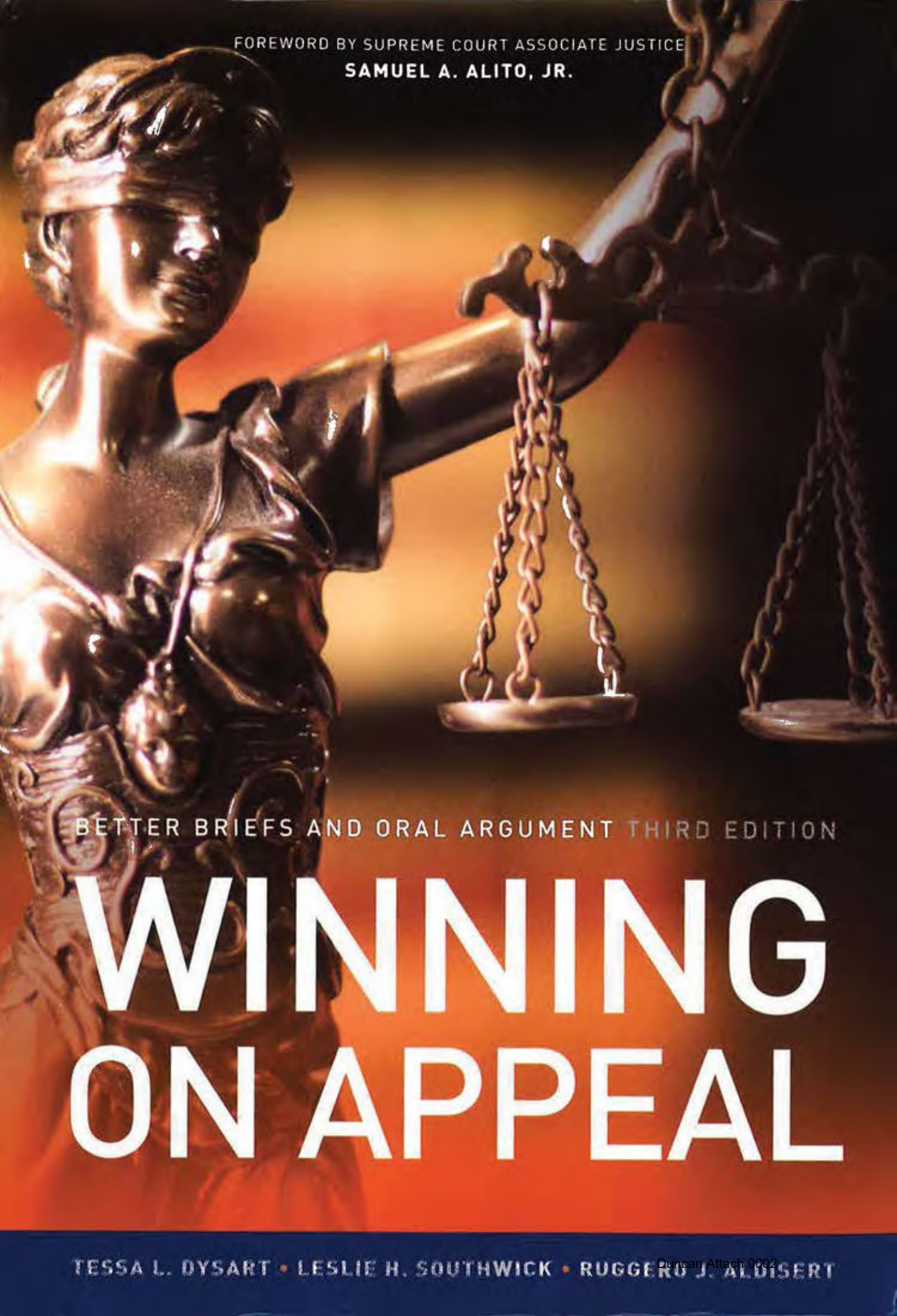
United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 12(a)

STUART KYLE DUNCAN
Nominee to be United States Circuit Judge
for the Fifth Circuit



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APPENDICES

especially do so if one of those prior cases included a judge that will be deciding your case.

b) Listen to oral arguments from your opponent. Most court websites allow you to search by "attorney name," in addition to by "case name" or "case number." If the lawyer on the other side is a specialist, it is likely that he or she may take the same approach to your case that was taken in a previous case.

c) Be efficient and multitask. I listen to oral arguments while traveling or exercising. Smartphones make it easy to combine argument preparation with life outside of the office.

4) Get Mooted And Moot Yourself

a) I am fortunate to have colleagues and friends who are either seasoned appellate litigators or former judicial law clerks. They don't always like it, but I make them review briefs and pepper me with questions. If a particular judge deciding my case is known for a certain approach to oral argument, I ask the person mooting me to assume that role. If one of the judges is a combative questioner, for example, I can expect a heated practice round. I like to compare the experience to a quarterback who faces an intense practice squad before the Sunday game.

b) Practice alone, too. And make the experience as formal as possible. Stand in front of a mirror or a lectern. Even if you have good ideas in your head, you will benefit from articulating them aloud for clarity in organization.

17.4 Kyle Duncan, Schaerr Duncan LLP

Kyle Duncan is one of the founding partners of the Washington, D.C., law firm Schaerr Duncan LLP. He has argued many appeals in federal courts including the U.S. Supreme Court and served as Louisiana's first Solicitor General. He offers this advice.

1) *"Smile and let them know you are glad to be there."* This last-minute advice was texted to me by the brilliant appellate lawyer, the late Greg Coleman, as I rode terrified in a taxi to my first argument before the U.S. Supreme Court. What Greg meant was that the attitude you bring to the bar is critical.

Arguing any appeal is a privilege. I think judges want to know that lawyers are grateful for the chance to explain why their client's cause is just. Whenever I make an argument, remembering Greg's advice helps me remember why I am there.

Greg was one of the finest appellate lawyers of his generation. He was the first Solicitor General of Texas and successfully argued many times before the High Court. I had the great good fortune to work for him and learn from him early on. Greg died in a tragic plane crash in 2010. Whenever I make an argument, I hope Greg likes it.

