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THE AMERICAN SYSTEM OF  
CHURCH-STATE  
RELATIONS

(AND ITS BEARING ON CHURCH AUTONOMY)

CARL H. ESBECK

*Abstract*

*THE OPENING CLAUSE OF THE FIRST AMENDMENT TO THE U.S. CONSTITUTION PROVIDES, "CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF". THE FREE EXERCISE CLAUSE FUNCTIONS AS AN INDIVIDUAL RIGHT WITH ITS PURPOSE BEING TO FORESTALL PERSONAL RELIGIOUS HARM. ITS UNDERLYING PRINCIPLE IS THAT IN RELIGIOUS MATTERS A PERSON OUGHT TO BE FREE OF COERCION CAUSED BY THE GOVERNMENT AND THEREBY NOT MADE TO SUFFER FOR CAUSE OF CONSCIENCE. THE FUNCTION OF THE ESTABLISHMENT CLAUSE IS ALTOGETHER DIFFERENT, FOR ITS PURPOSE IS TO RESTRAIN GOVERNMENT FROM USING ITS POWERS TO ACT ON MATTERS PROPERLY IN THE REALM OF RELIGION. THE RESULTING DIVISION BETWEEN CHURCH AND STATE IMPLIEDLY ACKNOWLEDGES THAT THE STATE IS LIMITED IN ITS POWERS AND THAT THE CHURCHES RETAIN SUFFICIENT BREATHING SPACE TO PERFORM THEIR WORK IN SOCIETY. THE PRINCIPLE UNDERLYING THIS AUTONOMY OF THE CHURCHES IS VOLUNTARISM, WITH IT CONSEQUENCE THAT INHERENTLY RELIGIOUS MATTERS ARE UNDER THE AUSPICES OF THE CHURCHES AND NOT THE STATE. THIS PROPER ORDERING OF THE RESPECTIVE COMPETENCIES OF STATE AND CHURCH IS BEST FOR THE BODY POLITIC BECAUSE IT AVOIDS INCREASING FACTIONALISM ALONG RELIGIOUS LINES WHILE REINFORCING THE*

*IDEA OF LIMITED GOVERNMENT, AND IT IS BEST FOR THE CHURCHES BECAUSE IT AVOIDS CORRUPTING RELIGION.*

I. INTRODUCTION

The American system of church-state relations presupposes that there are two realms in civil society, the *sacerdotum* and the *regnum*.<sup>1</sup> Each is distinct from and independent of the other. Each is its own center of authority, not one derived from or existing at the sufferance of the other. This division of powers is embodied in the opening phrase of the First Amendment<sup>2</sup> to the U.S. Constitution and is enforceable by the judiciary to, inter alia, protect churches from government when the latter exceeds its limited powers.<sup>3</sup>

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 government. Because of its structuralist character, the task of the Establishment Clause is to “negative” any governmental assertion of power to legislate or otherwise act on matters that concern “an establishment of religion”. The logical implication of this structural limit on the power of the state is the Constitution’s recognition of the unique place of religious organizations<sup>4</sup> and, hence, the protection of “church autonomy” with its locus in the Establishment Clause.

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<sup>1</sup> I do not mean to imply that these two realms, church and state, comprise the totality of civil society. There are many important societal building blocks, such as families and commercial enterprises, that occupy the same territory.

<sup>2</sup> The Establishment Clause, along with the Free Exercise Clause, reads as follows, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. Const. amend. I.

<sup>3</sup> Although the Establishment Clause initially restrained only the sovereign power of the federal government (*Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 589 (1845)), the Clause is now binding on state and local governments as well by force of the Due Process Clause of the Fourteenth Amendment (*Everson v. Board of Educ.*, 330 U.S. 1 (1947)).

<sup>4</sup> *Max L. Stackhouse* notes just how remarkable it is that a government should go beyond the granting of protection to individual religious rights and to intentionally limit its sovereignty by acknowledging a co-equal authority, one outside the state’s power when it comes to religious matters:

[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

## II. RIGHTS AND STRUCTURE

The United States Constitution consists of rights and structure. People (including organized groups of people) have rights. Governments do not have rights. Rather, governments have powers and duties. The powers of the federal government are expressly enumerated and limited. These federal powers are either delegated to one of three branches (executive, legislative, or judicial), shared by specified branches, or denied to all three. These delegations and denials of power constitute the structure or architecture of the federal government.

The difference between rights and structure within the overall Constitution is commonplace.<sup>5</sup> 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 individual 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.<sup>6</sup> Although individual rights can be waived because they are personal, structure cannot.<sup>7</sup>

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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, 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).

<sup>5</sup> See, e.g., *Daan Braveman et al.*, *Constitutional Law: Structure and Rights in Our Federal System* v-vi, 153, 193, 257, 365-66 (3d ed. 1996); *Gerald Gunther*, *Constitutional Law* xxxi to xxxv (12th ed. 1991) (devoting chapters 2-6 to governmental structure and chapters 7-15 to individual rights); *Laurence H. Tribe*, *American Constitutional Law* §§ 2-1 to 2-4, at pp. 18-22 (2d ed. 1988). See *id.* at § 7-1, at pp. 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.

<sup>6</sup> See, e.g., *Clinton v. City of New York*, 118 S. Ct. 2091 (1998), striking down the federal line item veto act as violative of separation of powers. Justice Kennedy distinguishes between rights and structure when he notes how liberty is the end result of both:

A structural clause, to be sure, often has a laudable effect on individual freedom by compelling various branches of the government to stay within their authority.<sup>8</sup> 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.

### III. A STRUCTURALIST ESTABLISHMENT CLAUSE

In the hands of the U.S. Supreme Court the Establishment Clause has not been regarded as an individual right, but as a structural restraint. Even in archetypal no-establishment cases such as those concerning religion in public schools, for example *Engel v. Vitale*<sup>9</sup> and *McCullum v. Board of Education*,<sup>10</sup> the Court has applied the Establishment Clause not to relieve

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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.

*Id.* at 2109 (Kennedy, J., concurring).

<sup>7</sup> *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982) (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*, 118 S. Ct. 2091, 2109 (1998) (Kennedy, J., concurring) (observing that structural clauses cannot be voluntarily surrendered, yielded up, or abdicated by Congress).

<sup>8</sup> *Printz v. United States*, 521 U.S. 898, 921-22 (1997) (explaining how individual liberty flows consequentially from the Constitution’s structure); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (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 division of power consequentially ensures the protection of liberty).

