on a person's religious belief or practice—as distinct from denominational affiliation—to lift civil burdens from those individuals. For example, Congress may confer conscientious objector draft status "on religious pacifists who oppose war in any form." *See Gillette*, 401 U.S. at 448-60; *Grumet*, 512 U.S. at 715-16 (O'Connor, J., concurring in part and concurring in the judgment). This is consistent with the rule that government can either treat all alike, not concerning itself with unintended effects, or government can purposefully lift civic burdens from individuals based on their religious practices. What is impermissible is to lift such burdens based on an individual's denominational or religious affiliation.

56. As one commentator put it, albeit in the context of discussing a different but related problem, some topics of legislation can be described as "arguably religious" for free exercise purposes but "arguably non-religious" for no-establishment purposes. See Tribe, *American*

the Establishment Clause is not violated when a governmental restriction (or social welfare program) merely reflects a moral judgment, shared by some religions, about conduct thought harmful (or beneficial) to society.[57] Accordingly, overlap between a law's purpose and the moral teachings of a variety of well-known religions does not, without more, render the law one "respecting an establishment of religion." Sunday-closing laws,[58] teenage sexual abstinence counseling,[59] the availability of abortion,[60] and interracial dating,[61] and civil marriage[62] are subject matters that the Court has deemed not inherently religious.[63] Hence, so far as the Establishment Clause is concerned, these are appropriate topics for legislation or other action by government. Wrestling with the issue of how to sort out moral-based legislation, permitted by the Establishment Clause, from legislation on an inherently religious matter, which is not permitted, Clifford R. Goldstein writes:

> [T]o believe not only that moral absolutes exist, but that we can know what those absolutes are, isn't synonymous with the assumption that government should enforce them . . . . Yet an open society's stance that any truth, or even The Truth, shouldn't oppress opposing "truth" or even untruth doesn't mean that it should act as if there is no truth. Law, implicitly or explicitly, implies morality, which reflects various concepts of "truth." . . . But can this be done without breaching the wall of separation? That all depends, of course, on how high and impregnable that wall is. A wall that separates church and state is fine; one that separates morality from law isn't. When, in the name of separation, a school protects a child from govern-

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Constitutional Law, 1st ed., § 14-6, at 828-33 (arguing that subject matters "arguably non-religious" are not prohibited by the Establishment Clause as topics of legislation).

57. *Bowen v. Kendrick*, 487 U.S. 589 (1988) at 604 n.8, 613 (counseling of teenagers concerning sexuality is not inherently religious); *Bob Jones University v. United States*, 461 U.S. at 604 n.30 (1983) (tax regulation prohibiting racial discrimination in education is not inherently religious); *Harris v. McRae*, 448 U.S. 297 (1980) at 319-20 (a restriction on abortion not inherently religious); *McGowan v. Maryland*, 366 U.S. 420 (1961) at 431-49 (Sunday-closing law is not inherently religious); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) at 592-98 (same); *Gallagher v. Crown Kosher Super Mkt.*, 366 U.S. 617 (1961) at 624-30 (same); *Hennington v. Georgia*, 163 U.S. 299 (1896) at 306-07 (prohibition on Sunday operation of trains is not inherently religious).

58. *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday-closing legislation as a mere labor law); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (same).

59. *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding federal funding program for centers counseling teenagers concerning sexuality, including faith-based centers).

60. *Harris v. McRae*, 448 U.S. 297 (1980) (upholding a federal restriction on the funding of elective abortions).

61. *Bob Jones University v. United States*, 461 U.S. at 604 n.30 (1983) (disapproving of a university's rule against interracial dating).

62. *Reynolds v. United States*, 98 U.S. 145 (1879) at 162-67 (upholding antipolygamy law regulating the civil law of marriage).