2) "*Once you are up on your feet, you are on your own[.]*" This quote is from a good book, *Effective Appellate Advocacy* by Frederick Wiener, and it is true: you feel alone at argument because the whole case is distilled in one short event, you want to do your best for the client, and you're up there by yourself. How to deal with that? Here are some ideas that have been helpful to me.

First, I must have a clear game plan. A simple theme; three or four main points; a few key cases, record cites, or quotes I want to emphasize. Appellate argument is not like defending a doctoral thesis. You must make your best points succinctly while the few minutes you have dribble away under a barrage of questions. A game plan is necessary to prevent wilting under that pressure.

Second, the game plan must be in my head. Not in the seventeen-page, single-spaced "Oral Argument Outline"; not in the massive colorfully tabbed binder on the podium. At most, I may bring to the podium two pages with a sketch of my main points, a few pointed phrases I want to work in, and any key record cites. Anything more is a distraction at best. At worst, it is a sign that I have not yet grasped what I want to tell the court. By the time you are alone at the podium, it is too late.

Third, I must be able to sum up why my client should win the case in about forty-five seconds. It is very comforting to be able to do this. I try to practice it over and over again, using different words and phrases, until it is embedded in my brain. This is the reference point for the entire argument. In some way, it must be the ultimate answer to every question, even the most hostile.

17.5 Miguel Estrada, Gibson Dunn & Crutcher

Miguel Estrada, a partner in Gibson Dunn's D.C. office, has argued twenty-two cases before the United States Supreme Court. He has also served as an Assistant to the Solicitor General of the United States and as an Assistant U.S. Attorney and the Deputy Chief of the Appellate Section in the Southern District of New York's U.S. Attorney's Office. He offers this advice.

Too many lawyers give oral argument preparation short shrift. After researching and writing the briefs, they think they can prepare by

CONTEMPORARY WORLD ISSUES

Society

Same-Sex Marriage

Second Edition

David E. Newton

Obergefell Fallout

Kyle Duncan

Intuitively, many people evaluate Supreme Court decisions based on how they feel about the outcome. Thus, *Obergefell v. Hodges* is good or bad based on a person's view of same-sex marriage. If one thinks same-sex marriage is good for the spouses, good for the children they may be raising, and good for society at large, then one thinks *Obergefell* is brilliant precisely because it constitutionalizes same-sex marriage. Conversely, if one thinks same-sex marriage is bad for the spouses, bad for the children they may be raising, and bad for society at large, then one thinks *Obergefell* is a travesty, again precisely because it constitutionalizes same-sex marriage.

But there is a better way of evaluating *Obergefell*, one that does not necessarily line up with one's view of the merits of same-sex marriage. One can assess the decision in terms of the integrity of the legal process that produced it. After all, *Obergefell* was not an exercise in abstract philosophy; it was a Supreme Court case, whose outcome turned on the Court's interpretation of a constitutional text (the Fourteenth Amendment) and of relevant precedents. Even more fundamentally, *Obergefell* was a decision by a federal court that overrode millions of recent votes for and against same-sex marriage at the state level. In sum, this way of assessing *Obergefell* considers not the underlying merits of same-sex marriage but whether the Court was faithful to constitutional text and structure, and, more broadly, whether the Court was justified in removing the issue of same-sex marriage from the democratic process.

Admittedly, assessing a Supreme Court decision along these lines has been increasingly derided in some circles as outdated—a narrow obsession with "who decides" instead of what is actually decided; a bloodless fixation on "process" as opposed to what is "really" at stake. But there are good reasons to persist in thinking that how and by whom an issue is decided in a constitutional case is of utmost importance. Those reasons are

simple: one, we have a written Constitution; two, courts are not legislatures; and three, the states play a crucial role in our federal system. In other words: as long as we have a written Constitution that protects certain rights (but not others), and as long as we have courts applying that Constitution in cases (as opposed to simply having elected legislators debate every question), and as long as we have states (and not a pure national democracy), then it should matter immensely on what grounds the Supreme Court assumes the authority to settle controversial questions at the national level.

Assessed from that point of view, I find *Obergefell* to be an abject failure. First, the decision effectively repudiates more than a century of precedent (precedent recently affirmed by the Court) recognizing states as the central source of family law. Thus, the decision sets up the federal government—and more specifically, the Supreme Court—as the arbiter of an area of law profoundly unsuited to national power. Second, the decision sweeps away the value of the democratic process. By overriding the votes of millions of Americans on this issue, the Supreme Court has cast severe doubt on whether the American people are capable of resolving any novel and sensitive issue on which there is widespread disagreement. And third, the decision imperils civic peace. The grounds of the decision effectively marginalize the views of millions of Americans at exactly the wrong time, when standards of civic discourse are rapidly degenerating and when Americans seem increasingly to be forgetting the value of a robust, free, and open exchange of ideas on controversial topics.

I. Overruling Windsor

Just two terms before *Obergefell*, in a case called *United States v. Windsor*, a five-justice majority of the Supreme Court emphatically reaffirmed the authority of states to decide whether to adopt same-sex marriage on the basis of democratic deliberation. *Windsor* invalidated the man–woman marriage definition in the federal Defense of Marriage Act (DOMA) because

it undermined New York's decision to extend marriage to same-sex couples. The Court left no doubt that the states' "historic and essential authority to define the marital relation" was the hinge on which *Windsor* turned. DOMA's federal marriage definition was invalid because it wrongly sought "to influence or interfere with State sovereign choices about who may be married."

Windsor did not merely mention state authority over marriage in a footnote. *Windsor* rhapsodized about it. Over 16 paragraphs, the majority:

- underscored that "the State's power in defining the marital relation" was "of central relevance" to Windsor's outcome;
- confirmed that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations";
- emphasized that "[t]he significance of state responsibilities for the definition of marriage dates to the Nation's beginning";
- wondered at DOMA's "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage"; and
- condemned DOMA because its goal "was to put a thumb on the scales and influence a state's decision as to how to shape its marriage laws."

The *Windsor* majority said all that a mere two years before *Obergefell*. Two years later, the *Obergefell* majority, composed of the same five justices, mentioned none of it. Two years earlier, the *Windsor* majority chastised Congress for trying to undermine a state's authority to adopt same-sex marriage. Two years later, the same majority in *Obergefell* chastised the states for not adopting same-sex marriage. The Court giveth; the Court taketh away. How *Obergefell* squares with *Windsor* on this point is not easy to see. As federal district judge

Juan Pérez-Giménez remarked in a decision upholding Puerto Rico's traditional marriage laws, "It takes inexplicable contortions of the mind . . . to interpret *Windsor*'s endorsement of the state control of marriage as eliminating the state control of marriage" (Sullivan 2014).