<sup>9</sup> 370 U.S. 421 (1962). In *Engel*, the Supreme Court considered a state program of daily classroom prayer in the public schools. Students not wanting to participate were excused without penalty. *Id.* at 423 n.2. The program was struck down despite the absence of religion being imposed by law. *Id.* at 430-31.

<sup>10</sup> 333 U.S. 203 (1948). In *McCullum*, the Supreme Court considered a program that

students of religious coercion or religious harm, but to keep in proper relationship two centers of authority: government and religion.<sup>11</sup> This 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 the civil government in the right relationship with religion – that the Establishment Clause broke with older European patterns<sup>12</sup> and made its most unique and celebrated contribution to

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permitted persons from the community to come onto the public school campus and conduct elective classes in religion. Student enrollment was optional and required parental permission. *Id.* at 207 n.2. The program was struck down despite the absence of religion being imposed by law. *Id.* at 232-33 (Jackson, J., concurring).

<sup>11</sup> As the Supreme Court wrote in *McCullum*, “[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”. *Id.* at 212. In reference to the Establishment Clause, the Court in *Engel* said that its “first and most immediate purpose 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 object of protecting individual religious rights. But consider *Lee v. Weisman*, 505 U.S. 577 (1992), and *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989). In *Weisman*, the Court found violative of the Establishment Clause prayer offered at public school commencement ceremonies. Attendance was voluntary as was participation in the prayer. Complainants claimed no violation of their religiously informed conscience or other religious burden on their own religious belief or practice. In *Allegheny*, the Court found a display on public property of a Christmas nativity scene depicting the miraculous birth of Jesus Christ as violative of the Establishment Clause. Viewing the display was, of course, a voluntary act. Once again the complainants claimed no coercion of conscience or other individual burden on their own religious practices as a result of the display. 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”. *Michael McConnell, Freedom From Religion?*, *The American Enterprise* 34, 36 (Jan/Feb 1993). 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 (prayer, religious symbolism) beyond its authority.

<sup>12</sup> In the stream of Western civilization, a structuralist Establishment Clause is the happy ending to a painful but natural progression. In the early Middle Ages state and

the American constitutional settlement.<sup>13</sup> The resulting American system was a limited state, free churches, and voluntarism in inherently religious matters and the exercise of conscience. Thus, matters of confessional or sacerdotal cognizance were deregulated,<sup>14</sup> and unlike Mother Europe, in America religion was no longer subject to the government's cognizance. The state was not understood as conferring on the churches this new-found freedom. Rather, the law presupposed and thus acknowledged the ontology

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church, while organizationally distinct from one another, were part of a single whole. Man's moral vision derived from one source, and in turn the state was legitimated by religious sanction. This unity of political polity and religion was shattered by the Reformation. 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 influence of the new Enlightenment, evolved matters 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 *John Neville Figgis, Political Thought From Gerson To Grotius, 1414-1625*, at pp. 128-32, 207-10 (Harper Torchbook ed. 1960). Such was the arrangement brought to all the British colonies in America (in both strong and weak variations) except for Rhode Island. The final turn, uniquely American, occurred state-by-state during the period of disestablishment, roughly from the 1780s to the 1830s.

<sup>13</sup> Historian *Stanford 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". *Stanford Cobb, The Rise of Religious Liberty in America* vii (1902). Another keen observer of America's founding, after reporting that all the venerated governing principles incorporated into the American Constitution, such as separation of powers and bicameralism, were ideas borrowed from others, noted the specialness of the Establishment Clause, "[W]e invented nothing, except disestablishment". Garry Willis, *Under God: Religion and American Politics* 383 (1990).

<sup>14</sup> *Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution* (1996):

Madison and 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.

*Id.* at 311-12.

of churches and their juridical autonomy concerning affairs within the realm of the spiritual.

This settlement was not, of course, one born of governmental indifference to religion. Although the churches foreswore any claim to coercive power, their active engagement in public affairs by way of example and teaching continued to be expected and welcomed.<sup>15</sup> Republican government, being one of popular sovereignty, was widely held to require a virtuous and self-disciplined people. Because survival of the state depended on civic virtue, government had an interest in and could properly assume a role in promoting that virtue. However, notwithstanding that religion played a vital role in training the people in virtuous living, the American constitutional settlement denied to the government a role in promoting religion. Accordingly, despite the state having a high stake (indeed, its own preservation) in the churches continuing to instill good habits in the people, religion was not to be a tool of statecraft.<sup>16</sup> Rather, religion was left to individual choice and voluntarism. This was a sharp break from the European model. Only through voluntarism, the American solution had it, could religion remain free of corruption by government's heavy involvement with it,<sup>17</sup> as well as the body politic kept free of the factionalism that is caused by sectarian ambition to wield civil power.

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<sup>15</sup> Churches would continue to influence the morality of the people, and the people in their role as citizens would shape the state. Thus, from the ground up, so to speak, it was contemplated that churches would continued to influence the state and they did so.

<sup>16</sup> *Michael W. McConnell*, *The Origins And Historical Understanding Of Free Exercise Of Religion*, 103 Harv. L. Rev. 1410, 1442-43 (1990).

<sup>17</sup> *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* 18-19 (1993). See also *id.* at 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].").

#### IV. DIFFERENTIATING THE FREE EXERCISE AND ESTABLISHMENT CLAUSES

It is important that the respective functions of the Free Exercise and Establishment Clauses not be confused. The literature is uneven when using the terms “religious freedom”, “religious liberty”, and “religious rights”.<sup>18</sup> This essay equates all three, and the terms are used in the sense of an individual constitutional right that protects against personal religious harms or burdens. Such a right is secured by the Free Exercise Clause.<sup>19</sup> Moreover,

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<sup>18</sup> 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, 343 (1977). See *Erwin Chemerinsky*, *Federal Jurisdiction* § 2.3, at pp. 103-04 (2d ed. 1994). 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 in its role as a limit on governmental power does afford religious groups institutional autonomy when acting on matters inherent to the sphere of religion. See *infra* notes 41-44 and accompanying text.

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 they 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.