63. See *Bowers v. Hardwick*, 478 U.S. 186 (1986). Although not referencing the Establishment Clause, it is implicit in *Bowers* that the Court did not consider the regulation of intimate sexual relations inherently religious.

ment-sponsored religious exercises, it's defending the [wall] . . . . [O]n the other hand, when, in the name of separation, a school teaches condom use instead of abstinence, it's violating principles of that same moral universe.[64]

The constitutionality of legislation exempting religion from regulatory burdens and taxation[65] also make sense from the perspective of a structuralist Establishment Clause, for these exemptions enhance and reinforce the desired separation of church and state.

The Supreme Court has successfully avoided two mistakes when drawing the boundary between government and religion. First, the Court has not identified churches and other religious organizations (e.g., educational, charitable, and mission societies) and then assumed that religion is actually confined to those institutions. Churches and their affiliated ministries do not monopolize religion. Religiously grounded convictions and obligations show their influence in every area of life, not merely in church affairs. Hence, Establishment Clause violations can occur notwithstanding the complete absence of involvement by churches, mission societies, religious schools, and the like.[66]

Second, the Supreme Court has not set out to separate government from all that could be said to be religious. Rather, the separation is of government from matters inherently religious. A separation of government from all that is religion or religious would result in a secular public square, one hostile to the public face of religion. The Founders intended no such regime. Historian Mark A. Noll writes:

[T]he founders' desire for the separation of the institutions of church and state reflected a desire to respect not only religion but also the moral choice of citizens. It was not a provision to remove religion as such from public life. In the context of the times it was more a device for purifying the religious impact on politics than removing it.

. . .

The authors of the [Constitution] seemed to be saying that religion and politics occupied two different "spheres." This was not secular in the modern sense. . . . [T]here was every expectation that Christian principles would continue to play a large role in strengthening the population and even in providing a moral context

64. Clifford R. Goldstein, "Getting Reality Right," *Liberty* 92 (May/June 1997): 30-31.

65. See, e.g., *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding religious exemption in an employment nondiscrimination law); *Walz v. Tax Commission*, 397 U.S. 664 (1970) (upholding property tax exemption for houses of worship). The aberrational case is *Jimmy Swaggart Ministries v. California Board of Equalization*, 493 U.S. 378 (1990) at 392-97, holding that the Establishment Clause is not violated by a state sales tax on the sale of religious material assessed against an evangelistic ministry.

66. See, e.g., *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (striking down state labor law that guaranteed private sector employees right not to work on Sabbath); *Stone v. Graham*, 449 U.S. 297 (1980) (per curiam) (disallowing posting of Ten Commandments in public school classrooms for veneration); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down state law prohibiting the teaching of evolution in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (disallowing state program of classroom prayer in public school).

for legislation. Yet the Constitution, without ever spelling it out precisely, nonetheless still acknowledges that the functions of government in society have a different role than the functions of religion. Both are important, and important to each other. But they are different.[67]

There are extreme voices claiming for the Establishment Clause the ordaining of a new secular order,[68] one that would thereby cabin religion in the "private" spaces of home and chapel.[69] Still others lament that the Court has promulgated a right to a freedom *from* religion.[70] But the cases will not bear either of these readings.

Various justices of the Supreme Court, in short but helpful statements, have sought to encapsulate a definition of the boundary between government and the inherently religious. Justice William Brennan wrote that the common thread in the Court's analysis of whether legislation transgresses the Establishment Clause restraint "is whether the statutes involve government in the 'essentially religious activities' of religious institutions."[71] Just a few years earlier, Justice John M. Harlan said "that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State so significantly and directly in the realm of the sectarian,"[72] then the constitutional restraint is not exceeded. As a final example, Justice Fe-

67. Mark A. Noll, *One Nation Under God? Christian Faith and Political Action in America* (San Francisco, Calif.: Harper & Row, 1988), 67-69.

68. See Suzanna Sherry, "Enlightening the Religion Clauses," *Journal Contemp. Legal Issues* 7 (1996): 473, 483-89 (arguing that secular rationalism is constitutionally preferred over religion); Kathleen M. Sullivan, "Religion and Liberal Democracy," *University of Chicago Law Review* 59 (1992): 195, 197-214, 222 (contending that the First Amendment's negative bar against an establishment of religion implies an affirmative establishment of a secular public order). The multicentury tradition of American politics being rooted in contrasting theological persuasions is so well documented as to make silly revisionists' claims that the Establishment Clause rendered religion of persuasive force only in the "privacy" of home and church. See, e.g., James L. Guth, et al., *The Bully Pulpit: The Politics of Protestant Clergy* (Lawrence, Kans.: Univ. Press of Kansas, 1997).