II. Discounting Democracy

Obergefell also swept away the value of the democratic process in the many states that recently considered whether to adopt same-sex marriage. Ironically, *Obergefell* discounted democracy not only in states that decided against adopting same-sex marriage but also in states that decided in favor of it. Over the past decade, proponents of same-sex marriage have achieved remarkable successes by convincing their fellow citizens that they have the better argument about the meaning of marriage. Despite numbering less than 4 percent of the population, in the space of about five years they used the political process to change marriage laws in Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. That is a stunning feat.

In those states, removing the man–woman definition from marriage may well signify a cultural shift toward a new vision of marriage. Take New York for example, which democratically adopted same-sex marriage in 2011. *Windsor* viewed this as an epochal event. What New Yorkers did, the Court explained, demanded "both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality."

Windsor appeared to view democratic deliberation on this issue as an indispensable exercise. The Court, after all, praised New Yorkers for engaging in a "statewide deliberative process that enabled [them] to discuss and weigh arguments for and against same-sex marriage." Two years later, however, we now know that the Fourteenth Amendment demanded all along that New Yorkers adopt same-sex marriage. In light of that, must we now downgrade *Windsor*'s praise of New York? It turns

out that New Yorkers were not adopting a new perspective on marriage based on their considered judgment about the meaning of marriage and equality. Instead, they were correcting an unjust defect in their marriage laws. How strange. *Windsor* was congratulating New Yorkers for engaging in a debate that—*Obergefell* now teaches—had only one right answer.

To be sure, *Obergefell* did not entirely omit mention of democratic debate. It gestures toward "referenda, legislative debates, and grassroots campaigns" on the issue of same-sex marriage. But the majority seemed to say that these things are valuable only to give the Court an "enhanced understanding" of the issue, which it was now high time to decide. That is an alarming theory of constitutional law. As the chief justice remarked in dissent: "In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will."

III. Marginalizing Dissenters

Finally, *Obergefell* reinforced the harmful message—heard all too often in the lower court decisions leading up to the Supreme Court's decision—that Americans on the "wrong" side of the same-sex marriage debate do not deserve to be heard. This represents yet another reversal by the Court of its recent precedents. In the term just before *Obergefell*, for instance, the Court decided in a case called *Schuette v. BAMN* that the citizens of Michigan had the authority to decide that their public universities would no longer use affirmative action in making admissions decisions. The Court squarely rejected the argument that the Fourteenth Amendment prohibited Michigan's decision to bar affirmative action as unjust discrimination: the Court explained in dramatic terms that removing a profound issue such as this from the hands of state citizens would be "demeaning to the democratic process."

Regrettably, in the run-up to *Obergefell*, *Schuette*'s warnings had proven prophetic. In the wave of lower court decisions striking down state marriage laws, citizens who did not

support same-sex marriage were called "barking crowds" and compared to those who "believed that racial mixing was just as unnatural and antithetical to marriage as . . . homosexuality." They were told that their marriage laws have "the same result" as interracial marriage bans. Their defense of marriage as grounded in the biological reality of procreation was mocked by one circuit judge, who summed it up in this way: "Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry." They were lectured that their views are "callous and cruel" and should be "discard[ed] into the ash heap of history."

This unsettling trend was also reflected in the lower courts' frequent reliance on *Loving v. Virginia*. Man–woman marriage laws were repeatedly linked to the white supremacist laws correctly invalidated in *Loving*. That was grossly unfair. *Loving* rightly invalidated antimiscegenation laws, racist relics of slavery that struck at the heart of the Fourteenth Amendment. But those odious laws have nothing to do with the same-sex marriage debate. While the Fourteenth Amendment outlaws racial discrimination, the Supreme Court recognized in *Windsor* that the Constitution leaves citizens free "to discuss and weigh arguments for and against same-sex marriage." It is laughable to suppose that *Windsor* would have praised New Yorkers' deliberations for and against same-sex marriage if a refusal to recognize same-sex marriage was equivalent to racism.

In *Obergefell*, the Supreme Court had a golden opportunity to do what the lower courts had largely failed to do—treat Americans holding opposing views on this question as honorable participants in a debate over a question of profound civic importance. Did *Obergefell* accomplish that? My view is that the Court failed.

On the one hand, the decision recognized that many who oppose same-sex marriage do so "based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." Yet, in the same paragraph, the

majority went on to say that, if those people enact their views into law, the "necessary consequence is to . . . demeanor stigmatize" gays and lesbians. Similarly, the Court "emphasize[d]" that those with religious objections to same-sex marriage "may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." The First Amendment protects those persons "as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." Yet elsewhere the Court explained that laws based on the conviction that marriage is a man–woman institution "disparage" gays and lesbians, "diminish their personhood," and are not "in accord with our society's most basic compact." And the Court repeatedly cited *Loving* as central to its outcome.

The four dissenting justices highlighted these unfortunate aspects of the majority opinion. The chief justice lamented "the extent to which the majority feels compelled to sully those on the other side of the debate." Justice Scalia remarked that the majority "is willing to say that any citizen" who does not support same-sex marriage thereby "stands against the Constitution." Justice Alito wrote that the decision "will be used to vilify Americans who are unwilling to assent to the new orthodoxy," and predicted this sort of social and legal fallout:

> I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

One hopes Justice Alito is mistaken. One fears that—given the rhetoric and reasoning of the majority opinion in *Obergefell* and the numerous lower court decisions it failed to repudiate—he may be proven right. If that happens, then whatever *Obergefell* has gained will have been won at great cost.

Reference

Sullivan, Gail. 2014. "Bucking Trend Federal Judge Upholds Same-Sex Marriage Ban in Puerto Rico, Citing 'Procreative Potential.'" *The Washington Post.* https://www.washingtonpost.com/news/morning-mix/wp/2014/10/22/bucking-trend-federal-judge-upholds-same-sex-marriage-ban-in-puerto-rico-citing-procreative-potential/. Accessed on March 29, 2016.