<sup>19</sup> 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 Empl. Div. 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, 544-65 (1997) (O’Connor, J., dissenting) (Smith should be reconsidered), with *id.* at 537-44 (Scalia, J., concurring) (defending Smith decision); see also *Lukumi*, 508 U.S. at 570-71

the redressing of personal harm to an individual's religious belief or practice is the Free Exercise Clause's only function.<sup>20</sup> This makes sense because the Clause is, by its terms, about prohibiting the free exercise of religion rather than of unbelief.<sup>21</sup> It follows that the Free Exercise Clause is not an all-

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(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 injury it redresses is in the nature of personal religious harm and nothing more. However, some critics of Smith, seemingly reeling from their loss, are forgetting that a structuralist Establishment Clause affords considerable autonomy to religion and religious organizations.

<sup>20</sup> 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); Central Bd. of Educ. v. Allen, 392 U.S. 236, 249 (1968) (holding that free exercise claim is without merit in absence of religious burden); Abington Sch. Dist. 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 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 prohibiting intentional discrimination on the basis of religion is important work indeed. Second, if the reader believes stopping intentional discrimination is still too little scope for this venerable clause, then that is not my doing but the doing of the Supreme Court in its controversial Smith decision. See *supra* note 19.

<sup>21</sup> See *John H. Garvey, An Anti-Liberal Argument for Religious Freedom*, 7 J. of Contemp. Legal Issues 275 (1996), addressing the contention that the Free Exercise Clause protects unbelief as well as religious belief:

This 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.)

*Id.* at 276. It might be argued that liberty in religious matters cannot end with freedom to embrace and practice one's faith, for liberty also includes freedom to reject and refuse to practice the faith of others. And that would indeed be so if the clause read “Congress shall make no law . . . prohibiting religious freedom”. But that is not the text. Rather, the text reaches out to individuals who have a religion, assuring their exercise thereof. Professor Garvey is right: an individual must first have a religious faith to exercise before its exercise can be unconstitutionally

purpose conscience clause.<sup>22</sup> It protects religiously informed belief and practice, nothing more.<sup>23</sup> People can incur injuries other than religious

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prohibited. I personally would prefer a broader text, but must work with the text as given. And that more narrow Free Exercise Clause explains why the Supreme Court decides cases devoid of individual religious harm, such as *McCollum*, *McGowan*, *Engel*, *Schempp*, and *Thornton*, under the Establishment Clause.

<sup>22</sup> See *Frazee v. Illinois Dep't of Empl. Security*, 489 U.S. 829, 833 (1989) (noting that only beliefs rooted in religion are protected by the Free Exercise Clause; secular views will not suffice); *Thomas v. Review Bd.*, 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 “personal and philosophical” 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 those claiming draft deferment to hold beliefs based on traditional religious views). *Welsh* cannot stand against the principle set forth in the text. First, *Welsh* involved the definition of religion for purposes of legislation rather than for the First Amendment. Second, because there was no majority opinion, *Welsh* is binding only on the narrow issue decided. Third, the *Welsh* plurality was later rejected, sub silentio, by majorities in *Frazee*, *Thomas*, and *Yoder*.

<sup>23</sup> When the religious harm is to speech of religious content or to religious associations, it has long been the practice of the Supreme 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 Va. State Bd. of Educ. 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 constitutional protection for speech and press from content-based and viewpoint-based discrimination by governmental officials is well settled in the courts and widely accepted at the popular level.

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

harms, such as economic harm or loss of property,<sup>24</sup> inhibitions on academic inquiry by teachers and students,<sup>25</sup> or constraints on free-thinking atheists.<sup>26</sup> These are serious harms, to be sure, but not religious harms. They are left to be remedied as a by-product of the Establishment Clause's separating of government and religion.<sup>27</sup> In such a paradigm the no-establishment

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conduct as well as religious belief and speech. *Id.* at 372.

<sup>24</sup> See *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).

<sup>25</sup> See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down a state law that required teaching of creation in public school science classes if evolution is taught); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down a state prohibition on teaching evolution in public school science classes).

<sup>26</sup> See *Torcaso v. Watkins*, 367 U.S. 488 (1961). In *Torcaso*, an atheist who otherwise qualified for a public office refused to take a required oath that professed belief in God. The Court held the oath requirement violative of the First Amendment without specifying either religion clause. If an individual objects to the oath out of a religious belief that forbids taking oaths, then he has a valid claim under the Free Exercise Clause. As an atheist, however, the claimant in *Torcaso* did not (indeed, by definition could not) suffer a religious injury as he professed to have no religious beliefs. Nevertheless, for a state to mandate taking of the oath would be a violation of the Establishment Clause as to all office seekers, including atheists, because confession of belief in a deity is a subject that remains in the realm of religion.

Atheists and agnostics are sensibly protected as well by the Free Speech Clause, for the rights implicated are freedom to believe and freedom to refrain from speaking. *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 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.

<sup>27</sup> The structuralist role in the three cases of *Thornton*, *Edwards*, and *Torcaso* (see *supra* notes 24-26), 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

principle orders, even in the absence of individual harm,<sup>28</sup> the respective competencies of government and religion.<sup>29</sup>

Structural clauses do indirectly bear on the protection of individual rights, including religious rights. By delimiting and qualifying governmental sovereignty, structure often redounds to further secure individual rights. Conversely, although rights clauses have as their immediate purpose the protection of personal freedom, they have a consequential impact on governmental power. But this happy symmetry between structure and rights is no reason to conflate the two. The object of a structural clause is to set compensating checks on the powers of a modern nation-state, checks that must be honored by the state whether or not individual complainants suffer

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politic, which in extreme instances of sectarian strife can destabilize the state. See *infra* note 87.

<sup>28</sup> Legal historian *Mark DeWolfe Howe* states the matter this way:

The First Amendment . . . interpreted [through Jefferson and Madison] would serve two purposes. . . . In the second place, it 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.

To find this second purpose in the First Amendment involves, necessarily I think, the admission that the Amendment is something more than a charter of individual liberties.

*Mark DeWolfe Howe*, *The Constitutional Question, in Religion and the Free Society* 49, 51 (1958). See also *id.* at 55.

<sup>29</sup> In *Larson v. Valente*, 456 U.S. 228, 244-56 (1982), the Court did apply the no-establishment principle to entertain a claim involving discrimination among religious groups and thus redressed allegations of religious harm. But this is the only Supreme Court case to do so. Moreover, Larson's reliance on the Establishment Clause was probably wrongheaded. 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 effected a preference for competing religions. This framing of the claimants' 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, violative of the Free Exercise Clause.

concrete “injury in fact”.<sup>30</sup> Because the Establishment Clause is a structural clause rather than a rights clause, it is vital that it be understood as such and so applied.