69. "[There are those] devoted to promoting secularism as a kind of antireligion for everyone. Such individuals or organizations—for example, the aptly named Freedom from Religion Foundation—are as militant in their convictions and as sure of their truth as religious fundamentalists. But for more skeptical secularists, pragmatic adjustment to reality in one's environment in an atmosphere of tolerance is what makes sense. . . ." Robert Booth Fowler, "A Skeptical Postmodern Defense of Multiestablishment: The Case for Government Aid to Religious Schools in a Multicultural Age," in *Everson Revisited: Religion, Education, and Law at the Crossroads*, eds. Jo Renée Formicola & Hubert Morken (Lanham, Md.: Rowman & Littlefield, 1997), 167, 171.

70. See McConnell, "Freedom from Religion," 36.

71. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) at 658 (Brennan, J., concurring).

72. *Central Board of Education v. Allen*, 392 U.S. 236 (1968) at 249 (Harlan, J., concurring) (internal quotation omitted).

lix Frankfurter sketched the no-establishment boundary in structuralist terms with these words:

> The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country.[73]

Each of these formulations will do, for they point to the same basic distinction between subject matters that are inherently religious and subjects that—while arguably religious—are grounded in the morals, traditions, or cultural values of the political community and hence explained in those terms. This approach, of course, unapologetically draws upon the historic Western tradition as received in the American colonies and later altered during the period of state-by-state disestablishment, roughly the 1780s to the 1830s.

"Inherently religious," then, means those exclusively religious activities of worship and the propagation or inculcation of the sort of tenets that comprise confessional statements or creeds common to many religions. The term includes, as well, the supernatural claims emanating from churches, mosques, synagogues, temples, and other centers of worship, using those words not to identify buildings, but to describe the faith community around which a religion identifies and defines itself, conducts its collective worship, divines and teaches doctrine, and propagates the faith to children and adult converts. A structuralist Establishment Clause places these matters—being in the exclusive province of religion—beyond the government's jurisdiction.

Conclusion

This essay does not claim that the United States Supreme Court has resolved all of the problems in defining the boundary between religion and government by relegating the Establishment Clause restraint to

73. *McGowan v. Maryland*, 366 U.S. 420 (1961) at 465-66 (Frankfurter, J., concurring in the judgment). See also ibid. at 465 (Frankfurter, J., concurring) ("The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation."); *Abington School District v. Schempp*, 374 U.S. 203 (1963) at 306 (Goldberg, J., concurring) (Observing that "the Court would recognize the propriety . . . of the teaching *about* religion, as distinguished from the teaching *of* religion, in the public schools."); Douglas Laycock, "The Benefits of the Establishment Clause," *DePaul Law Review* 42 (1992): 373, 381 ("What the Establishment Clause separates from government is theology, worship, and ritual, the aspects of religion that relate only to things outside the jurisdiction of government. Questions of morality, of right conduct, of proper treatment of our fellow humans, are questions to which both church and state have historically spoken.")

governmental acts on matters inherently religious. There will always be boundary disputes because the task of determining what is "inherently religious" generates tension between the Western tradition and the deeply held beliefs (religious and secular) of others. It suffices here to candidly acknowledge that a structuralist Establishment Clause is not substantively neutral.[74] Indeed, substantive neutrality is impossible because every theory of government-religion relations necessarily takes a position on the nature and value of organized religion and on the purpose and direction of the modern nation-state.