Kyle Duncan is a partner at the Washington, D.C., firm, Schaerr|Duncan LLP. He previously served as general counsel of the Becket Fund for Religious Liberty and as the solicitor general for the state of Louisiana. He also clerked for Judge John M. Duhé of the U.S. Fifth Circuit Court of Appeals. Kyle is a graduate of the LSU Law Center (J.D. 1997) and Columbia Law School (LL.M. 2004).

In Sickness and in Health: Marrying at an Older Age

Paul Feiler and Philip Bockman

Like many gay couples who are now able to marry, we find ourselves presented with the prospect of starting our married life as older men who have already been together for many years.

We met in 1996 at an LGBT counseling center in New York City, where Paul was an intern and Phil a staff therapist. Living in New York for most of our adult lives, both of us had returned to graduate school to prepare for new careers as psychotherapists. We were also both hoping to meet someone who was self-assured and mature, who might make a suitable life partner.

On Mondays when Paul came to work, he would find Phil outside the facility smoking his pipe. Nervous at the prospect of working in his new field, Paul found comfort in Phil's willingness to share his insights and his confidence as a staff therapist. During these conversations we discovered that besides going back to school after years in other professions, we had many other things in common. Within weeks a deep attraction

June 30, 2016

Hobby Lobby Spells Doom for Mandate 2.0

Religious Freedom Institute

*Ruling in favor of Hobby Lobby, the Supreme Court decided that companies with r*eligious *objections cannot be r*equir*ed to provide health coverage for certain contraceptive services. In this week's conversation, scholars discuss the implications of this decision for religious fr*eedom *and explore the wider role of religion in American public life.*

By: Kyle Duncan

This week's *Hobby Lobby* decision has unleashed a torrent of reaction, ranging from dancing in the street to gnashing of teeth. I represented Hobby Lobby, so put me in the dancing camp. Instead of adding to that commentary, however, it's worth considering what the decision portends for challenges now percolating through lower courts by religious nonprofits. Hobby Lobby gives those organizations solid grounds for hoping their suits will succeed too.

The nonprofits—which include the Little Sisters of the Poor, the Eternal Word Television Network, and schools like Wheaton College and the Catholic University of America—are operating under a version of the HHS mandate slightly different from the one invalidated in *Hobby Lobby*. Call it Mandate 2.0. Under this "accommodation," religious organizations need not cover contraceptives directly in their health plans. Instead, they must execute a form that authorizes their insurer or administrator to deliver that same coverage to their employees.

The problem for the non-profits is that the contraceptive coverage goes into effect *only if* they execute the form. Their signature is the triggering event—the starter's pistol, the ringing-the-

opening-bell-on-Wall-Street—that initiates the revamped contraceptive delivery system. Once they grasped how Mandate 2.0 works, most objectors said to themselves, "This is just as bad as Mandate 1.0. It's just an extra layer of paperwork."

Some will say, "Signing a form is no big deal." Really? How about signing a mortgage? A living will? What if the President signs an executive order? What if a governor signs a death warrant? The physical action of signing these pieces of paper is trivial. The consequences can be life-altering. So, one need not consult Thomas Aquinas to grasp a religious organization's objection to signing*this* particular form. By doing so, they would authorize an agent to deliver *on their behalf* the same services they object to in the first place.

Hobby Lobby did not consider Mandate 2.0. So how might it help the nonprofits? The answer is that the Court explained when the government "substantially burdens" religious exercise. The government had argued that Mandate 1.0 was not a substantial burden because the business owners' connection to contraception was "attenuated": *they*didn't have to take the drugs but rather only had to cover them. The Court rejected that theory. Whether the business owners were complicit, the Court explained, "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." The Court rejected the government's "attenuation" argument as an attempt to "[a]rrogat[e] the authority to provide a binding national answer to this religious and philosophical question."

That analysis dooms Mandate 2.0. After all, the government created the "accommodation" to buttress its "attenuation" argument. And so, in the non-profit litigation, it has claimed that Mandate 2.0 makes a religious objector even *further*"attenuated" from contraception. Before *Hobby Lobby*, that argument was specious; now it is extinct. The government cannot rewrite the theology of religious objectors by adding a layer of bureaucracy to its contraceptive delivery system.

Some, however, think *Hobby Lobby* implicitly approved the accommodation by pointing to it as an alternative means for delivering contraceptives. That is implausible. The Court clearly said it was*not* deciding the validity of the accommodation, provoking criticism from the dissent. And the Court specifically endorsed the injunction it had previously granted the Little Sisters that allowed them to avoid executing the government's form. (For more on this, see here Ed Whelan's "More on the Accommodation Alternative" in the *National Review*.)

The idea that *Hobby Lobby* spells doom for Mandate 2.0 was given a powerful boost not three hours after the decision. Relying on *Hobby Lobby*, the Eleventh Circuit granted EWTN an injunction pending its appeal from a lower court decision that had accepted the government's "attenuation" argument. That is significant in itself, since EWTN had to show likelihood of success to get the injunction. But one of the panel members, Judge William Pryor, delivered a 26-page concurrence explaining why *Hobby Lobby* eviscerates the government's case against EWTN. Of the "attenuation" argument, Judge Pryor said it "calls to mind the proverbial Mizaru, Kikazaru, and Iwazaru who cover their eyes, ears, and mouth to see, hear, and speak no evil.

That is, the United States turns a blind eye to the undisputed evidence that delivering Form 700 would violate [EWTN's] religious beliefs." Judge Pryor's sparkling opinion has been analyzed in detail here, but suffice it to say that it may be the beginning of the end for Mandate 2.0.