In the hands of the Supreme Court, then, the task of the Establishment Clause is separate and independent of the Free Exercise Clause’s protection of individual religious rights. Neither clause is subordinate or instrumental to the other. The religious rights of individuals and the ordering of relations between government and religion – while complementary, not contradictory – are altogether different enterprises.<sup>31</sup>

## V. LOCATING THE BOUNDARY BETWEEN RELIGION AND GOVERNMENT

Matters concerning religious belief and practice having been deregulated, what remains in question is not so much the existence of a “wall of separation”<sup>32</sup> as it is locating where the boundary between government and

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<sup>30</sup> This is why federal taxpayers, without any showing of personal “injury in fact”, are granted special standing to pursue Establishment Clause claims challenging congressional spending programs. See *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982); *Flast v. Cohen*, 392 U.S. 83 (1968). That the Supreme Court devised special standing rules just for Establishment Clause cases is proof that the Court views the Clause as structuralist. See *Carl H. Esbeck*, *The Establishment Clause as a Structural Restraint On Governmental Power*, 84 *Iowa L. Rev.* 1, 32-39 (1999).

Additional proof of the structuralist nature of the Establishment Clause is that such a paradigm explains why there are two definitions of religion, one for the Free Exercise Clause and another for the Establishment Clause (*id.* at 6-9), why courts often – with reference to the Establishment Clause – dispose of cases for lack of subject matter jurisdiction stating that the dispute is to be adjudicated by the church (*id.* at 41-49), and why courts deny certain governmental benefits to religious schools giving as part of the rationale that the aid, which the schools eagerly want, will be corrupting to the schools’ religious mission (*id.* at 59-61).

<sup>31</sup> The Establishment Clause does, however, work in service of religious liberty writ large. This essay distinguishes between religious rights personal to individuals and groups of individuals (see *supra* note 18) and religious liberty writ large (see *infra* note 87). The latter is a liberty that is best described as class-wide, collective, or in the interest of the larger civil society. The Establishment Clause has the object of protecting not individuals qua individuals, but two large bodies in civil society: the body politic, on the one hand, and religion and religious organizations, on the other. The nature of the injury to these respective bodies is explored *infra* notes 41-44, 87 and accompanying text.

<sup>32</sup> *William Clancy* aptly frames the constitutional settlement embodied in the

religion lies and, hence, what religious organizations may do on the *secerdotum* side of the boundary free from involvement by the *regnum*. This is the doctrine of “church autonomy”, the scope of which resolves itself into a question of jurisdiction.

Identification of the precise subject matters that fall within the meaning of the restraint to “make no law respecting an establishment of religion” necessarily entails substantive choices. That boundary has been disputed for over two thousand years,<sup>33</sup> 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 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”.<sup>34</sup>

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

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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.

*William Clancy*, Religion as a Source of Tension, in *Religion and the Free Society* 23, 27-28 (1958).

<sup>33</sup> 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, 20 Ohio. St. L. J. 508, 508 (1959).

<sup>34</sup> Letter from James Madison to the Reverend Adams (1832), IX *The Writings of James Madison* 484, 487 (*Gaillard Hunt* ed., 1910). See also *McCullum v. Board of Educ.*, 333 U.S. 203, 237-38 (1948) (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.”).

side of the Atlantic and later altered on this soil<sup>35</sup> will yield a result on which there is considerable agreement. It is the hard cases that get most of the attention (for example, aid to K-12 religious schools), thereby leaving the impression that the overall task of boundary keeping is hopelessly conflicted. That factions are endlessly struggling over the location of the boundary actually serves to confirm the central point of this essay, namely: everyone presumes that there are two spheres of competency and, hence, a religious sphere in which the churches are to operate free of involvement, for good or ill, by the government.

The Supreme Court has not left the lower courts, legislators, and litigants without guidance on this all-important question. 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,<sup>36</sup> devotional Bible reading,<sup>37</sup> veneration of the Ten Commandments,<sup>38</sup> classes in confessional religion,<sup>39</sup> and the biblical story of

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<sup>35</sup> It should come as no surprise that a structuralist clause looks to the Western tradition as received in the American colonies and later uniquely altered on this soil. See *supra* notes 12-14. It could hardly look elsewhere. The Founders (as well as the Constitution they wrote) were immersed in Western thought, and America's unique arrangement of government-religion separation comes out of an alliance of two threads within that Western tradition. See *Donald L. Drakeman, Church-State Constitutional Issues: Making Sense of the Establishment Clause* 55-58 (1991) (Enlightenment thinkers, allied with Baptists and Quakers, sought the same political result but for different reasons); *William G. McLoughlin, New England Dissent 1630-1833: The Baptists and the Separation of Church and State*, vol. I, p. xv (1971) (the development of the tradition of church-state separation was a combination of rationalist and pietist approaches to the age old problem of what is God's and what is Caesar's); *Sidney E. Mead, The Lively Experiment: The Shaping of Christianity in America* 35-45 (1976) (alliance between pietists and rationalists responsible for discontinuance of government support for religion); *John Witte, Jr., The Essential Rights And Liberties Of Religion In The American Constitutional Experiment*, 71 *Notre Dame L. Rev.* 371, 377-88 (1991) (discussing separationism as the common cause of Enlightenment rationalists and Protestant pietists). Indeed, the First Amendment's regard for religious exercise and no-establishment cannot be understood apart from its religious justifications. *Stephen L. Carter, The Free Exercise Thereof*, 38 *Wm. & Mary L. Rev.* 1627, 1632-33 (1997); Steven Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 *U. Pa. L. Rev.* 149, 154-66 (1991).

<sup>36</sup> *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>37</sup> *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

<sup>38</sup> *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

creation taught as science<sup>40</sup> are all inherently religious. Hence, by virtue of the Establishment Clause, these topics are off limits as objects of legislation or any other purposeful action by 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 power of government.<sup>41</sup> Finally, the Court has acknowledged as beyond the competence of government those issues involving the meaning of religious words, practices, and events,<sup>42</sup> as

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<sup>39</sup> *McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

<sup>40</sup> *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

<sup>41</sup> 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, 708-24 (1976) (stating that civil courts may not probe into church polity); *Maryland & Va. Churches of God v. Church at Sharpsburg*, 396 U.S. 367, 368 (1970) (per curiam) (urging the avoidance of doctrinal disputes); *Presbyterian Church v. Hull Mem'l Church*, 393 U.S. 440, 451 (1969) (civil courts forbidden to interpret and weigh church doctrine); *Kreshik v. St. Nicholas Cathedral*, 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. St. Nicholas Cathedral*, 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. (15 Wall.) 679, 725-33 (1872) (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 as to these matters. Rather, the cases reference the First Amendment and the necessity to keep a separation of church and state.