The first line of defense for the Supreme Court's position is that the Constitution's church-state boundary is the disestablishment settlement of the early nationhood period. As such, it is not to be tampered with under the guise of needed updating of "our living Constitution." In the end, however, if the Court's government-religion boundary is to have staying power it has to be defended not because it is originalist or noncontroversial, but because it is good. Indeed, it is a three-fold good: it maximizes individual religious choice, protects the integrity of religion and religious organizations, and minimizes government-induced religious factionalism within the body politic.[75] In a representa-

74. The structuralist settlement is a formal legal rule, but it is not substantively neutral. If it is objective law-making that is desired, the best a legal system can do is to pick a formal legal rule and then rigorously and dispassionately apply it without regard to the winners and losers in any fact-specific case that should later come before a judge. Such formal rules provide clarity and reduce judicial subjectivity. But the initial choice of a particular formal rule, necessarily rejecting competing rules, is a value-laden judgment that is in no sense substantively neutral. At bottom all claims of neutrality are a mask. See Garvey, "An Anti-Liberal Argument," 290-91 (liberalism is not neutral, but makes "assumptions about human nature (the unencumbered self, the value of authenticity) that are inconsistent with convictions that many religious people hold"); Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (New York: Oxford University Press, 1995), 68 ("A different religion or a secular viewpoint will support different background beliefs that logically generate different views or theories of religious freedom.").

75. The Supreme Court's most complete explication of the twin purposes underlying the Establishment Clause is found in *Engel v. Vitale*, 370 U.S. 421, 431-33 (1962) (stating the purposes as protection of religion from the corrupting hand of government and protection of government from being destroyed by sectarian strife). See also Ira C. Lupu, "To Control Faction and Protect Liberty: A General Theory of the Religion Clauses," *Journal of Contemporary Legal Issues* 7 (1996): 357. In a representative democracy there will always be factionalism along political lines. This is to be expected. But it is not desirable when religious denominations and political factionalism become one and the same. To the extent that government actions cause political factionalism and religious denominations (or similar creedal differences) to converge, such actions are of heightened concern to the Establishment Clause. This concern for avoidance of sectarian strife within the body politic was articulated in *McGowan v. Maryland*, 366 U.S. 420 (1961) at 430, in that "the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority."

By denying governmental jurisdiction over inherently religious matters, the Establishment Clause has the object of protecting religious liberty writ large, i.e., the twin purposes

tive democracy, there will always be factionalism along political lines. It is not desirable, however, when religious denominations and political factions become one and the same. To the extent that governmental actions cause political factions and religious differences to converge, such actions are of heightened concern to the Establishment Clause. Thus, the Supreme Court, in *Engel v. Vitale*, made clear that the twin purposes of the Establishment Clause are to protect religion from the corrupting hand of government and to protect the government from being torn apart by sectarian strife.[76]

Under the constitutional settlement, the Establishment Clause is not a silver bullet for winning (or ending) the culture wars.[77] Although the government-religion boundary—policed by the no-establishment principle—keeps government from taking sides on confessional and other inherently religious matters, moral and ethical questions have always been proper objects of legislation. Whose morality will dominate the Republic at any point in time, and hence will be reflected in the positive law of the nation, is not predetermined by the Establishment Clause. That determination is left for the making based on who has the more persuasive argument in the marketplace of ideas, as well as the organizational acumen to promote it.

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of the Establishment Clause. Thus, the no-establishment principle is not an individual right from governmental intrusion, but a polity-wide liberty (the blessings of which favor the entire body politic) to a government that may not intermeddle in inherently religious matters. This fundamental difference between the individual freedom that derives from a constitutional right and the polity-wide liberty that derives from constitutional structure was noted by Justice Kennedy in the recent line item veto case:

> So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary. . . .
>
> In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts. The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions.

Clinton v. City of New York, 524 U.S. 417 (1998) at 449, 451 (Kennedy, J., concurring).

76. *Engel v. Vitale*, 370 U. S. 421 (1962), 431-33. This concern for the avoidance of sectarian strife within the body politic was articulated in *McGowan v. Maryland* 366 U. S. 420 (1961), 430, in that "the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of political authority."

77. Douglas Laycock, "Religious Liberty as Liberty," *Journal of Contemporary Legal Issues* 7 (1996): 313, 327.