Kyle Duncan *was formerly general counsel of the Becket Fund for Religious* Liberty*, where he was lead counsel r*epr*esenting Hobby Lobby Stores in its challenge to the HHS mandate.*

*This piece was originally authored on July 2, 2014 for the Religious Freedom Pro*ject *at Geor*getown's *Berkley Center for Religion, Peace, and World Affairs.*

Tagged: religious freedom, Hobby Lobby, Supreme Court, birth control, law

Duncan Attach 0026

Supplemental Briefs in Zubik v. Burwell

Kyle Duncan April 15, 2016 SHARE:

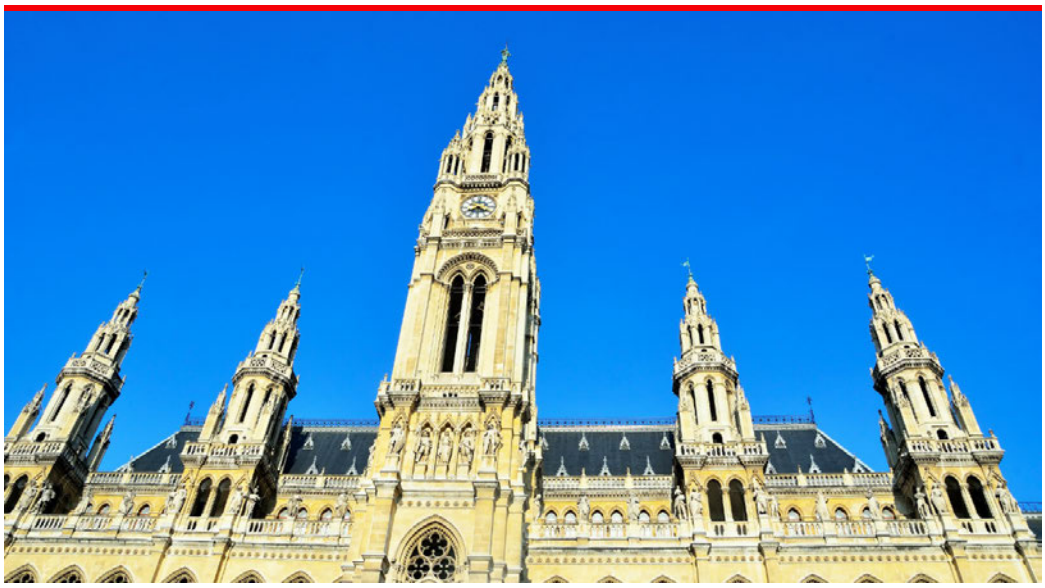
Last Monday, the parties in the challenges to the HHS contraceptive mandate (collectively called Zubik et al. v. Burwell) filed supplemental briefs in response to the U.S. Supreme Court's unusual post-argument order. Issued shortly after oral argument revealed the Justices to be sharply divided on how to resolve the cases, the Court issued an order asking the parties to address whether there could be an arrangement under which employees of the religious plaintiffs could obtain contraceptive coverage, "but in a way that does not require any involvement of [the religious plaintiffs] beyond their own decision to provide health insurance without contraceptive coverage to their employees."

The supplemental brief of the religious plaintiffs is here, and the supplemental brief of the United States is here. Readers may want to consider excellent commentary on those briefs from Michael McConnell at the Volokh Conspiracy, and from Ed Whelan and Yuval Levin at National Review Online. I filed an amicus brief on behalf of another religious plaintiff, the Eternal Word Television Network, which addresses many of the same arguments concerning the validity of the so-called "accommodation" for religious non-profit organizations. The parties will file replies to the supplemental briefs by April 20, 2016.

Questions? Reactions? Email blog@fedsoc.org with your response to continue the conversation. Select comments may be published on the blog.

Duncan Attach 0027

News



Trinity Lutheran Church v. Pauley

Kyle Duncan February 04, 2016

SHARE:

The U.S. Supreme Court recently agreed to review the Eighth Circuit's decision in T*rinity Lutheran Church v. Pauley*. At first blush, this case does not promise the same religious fireworks as some of the Court's recent cases, such as the widespread challenges to the HHS contraceptive mandate by religious orders like the Little Sisters of the Poor and businesses like Hobby Lobby. On closer examination, however, Trinity Lutheran raises serious and contested questions about anti-religious discrimination, and more specifically the extent to which the Constitution restrains the government from excluding religious organizations from participation in public benefit programs.

T*rinity Lutheran* shows that important legal questions can blossom from the smallest seeds. The case concerns a Missouri program that grants funds for the installation at private schools of playgrounds made from recycled tires. Trinity Lutheran, which is

a church that runs a day care center, applied for grant funds to convert its pea gravel playground (which presented safety hazards for children) into a safer poured rubber playground. The state declined the church's application, however, based on a provision in the Missouri Constitution that forbids any "public funds" from aiding, directly or indirectly, any "church, sect, or denomination of religion."

That provision is from one of a number of so-called "State Blaine Amendments," provisions that crept into a many state constitutions in the late 19th and early 20th century. They were inspired by a failed amendment to the federal Constitution sponsored by Maine senator and presidential candidate James G. Blaine. Both in their federal and state versions, Blaine amendments were transparently anti-Catholic. The terms of these provisions were designed to seal off all public funds from Catholic schools, which were commonly referred to at that time as "sectarian" or "denominational" schools. (Many articles have been written about the State Blaine Amendments, including one I wrote in the *Fordham Law Review*).

Today, of course, the federal Establishment Clause allows fairly broad funding of private religious schools—provided those funds are part of a genuinely "neutral" program and end up at religious schools through private individuals' choices. But the state Blaine Amendments, which persist today in numerous state constitutions, erect a far more formidable barrier to public money flowing to any religious organization. Hence the problem in T*rinity Lutheran*: whereas the federal Establishment Clause poses no obstacle to the church participating in the "Scrap Tire Grant Program," the Missouri Constitution categorically bars participation of any the grant applicant who is a "church" or some other religious organization.

Trinity Lutheran challenged its religion-based exclusion from the grant program under the Free Exercise Clause, and one would have thought its case was bullet-proof. After all, the Missouri

Constitution excluded it from the program only because it was a religious institution; a day care run by a secular institution would have qualified for the grant. That appears to be rank religious discrimination, invalid even under the modern free exercise test adopted in *Employment Division v. Smith* because it does not "neutrally" treat religion. Yet the federal Eighth Circuit upheld the exclusion, based on a problematic U.S. Supreme Court decision from 2004 called *Locke v. Davey*.

Locke held that the Free Exercise Clause was not offended by a Washington scholarship program that prohibited funding majors in "devotional theology." The 7-justice majority opinion (authored by Chief Justice Rehnquist) reasoned that states have a strong interest in preventing public funds from being used to educate ministers, even in the context of an otherwise neutral program. As authority for that point, the majority drew on the founding-era hostility to taxes earmarked for ministers' salaries (most famously expressed by James Madison in his "Memorial and Remonstrance").