<sup>42</sup> See *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 844-45 (1995) (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, 336 (1987) and *id.* at 344-45 (Brennan, J., concurring) (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); *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) (holding 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, 305-07 (1940) (stating that petty officials are not to be given discretion to

well as questions concerning the centrality of a particular belief or practice to a given religion.<sup>43</sup> Each of the foregoing rules of law is far easier to

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determine what is a legitimate “religion” for purposes of issuing 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, 564-65 (1972) (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 admittedly religious organization; IRS had sought to examine all of religious organization’s activities and characterize them as either “religious” or “political” and, if political, then “non-religious”).

<sup>43</sup> *Oregon Empl. Div. v. Smith*, 494 U.S. 872, 886-87 (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, 457-58 (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 explaining, in part, the decision in *Smith*. The compelling-interest balancing 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 Court has similarly held that legislative classifications based on denominational affiliation are not permitted. See *Kiryas Joel Bd. of Educ. v. Grumet*, 512 U.S. 687, 702-08 (1994); *Gillette v. United States*, 401 U.S. 437, 448-51 (1971); cf. *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (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.

explain when attributed to constitutional structure (Establishment Clause) than to personal religious rights (Free Exercise Clause).<sup>44</sup>

Closely related to these case-by-case designations of what is inherently religious and what is arguably nonreligious is the rule that 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.<sup>45</sup> 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 concerning "an establishment of religion". Sunday closing laws,<sup>46</sup> teenage sexual abstinence counseling,<sup>47</sup> the availability of abortion,<sup>48</sup> interracial dating,<sup>49</sup> and civil marriage<sup>50</sup> are subject matters that the Court has deemed not inherently

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<sup>44</sup> In many cases it is the religious rights claimant inviting the Supreme Court to probe into the question of religious doctrine and it is the Court refusing to do so. See *Jimmy Swaggart Ministries v. California Bd. of Equalization*, 493 U.S. 378, 396-98 (1990); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 20 (1989) (plurality opinion); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983). Thus, the rule of law in these cases could not be vindicating a free exercise right. This is because a free exercise right could be waived by the claimant. But if the operative rule of law is a constitutional restraint on the Court's power, then the objection to judicial inquiry into religious doctrine cannot be waived. See *supra* note 7 and accompanying text. Accordingly, it can be inferred that the rule of law in "church autonomy" cases is structural in origin.

<sup>45</sup> *Bowen v. Kendrick*, 487 U.S. 589, 604 n.8, 613 (1988) (counseling of teenagers concerning sexuality not inherently religious); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (tax regulation prohibiting racial discrimination in education not inherently religious); *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (restrictions on abortion not inherently religious); *McGowan v. Maryland*, 366 U.S. 420, 431-49 (1961) (Sunday closing law is not inherently religious); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 592-98 (1961) (same); *Gallagher v. Crown Koshier Super Mkt.*, 366 U.S. 617, 624-30 (1961) (same); *Hennington v. Georgia*, 163 U.S. 299, 306-07 (1896) (prohibition on Sunday operation of trains not inherently religious).

<sup>46</sup> *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing law as mere labor legislation); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (same).

<sup>47</sup> *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding federal funding program for centers counseling teenagers concerning sexuality, including faith-based centers).

<sup>48</sup> *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the federal restriction on funding of elective abortions).

<sup>49</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (disapproving university ban on interracial dating).

<sup>50</sup> *Reynolds v. United States*, 98 U.S. 145, 162-67 (1879) (upholding antipolygamy law

religious.<sup>51</sup> Hence, so far as the Establishment Clause is concerned, these are appropriate topics for civil legislation. Furthermore, cases upholding the constitutionality of legislation exempting religion from regulatory burdens and taxation<sup>52</sup> make sense from the perspective of a structuralist Establishment Clause, for these exemptions enhance and reinforce the desired separation of church and state.

Various Justices of the Supreme Court, in short statements, have sought to encapsulate a definition of the boundary between government and the inherently religious. Their formulations thereby strive to define the parameters of “church autonomy”. Justice 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”.<sup>53</sup> Just a few years earlier, Justice 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”,<sup>54</sup> then constitutional restraints are not exceeded. As a final example, Justice Frankfurter set 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.<sup>55</sup>

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regulating the civil law of marriage).

<sup>51</sup> See *Bowers v. Hardwick*, 478 U.S. 186 (1986). Although not referencing the Establishment Clause, it is implicit in *Bowers* that the Court does not consider the regulation of intimate sexual relations inherently religious.

<sup>52</sup> See, e.g., *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding religious exemption in employment nondiscrimination law); *Walz v. Tax Comm’n*, 397 U.S. 664 (1970) (upholding property tax exemption for houses of worship); *The Selective Draft Law Cases*, 245 U.S. 366 (1918) (upholding military service exemptions for clergy and theology students). The aberrational case is *Jimmy Swaggart Ministries v. California Board of Equalization*, 493 U.S. 378, 392-97 (1990) (holding that Establishment Clause is not violated by a state sales and use tax on the sale of religious material assessed against an evangelistic ministry).

<sup>53</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 658 (1971) (Brennan, J., concurring).

<sup>54</sup> *Central Bd. of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) (internal quotation omitted).

<sup>55</sup> *McGowan v. Maryland*, 366 U.S. 420, 465-66 (1961) (Frankfurter, J., concurring in the judgment). See also *id.* at 465 (1961) (Frankfurter, J., concurring) (“The purpose

Each of these formulations will do, for they point to the same basic distinction between subject matters that are inherently religious and subjects that 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 from the historic Western tradition as received in the American colonies and later altered during the period of disestablishment in the states, roughly 1780s to 1830s.<sup>56</sup>

“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 of churches, mosques, synagogues, temples, and other houses of worship, using those words not to identify buildings, but to describe the confessional 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 power. It is these matters to which churches and other religious communities are autonomous, subject, of course, to the needs of society to protect itself against real and substantial threats to the public health or safety.

## VI. THE JURIDICAL STATUS OF THE CHURCHES

The logic of the Supreme Court’s opinions inexorably leads to the conclusion that churches (and other religious groups) have a constitutional status wholly unlike other voluntary organizations and, hence, a unique institutional autonomy, not the mere sum of the derivative rights of their

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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 Sch. Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (“[T]he 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*, 42 *DePaul L. Rev.* 373, 381 (1992) (“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.”).

<sup>56</sup> See *supra* notes 12-14, 35.

individual members.<sup>57</sup> Several scholars have noted that this follows from the Court's holdings, variously describing the cases as granting churches "some of the prerogatives of sovereignty",<sup>58</sup> affording ecclesiastical entities a status "distinguishable from other types of voluntary associations",<sup>59</sup> and as "spiritual bodies . . . requir[ing] distinct constitutional protection".<sup>60</sup> This line of reasoning coincides with the historic claims of the churches that they are not mere legal personalities that ultimately derive their existence from the state. Churches have long maintained that they are more than jural entities, but rather they preexisted the state, are transnational, and will continue to exist if the state were suddenly dissolved or destroyed.<sup>61</sup> The

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<sup>57</sup> *Mark DeWolfe Howe*, *Political Theory and the Nature of Liberty*, 67 *Harv. L.Rev.* 91, 92-93 (1953).

<sup>58</sup> *Howe*, *supra* note 57, at 92-95 (identifying church autonomy as giving religious bodies "some of the prerogatives of sovereignty"); Note, *Judicial Intervention In Disputes Over The Use Of Church Property*, 75 *Harv. L.Rev.* 1142, 1185 (1962) (noting that *Watson v. Jones* is "grounded . . . in a notion that religious associations should be accorded certain prerogatives of sovereignty").

<sup>59</sup> *Paul G. Kauper*, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, in *Church and State: The Supreme Court and the First Amendment* 67, 95 (*Philip Kurland* ed., 1975) ("[I]n the Court's view voluntary religious associations are constitutionally distinguishable from other types of voluntary associations.").

<sup>60</sup> Tribe, *supra* note 5, at 1236 ("[T]he Supreme Court has recognized for nearly a quarter-century that, whatever may be true of other private associations, religious organizations as spiritual bodies have rights which require distinct constitutional protection."). See also *Howe*, *supra* note 26, at 12 ("From time to time the justices [of the Supreme Court] have explicitly acknowledged . . . that their insistence on total separation promotes the best interests of religion. . . . [T]hat is, that they have reached the result in question in order that they may, like Roger Williams, protect the garden from the intrusion of the wilderness."); *David Little*, *The Reformed Tradition and the First Amendment*, in *The First Freedom: Religion & The Bill Of Rights* 17, 27 (*James E. Wood, Jr.* ed., 1990) ("If the spiritual order was not coterminous with the civil order . . . then the way was clear for a new independent sphere of authority set alongside civil authority."); *Herbert Richardson*, *Civil Religion in Theological Perspective*, in *American Civil Religion* 161, 178-80 (*Russell E. Richey/Donald G. Jones* ed., 1974)("[T]he church cannot acquiesce in the notion that it is a mere congregation or voluntary association established by the authority of its members.").

<sup>61</sup> *John Courtney Murray* states the Establishment Clause principle as follows: The juridical result of the American limitation of governmental powers is the guarantee to the Church of a stable condition of freedom . . . . It should be added that this guarantee is made not only to the individual . . . but to the Church as an organized society with its own law and jurisdiction. . . . The United States has a government, or better, a structure of governments operating on different levels. . . . Within society, as distinct from the state, there is room for the independent exercise of an authority which is not that of the state. This principle has more than once been

Establishment Clause implicitly recognizes this ontological character. If the law is to keep distinct these two entities (“separation of church and state”), then the law must first recognize the independent existence of both. Importantly, the argument is not that governmental interference with the churches is in some sense an “invasion of privacy”, that such regulatory oversight is “excessively entangling”, or that certain state actions inhibit associational rights. Again, this is not an assertion of a rights violation. Rather, the operative principle is that government has no competence in making decisions that are in the exclusive purview of religion. The juridical consequence is that religious entities are specially accounted for by the Establishment Clause, and a sphere of autonomy is acknowledged in which these religious entities may operate unhindered by government in accord with their understanding of their own divine origin and mission.

## VII. VOLUNTARISM AND THE LIMITED STATE

Precursors to the separate ordering of government and religion as being best for religion and best for the body politic are found in developments in the sixteenth century. Beginning with the Reformation, there evolved in the Western world the belief that authentic religion presupposes adherents coming to their faith free of state coercion. Two centuries later, the Enlightenment, with its celebration of reason and the individual, routed the remaining vestiges of Constantinianism. In America, unlike Great Britain and the European Continent, this resulted in more than official toleration of dissenting religions. Developments in governmental theory on these shores took a unique turn, one resulting in religious voluntarism: the juridical stance that beliefs and practices that are inherent to religious faith are not to be the object of the government’s superintending influence.<sup>62</sup> Government

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affirmed by American courts, most recently by the Supreme Court in the *Kedroff* case.

*John Courtney Murray*, *We Hold These Truths: Catholic Reflections on the American Proposition* 78-79 (1964). See also *Clancy*, supra note 32, at 27 (“What we have constitutionally is . . . 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.”); *Duesenberg*, supra note 33, at 526 n.59 (“[A]s a total organism, it is the body of Christ . . . which, though persecuted, exists without authority from the state.”); *Stackhouse*, supra note 4 (“[The First] amendment . . . acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority.”).

<sup>62</sup> The term “voluntarism” can be confusing because it is not used narrowly in the sense

could, of course, continue to influence morality using its police powers,<sup>63</sup> but it was to refrain from continued tampering with matters inherently religious. That uncommon turn of events is today reflected in the strictures laid down by the Establishment Clause. It accounts for why the government is restrained from involvement with prayer, devotional Bible reading, the teaching of religious doctrine, veneration of the Ten Commandments, and similar inherently religious practices.<sup>64</sup>

Voluntarism means more than the mere absence of official coercion.<sup>65</sup> Government coercion of religiously informed conscience can (and often will) result in individual religious injury. Such injury or harm is a matter to be addressed by the Free Exercise Clause.<sup>66</sup> But government can favor a particular religion in ways that fall short of coercion for those not of that faith. Such favoritism can influence people's religious choices. For example, a public school teacher who, at the close of each school day in December, urges her students to "remember to keep Christ in Christmas", coerces no one to do anything and erects no official barriers to the religious observance

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of uncoerced belief or practice. Voluntarism means that government is restrained from involvement in inherently religious affairs. Historically the term referred to "the voluntary church", meaning that a church is most genuine when it draws support from responding hearts and minds entirely unassisted (as well as undeterred) by government.