Whether that historical analogy holds water is only one of Locke's problems. A bigger problem is whether Locke implicitly gave permission to states to engage in religious discrimination that goes beyond a refusal to fund "devotional theology" degrees. Justice Scalia's dissent was concerned about exactly that: he warned that, while Locke's holding was "limited to training the clergy," its logic was "readily extendible" to other kinds of funding programs and could serve as a pretext for broad discrimination against religious persons and groups.

Thus, what is immediately at stake in T*rinity Lutheran* is the breadth of Locke. A 3-2 split among the lower courts is presumably what led the Court to review the case. Some lower courts had, like the Eighth Circuit, read Locke broadly and have relied on the decision to justify state exclusion of religious schools from educational funding and scholarship programs,

Duncan Attach 0030

based purely on the religious character of the schools. In a superb opinion in *Colorado Christian University v. W*eaver, then-Tenth Circuit Judge Michael McConnell correctly explained that *Locke* is far narrower than those courts imagine and cannot justify excluding schools from neutral funding programs based on their religious identity. Such religious discrimination should virtually always violate the Free Exercise Clause.

One hopes that in T*rinity Lutheran*, the U.S. Supreme Court carefully reviews Judge McConnell's opinion in Weaver and reaches a similar result. Short of overruling Locke (which the certiorari petition does not seek), it is imperative to limit Locke as closely to possible to its historical basis in the denial of government funds for training ministers. A broad reading of Locke could have severely negative consequences for the ability of religious institutions and persons to participate in public benefit programs.

For instance, it could justify restrictions barring "pervasively sectarian" schools from participating in student aid programs, or restrictions on bond financing for religious institutions. It could be used as a pretext for excluding religious people from competition for government contracts, from tax exemptions, or from student loans. None of these exclusions would be justified by any rigid principle of "separation of church and state" in the federal Establishment Clause; over the past decades the Supreme Court (assisted by excellent historical scholars like Michael McConnell, Douglas Laycock, and Philip Hamburger) has happily disentangled its jurisprudence from such ahistorical notions. It would be deeply unfortunate, then, if states or the federal government could use the dubious reasoning in Locke to justify religion-based restrictions on participation in public programs. In T*rinity Lutheran*, the Supreme Court has the opportunity to clarify that such restrictions are anathema to the Free Exercise Clause.

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Duncan Attach 0031

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Symposium: Overruling Windsor

Posted Sat, June 27th, 2015 2:38 pm by Kyle Duncan

Kyle Duncan is a lawyer in private practice in Washington, D.C. He successfully defended Louisiana's marriage laws in Robicheaux v. Caldwell, and filed an amicus brief on behalf of fifteen States in Obergefell v. Hodges. The views in this post are his alone.

In Obergefell v. Hodges, fifteen states submitted an amicus brief cautioning that a decision constitutionalizing the issue of same-sex marriage would repudiate the Court's own recent decision in United States v. Windsor, demean the democratic process, and imperil civic peace by marginalizing the views of millions of Americans. Now that decision has come. Let's examine it in light of the concerns raised by those states.

Windsor's Disappearing Ink

Just two terms ago in Windsor, a five-Justice majority emphatically reaffirmed the authority of states to decide whether to adopt same-sex marriage on the basis of democratic deliberation. Windsor invalidated the federal marriage definition in the Defense of Marriage Act because it undermined New York's decision to extend marriage to same-sex couples. The Court left no doubt that the states' "historic and essential authority to define the marital relation" was the hinge on which Windsor turned. DOMA's federal marriage definition was invalid because it wrongly sought "to influence or interfere with state sovereign choices about who may be married."

Windsor did not just mention state authority over marriage in a footnote. Windsor rhapsodized about it. Over sixteen paragraphs, the majority:

- underscored that "the State's power in defining the marital relation" was "of central relevance" to Windsor's outcome;
- confirmed that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations";
- emphasized that "[t]he significance of state responsibilities for the definition of marriage dates to the Nation's beginning";
- wondered at DOMA's "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage"; and
- condemned DOMA because its goal "was to put a thumb on the scales and influence a state's decision as to how to shape its marriage laws."

The Windsor majority said all that two years ago. Two years later, the same majority in Obergefell mentions none of it. Two years ago, the Windsor majority chastised Congress for trying to undermine a state's authority to adopt same-sex marriage. Two years later, the same majority in Obergefell chastises the states for not adopting same-sex marriage. The Court giveth; the Court taketh away. How Obergefell squares with Windsor on this point is puzzling. As federal district judge Juan Pérez-Giménez remarked in a decision upholding Puerto Rico's traditional marriage laws, "It takes inexplicable contortions of the mind … to interpret Windsor's endorsement of the state control of marriage as eliminating the state control of marriage."

Discounting democracy?

The amici states also warned that a decision constitutionalizing this issue would sweep away the value of the democratic process in states that have decided to confer marriage on same-sex couples. Over the past decade, proponents of same-sex marriage have achieved remarkable successes by convincing their

fellow citizens that they have the better argument about the meaning of marriage. Despite numbering less than four percent of the population, in some five years they have used the political process to change marriage laws in Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. That is a stunning feat.

In those states, removing the man-woman definition from marriage may well signify a cultural shift towards a new vision of marriage in those states. Take New York for example, which democratically adopted same-sex marriage in 2011. Windsor viewed this as an epochal event. What New Yorkers did, the Court explained, demanded "both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality."

Windsor appeared to view democratic deliberation on this issue as a valuable exercise. The Court, after all, praised New Yorkers for engaging in a "statewide deliberative process that enabled [them] to discuss and weigh arguments for and against same-sex marriage." Two years later, however, we now know that the Fourteenth Amendment demanded all along that New Yorkers adopt same-sex marriage. In light of that, must we now downgrade Windsor's praise of New York? It turns out that New Yorkers were not adopting a new perspective on marriage based on their considered judgment about the meaning of marriage and equality. Instead, they were correcting an unjust defect in their marriage laws. How strange. Windsor was congratulating New Yorkers for engaging in a debate that – Obergefell now teaches – has only one right answer.

To be sure, Obergefell does not entirely omit mention of democratic debate. It gestures towards "referenda, legislative debates, and grassroots campaigns." But the majority seems to say that these things are valuable only to give the Court an "enhanced understanding" of the issue, which it is now time to decide. That is an alarming theory of constitutional law. As Chief Justice John Roberts remarked in dissent: "In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will."