Because the term "voluntarism" is confusing perhaps its use ought to be abandoned. Indeed, that may already be taking place. The principle that government should act, either when imposing burdens or extending benefits, so as to influence as little as possible religion and individual religious choices in the newer literature is being called "substantive neutrality" (see *Douglas Laycock*, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993 (1990)) or simply "neutrality theory" (see *Carl H. Esbeck*, A Constitutional Case For Governmental Cooperation With Faith-Based Social Service Providers, 46 Emory L. J. 1, 4-5, 20-22 (1997)).

<sup>63</sup> See supra notes 53-55 and accompanying text (quoting various Justices on the boundary between impermissible legislation – thus prohibited by the Establishment Clause – and permissible legislation).

<sup>64</sup> Discussion concerning the Supreme Court's distinction between laws touching on practices that are "inherently religious" and laws which have a basis in societal mores appears supra notes 36-43, 46-51 and accompanying text.

<sup>65</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 606 (1992) (Blackmun, J., concurring) (quotation and citation omitted) ("Our decisions have gone beyond prohibiting coercion

. . . because the Court has recognized that the fullest possible scope of religious liberty

. . . entails more than freedom from coercion.").

<sup>66</sup> See supra notes 19-21 and accompanying text.

of her students.<sup>67</sup> Yet, it is these more furtive influences by government employees that undermine religious voluntarism.<sup>68</sup>

Justice Stevens, writing for the majority in *Wallace v. Jaffree*,<sup>69</sup> acknowledged that voluntarism, as a step beyond preventing coercion of conscience, has been recognized by the Supreme Court as part of the church-state settlement in the First Amendment:

[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful  
...<sup>70</sup>

From the perspective of the First Amendment, then, religions of integrity (“worthy of respect”) are those religions that the people subscribe to and hold as a matter of voluntary choice. Justice Blackmun has likewise observed that a core idea underlying no-establishment is that “religion flourishes in greater purity, without than with the aid of Government”.<sup>71</sup> Therefore, so as to abound (“flourish”) and avoid corruption (“purity”), by law religions are caused to not depend on certain forms of government aid. For religious belief to be genuine it is likely the product of ecclesiastical institutions that have integrity and vitality.<sup>72</sup> This constitutional settlement

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<sup>67</sup> See, e.g., *McCullum v. Board of Educ.*, 333 U.S. 203, 233 (1948) (Jackson, J., concurring) (“[I]t may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress.”).

<sup>68</sup> In the example in the text of the public school teacher, there would be religious injury to those students who held a religion other than Christianity. The Free Exercise Clause rights of any such students would be violated by the teacher’s remark urging Christian observance. But the Establishment Clause is exceeded as a result of the teacher’s actions regardless of whether some of her students subscribed to non-Christian religions or no religion at all. See *supra* notes 9-11, 28-30 and accompanying text. The no-establishment restraint being transgressed quite independent of any individual religious coercion is, of course, indicative of its structural character.

<sup>69</sup> 472 U.S. 38 (1985) (overturning a state law requiring a moment of silence in public schools for the purpose of prayer or meditation).

<sup>70</sup> *Id.* at 52-53.

<sup>71</sup> *Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring) (internal quotation and citation omitted).

<sup>72</sup> See *Donald A. Giannella*, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 *Harv. L. Rev.* 513, 517

was born, inter alia, of the untoward experience that “any religion that had relied upon the support of government to spread its faith”<sup>73</sup> lost the people’s respect. Religious persecution brought ruin not to the persecuted, but to the vitality of the established church.<sup>74</sup>

Looking back over half a century of public life, James Madison observed that the improvement of religion following disestablishment in Virginia and elsewhere in the South was proof that the experiment with voluntarism was good for religion:

And if we turn to the Southern States where there was, previous to the Declaration of Independence, a legal provision for the support of Religion; and since that event a surrender of it to a spontaneous support by the people, it may said that the difference amounts nearly to a contrast in the greater purity & industry of the Pastors and in the greater devotion of their flocks, in the latter period than in the former. . . . [T]he existing character, distinguished as it is by its religious features, and the lapse of time now more than 50 years since the legal support of Religion was withdrawn sufficiently prove that it does not need the support of Govt. . . .<sup>75</sup>

When James Madison wrote that conditions in the southern states had favored religion, he meant conditions favored voluntaristic religion, that is, religion untainted (“exemplary priesthood” and “flourishes in greater purity”) by governmental attempts to support it.<sup>76</sup>

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(1968) (footnotes omitted) (“Institutional independence of churches is thought to guarantee the purity and vigor of their role in society, and the free competition of faiths and ideas is expected to guarantee their excellence and vitality to the benefit of the entire society.”).

<sup>73</sup> Engel v. Vitale, 370 U.S. 421, 431 (1962) (striking down teacher-led public school prayer).

<sup>74</sup> Theologian and Union Seminary professor, *Robert L. Dabney*, observed over a century ago:

The history is, that no communion ever persecuted which did not cut its own throat thereby . . . . The persecuting communion dies, either by the hand of the outraged and irresistible reaction it produces; or if the persecution is thorough, by the syncope and atrophy of a spiritual stagnation, that leaves it a religious communion only in name.

*Robert L. Dabney*, *Religious Liberty And Church And State*, Lectures in Systematic Theology 873, 877 (Zondervan ed. 1972) (first published 1878).

<sup>75</sup> Letter from James Madison to the Reverend Adams (1832), IX *The Writings of James Madison* 484, 486 (Gaillard Hunt ed., 1910).

<sup>76</sup> See also Letter from James Madison to Edward Livingston (July 10, 1822):

[I]t is impossible to deny that [in Virginia] Religion prevails with more zeal, and a more exemplary priesthood than it ever did when established and patronized by Public authority. We are teaching the world the great truth that Govts. do better without Kings & Nobles than with them. The merit will be doubled by the other

Although formal alliances between government and church yielded grudgingly in the American Republic, today genuine religious faith is presumed (from the perspective of the First Amendment) to be a matter of persuasion rather than official privilege or position.<sup>77</sup> Influenced as it was by the common cause of Protestant pietists and the Enlightenment,<sup>78</sup> the constitutional settlement now lodged in the Establishment Clause leaves religious communities to attract members by force of their doctrine and the appeal of their beneficence, not by the imprimatur of state officialdom. Most certainly, then, the government should not be an agent of religious propagation. The Establishment Clause, applied by a Supreme Court that presumes voluntarism, now restrains government when its actions involve the civic arm in inherently religious matters. And the Clause does so, *inter alia*, to protect religion – that is, voluntaristic religion.

A natural correlative to voluntarism is that religions that believe in a transcendent authority limit the power of the modern nation-state. This is because such religions refuse to recognize the state's sovereignty as absolute. Transcendent religions posit another sovereignty – a God or gods – that is (are) beyond, before, and superior to the state. Indeed, theistic religion posits a Sovereignty that presumes to sit in judgment over the state, its ambitions to temporal power, and its pretensions of infallibility. It is for this reason that at crucial points in Western history the institutional church had a “pivotal role in guarding against political absolutism”.<sup>79</sup>

Religious theists have an allegiance that is higher than the state and that thereby limits the state. Sociologist Peter L. Berger explains how this works to the benefit of democracy. He begins by observing that “a state that guarantees religious liberty” thereby “acknowledges, perhaps without knowing it, that its power is less than ultimate”.<sup>80</sup> Berger then ties in how

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lesson that Religion flourishes in greater purity, without than with the aid of Govt.  
*Id.* at 98, 102-03.

<sup>77</sup> *Gerald V. Bradley*, Church Autonomy in the Constitutional Order: The End of Church and State, 49 *La. L. Rev.* 1057, 1059 (1989); *Garvey*, *supra* note 21, at 284-86.

<sup>78</sup> See *Elwyn A. Smith*, Religious Liberty in the United States: The Development of Church-State Thought Since the Revolutionary Era 15-26 (1972) (explicating the role of Isaac Backus, a New England pastor, as a type representing the Protestant-pietist theory of church-state relations); *supra* note 35 (collecting historical authorities).

<sup>79</sup> *Bradley*, *supra* note 77, at 1072. When individuals in a society believe that human rights are derived from an authority higher than the state it invites self-criticism of the acts of state. This renders the totalitarian state illegitimate and places religious restraints on the use of political power.

<sup>80</sup> *Peter L. Berger*, The Serendipity of Liberties, in *The Structure of Freedom: Correlations, Causes & Cautions* 1, 15 (*Richard John Neuhaus* ed., 1991); see also

church-state separation is crucial to this role of restraining the state. It is “an intriguing paradox”, notes Berger, that if the church is to do this “secular service” of enhancing democracy and expanding human liberties, the contribution of the churches “*is possible only if religion itself remains otherworldly*”.<sup>81</sup> Religion, here, intends transcendence; it points to realities beyond the world of the ordinary and everyday life. This otherworldliness is intrinsic to the very definition of most Western systems of religion (and many outside the West), and it is why religion attracts human interest and the ultimate allegiance of man.<sup>82</sup>

Democracy, then, also has a stake in the Establishment Clause protecting religion from its own bad choices, to the end that religion retains sufficient vitality that it can hold its followers to any ultimate allegiance and thereby limit the state.

## VIII. CONCLUSION

This essay does not claim that the Supreme Court has resolved all of the problems in defining the boundary between religion and government by relegating the Establishment Clause “negative” on government action to inherently religious matters. There will always be border disputes because the task of determining what is “inherently religious” generates tension between the Western tradition and the deeply held beliefs (ancient and modern, religious and secular) of others.<sup>83</sup> It suffices here to candidly acknowledge that a structuralist Establishment Clause is not substantively neutral.<sup>84</sup> Indeed, substantive neutrality is impossible because every theory

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supra note 4 (quoting Max L. Stackhouse) and supra note 32 (quoting William Clancy).

<sup>81</sup> *Berger*, supra note 80, at 16.

<sup>82</sup> *Id.* at 14-15; see also *Carter*, supra note 35, at 1637-38.

<sup>83</sup> Secular liberals are sometimes offended by this, but common sense would indicate that reference to the historic Western tradition should be expected. Any other path would be a deviation from the intent and context of the Framers. See *Clifford Goldstein*, *The Theology Of A Godless Constitution*, 93 *Liberty* 30-31 (May/June 1998). That there are those outside the Western tradition as received in America that are displeased with this location of the church-state boundary is cause for sensitivity and (when prudent) accommodation. But it is not a reason to relocate that boundary under the guise of judicial “up dating” of the Establishment Clause. Any shifting of the church-state boundary will just create new grievants, because, again, there is no substantively neutral location for the boundary between church and state.

<sup>84</sup> 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

of church-state 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 church-state boundary is the settlement of America's early national period. As such, it is not to be tampered with under the guise of needed judicial revision of "Our Living Constitution". In the end, however, if the Court's boundary between government and religion 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,<sup>85</sup> protects the autonomy of religion and religious organizations,<sup>86</sup> and minimizes government-induced sectarian factionalism within the body politic.<sup>87</sup>

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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*, supra note 21, at 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* 68 (1995) ("A different religion or a secular viewpoint will support different background beliefs that logically generate different views or theories of religious freedom.").

<sup>85</sup> See *Douglas Laycock*, *The Underlying Unity of Separation and Neutrality*, 46 *Emory L. J.* 43, 69 (1997).

<sup>86</sup> See supra notes 41-44 (collecting cases on the autonomy of religion and religious organizations).

<sup>87</sup> The Supreme Court's most complete explication of the twin purposes underlying the Establishment Clause are found in *Engel v. Vitale*, 370 U.S. 421, 431-33 (1962) (stating the dual purposes as protection of religion from the corrupting hand of government and protection of the 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*, 7 *J. Contemp. Legal Issues* 357 (1996). 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 governmental 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 is articulated in *McGowan v. Maryland*, 366 U.S. 420, 430 (1961) ("[T]he establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority.").

The Establishment Clause is not a silver bullet for winning (or ending) the culture war.<sup>88</sup> Although the church-state boundary 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 whose values 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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By denying governmental jurisdiction over inherently religious matters the Establishment Clause has the object of protecting religious liberty writ large. Thus, the no-establishment principle is not an individual right from governmental intrusion, but a 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 Court's 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*, 118 S. Ct. 2091, 2109 (1998) (Kennedy, J., concurring).

<sup>88</sup> *Douglas Laycock*, *Religious Liberty as Liberty*, 7 J. of Contemp. Legal Issues 313, 327 (1996). See *Goldstein*, *supra* note 83, at 31 (“A wall that separates church and state is fine; one that separates morality from law isn’t.”).