Marginalizing dissenters

Finally, the amici states cautioned that a decision constitutionalizing same-sex marriage would send the harmful message that state citizens are incapable of resolving the issue. As the Court explained last year in Schuette v. Coalition to Defend Affirmative Action, removing a profound issue such as this from the hands of state citizens would be "demeaning to the democratic process."

Regrettably, in the run-up to Obergefell, Schuette's warnings had proven prophetic. In the wave of post-Windsor decisions striking down state marriage laws, citizens who did not support same-sex marriage were called "barking crowds" and compared to those who "believed that racial mixing was just as unnatural and antithetical to marriage as … homosexuality." They were told that their marriage laws have "the same result" as interracial marriage bans. Their defense of marriage as grounded in the biological reality of procreation was mocked by one circuit judge who summed it up in this way: "Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry." They were lectured that their views are "callous and cruel" and should be "discard[ed] into the ash heap of history."

This unsettling trend was also reflected in the lower courts' frequent reliance on Loving v. Virginia. Man-woman marriage laws were repeatedly linked to the white supremacist laws correctly invalidated in Loving. That was troubling and unfair. Loving rightly invalidated anti-miscegenation laws, racist relics of slavery that struck at the heart of the Fourteenth Amendment. But, as the amici states stressed, those odious laws have nothing to do with the same-sex marriage debate. While the

Fourteenth Amendment outlaws racial discrimination, the Supreme Court recognized in Windsor that the Constitution leaves citizens free "to discuss and weigh arguments for and against same-sex marriage." It is laughable to suppose that Windsor would have praised New Yorkers' deliberations for and against same-sex marriage if a refusal to recognize same-sex marriage was equivalent to racism.

In their brief, the amici states urged the Supreme Court to do what the lower courts had largely failed to do – treat Americans holding opposing views on this question as honorable participants in a debate over a question of profound civic importance. Did the Obergefell decision accomplish that? My initial read is that the opinion tried but failed.

On the one hand, the decision states that many who oppose same-sex marriage do so "based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." Yet, in the same paragraph, the majority goes on to say that, if those people enact their views into law, the "necessary consequence is to … demean[] or stigmatize[]" gays and lesbians. Similarly, the Court "emphasize[s]" that those with religious objections to same-sex marriage "may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." The First Amendment protects those persons "as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." Yet elsewhere the Court explains that laws based on the conviction that marriage is a man-woman institution "disparage" gays and lesbians, "diminish their personhood," and are not "in accord with our society's most basic compact." And the Court repeatedly cites Loving as central to its outcome.

The four dissenting Justices highlighted these unfortunate aspects of the majority opinion. The Chief Justice lamented "the extent to which the majority feels compelled to sully those on the other side of the debate." Justice Scalia remarked that the majority "is willing to say that any citizen" who does not support same-sex marriage thereby "stands against the Constitution." Justice Alito wrote that the decision "will be used to vilify Americans who are unwilling to assent to the new orthodoxy," and predicted this sort of social and legal fallout:

I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

One hopes Justice Alito is mistaken. One fears that – given the rhetoric and reasoning of the majority opinion in Obergefell – he may be proven right.

Marriage, Self-Government, and Civility

thepublicdiscourse.com/2015/04/14894/

By Kyle Duncan 4/23/2015

When state citizens determine the shape of civil marriage, they reflect on an institution more fundamental to our civilization than any other. In recent years, some states have concluded that marriage should include same-sex couples. Accordingly, they have altered their marriage laws through the democratic process. Others have concluded that marriage has always been, and should remain, a man-woman relationship. They have accordingly declined to alter their marriage laws.

In both cases, these citizens have acted upon what the Supreme Court calls their "considered perspective on the historical roots of the institution of marriage" (United State*s* v. Windsor). Our federal system accommodates Americans on both sides of this profound issue. As Justice Oliver Wendell Holmes wrote over a century ago, our "Constitution . . . is made for people of fundamentally differing views."

Yet pending before the Supreme Court are four cases that could impose on every state a novel and widely contested definition of marriage. The plaintiffs are same-sex couples who assert that the Fourteenth Amendment removes same-sex marriage from democratic deliberation and compels all fifty states to adopt it. They are profoundly mistaken. The Constitution takes no sides on this issue, and so leaves it up to the states.

The fact that Americans have reached different conclusions about same-sex marriage is not a sign of a constitutional crisis that requires the Supreme Court to step in. On the contrary, it's a sign that our Constitution is working the way it should. In our federal system, this issue must be resolved at the state level. To resolve it through federal judicial decree would demean the democratic process, marginalize the views of millions of Americans, and do incalculable damage to our national civic life.

Dignity and Self-Government

The structure of our federal Constitution is premised on state sovereignty. This may seem obvious, but it was not during the Constitution's ratification. For instance, Alexander Hamilton needed to assure the readers of the Federalist papers that

> The proposed constitution, so far from implying an abolition of the state governments, make*s* them constituent part*s* of the national sovereignt*y* … and leave*s* in their possession certain exclusive, and ver*y* important, portion*s* of the sovereign power.

The Supreme Court has confirmed Hamilton's promise. The Constitution does not make the states "political subdivisions of the United States" (New Yor*k* v. United States), nor "mere provinces or political corporations" (Alden v. Maine). Rather, the Constitution "specifically recognizes the States as sovereign entities" (Alden).

One might think multiplying sovereigns would multiply threats to our freedom. Paradoxically, the opposite is true: it means we have more freedom, not less. Government power is diffused, not concentrated. When the national government respects the authorities of state governments, people can more effectively shape their local communities. Perhaps most importantly, states can disagree on important matters. This is why Justice Brandeis called the states "laboratories of democracy for social and economic experiment."

Family Law Belongs to the States

Among the many areas of law reserved to the states, none is more central than family law. In Ankenbrandt v. Richards, the Court clearly acknowledged that "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." Just two years ago, in

Windsor, the Court confirmed that “The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations.”

When the Supreme Court decided Windsor in June 2013, twelve states had democratically adopted same-sex marriage. Whether one sees this development as encouraging or alarming, it is obviously brand new. No state recognized same-sex marriage until Massachusetts in 2003; no country in the world did until the Netherlands in 2000.

The step from the older to the newer version of marriage is a momentous one. As Judge Jeffrey Sutton wrote for the Sixth Circuit, the concept of marriage as a man-woman institution is “measured in millennia, not centuries or decades,” and “until recently [it] had been adopted by all governments and major religions of the world.” In Windsor, the Supreme Court similarly observed that “marriage between a man and a woman had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.” Thus, when state citizens decide whether to adopt same-sex marriage, one thing appears inescapably true: they are exercising their sovereign authority over the basic architecture of family law.

Only from this perspective can we see what is truly at stake in the same-sex marriage cases. The plaintiffs are not merely asking the Court to recognize a new right. Instead, they are asking the Court to declare that the Constitution removes this issue from democratic deliberation. It is often asked by proponents of same-sex marriage what “harms” would flow from judicial recognition of their claims. From the perspective of democratic self-government, those harms would be severe, unavoidable, and irreversible.

State Authority and the Windsor Decision

The first casualty of a decision constitutionalizing same-sex marriage would be the coherence of the Supreme Court’s own precedent, which just two terms ago emphatically reaffirmed the authority of states to decide this very question on the basis of democratic deliberation.

In Windsor, the Court invalidated the federal marriage definition in the Defense of Marriage Act (“DOMA”) because it undermined New York’s authority to extend marriage to same-sex couples. The Court left no doubt that state authority—what the Court called the states’ “historic and essential authority to define the marital relation”—was the hinge on which Windsor turned. As the Court put it, DOMA’s federal definition wrongly sought “to influence or interfere with state sovereign choices about who may be married.”

Ironically, the plaintiffs ground their arguments for overturning state marriage laws on Windsor itself. They can do so, however, only by maintaining a studied silence about Windsor’s affirmation of state authority over marriage. Their reticence is unsurprising: as federal district judge Juan Pérez-Giménez acidly remarked, “It takes inexplicable contortions of the mind . . . to interpret Windsor’s endorsement of the state control of marriage as eliminating the state control of marriage.”

Mocking Democracy

A decision constitutionalizing this issue would also sweep away the value of the democratic process in states that have decided to confer marriage on same-sex couples. Over the past decade, proponents of same-sex marriage have achieved remarkable successes by convincing their fellow citizens that they have the better argument about the meaning of marriage. Despite numbering less than 4 percent of the population, in some five years they have used the political process to change marriage laws in Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. That is a stunning feat, given that the man-woman definition had been so ingrained in American culture.

One should not lightly conclude that these victories arose merely from savvy politics. To the contrary, removing the man-woman definition from marriage may signify a cultural shift towards a new vision of marriage in those states. Take New York, for example, which adopted same-sex marriage in 2011. Windsor viewed this as no mere alteration of a statute, but as an epochal event. What New Yorkers did, the Court explained, demanded “both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the

meaning of equality." A decision constitutionalizing same-sex marriage would obliterate the significance of that remarkable democratic victory.

It would also make nonsense of Windsor itself. Windsor, after all, praised New Yorkers for engaging in a "statewide deliberative process that enabled [them] to discuss and weigh arguments for and against same-sex marriage." But deciding that the Constitution dictates adoption of same-sex marriage would mock that democratic process. On that view, New Yorkers were not adopting a new perspective on marriage, but simply correcting a defect in their marriage laws. Windsor, however, did not praise New Yorkers for engaging in a debate with only one correct constitutional answer.

Poisoning Debate

A decision constitutionalizing same-sex marriage would discount the democratic process in an even more troubling way. It would send the message that state citizens are incapable of constructively resolving the issue. That would flout Windsor's affirmation of democratic consensus, and it would be false to the Court's recent teaching in Schuette v. Coalition to Defend Affirmative Action.

In Schuette, the Court rejected an equal protection challenge to a Michigan constitutional amendment forbidding affirmative action in public universities. Recognizing that the amendment reflected "the national dialogue regarding the wisdom and practicality of [affirmative action]," Schuette held that "courts may not disempower the voters from choosing which path to follow." "It is demeaning to the democratic process," Schuette explained, "to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds."

What Schuette taught about affirmative action speaks directly to same-sex marriage. As with affirmative action, there is a "national dialogue" regarding same-sex marriage, and "courts may not disempower the voters from choosing which path to follow." As with affirmative action, it would be "demeaning to the democratic process to presume . . . voters are not capable of deciding an issue of this sensitivity on decent and rational grounds."

Regrettably, Schuette's warning against demeaning the democratic process has proven prophetic. In the wave of post-Windsor decisions striking down state marriage laws, citizens who do not support same-sex marriage have been called "barking crowds" and compared to those who "believed that racial mixing was just as unnatural and antithetical to marriage as . . . homosexuality." They have been told that their marriage laws have "the same result" as interracial marriage bans. Their defense of marriage as grounded in the biological reality of procreation has been mocked by a judge who summed it up in this way: "Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry." They have been lectured that their views are "callous and cruel" and should be "discard[ed] into the ash heap of history."

This unsettling trend is also reflected in the lower courts' frequent reliance on Loving v. Virginia. Courts have repeatedly linked the white supremacist laws correctly invalidated in Loving with man-woman marriage laws. That is a troubling misuse of a landmark decision. Loving rightly invalidated anti-miscegenation laws, racist relics of slavery that struck at the heart of the Fourteenth Amendment. Those odious laws have nothing—nothing—to do with same-sex marriage. While the Fourteenth Amendment outlaws racial discrimination, the Supreme Court recognized in Windsor that the Constitution leaves citizens free "to discuss and weigh arguments for and against same-sex marriage." It is laughable to suppose that Windsor would have praised New Yorkers' deliberations for and against same-sex marriage if a refusal to recognize same-sex marriage were equivalent to racism.

Protecting Civic Peace

When state citizens decline to adopt same-sex marriage, they are not voting to roll back the Civil Rights Movement. That insinuation is degrading to millions of Americans, and the Supreme Court should roundly denounce it. Only that will expunge the corrosive premise so many lower court opinions have eagerly adopted. Those decisions, both in rhetoric and reasoning, forget Justice Holmes's insight that our "Constitution . . . is made for people of fundamentally differing views."

Many Americans believe marriage should extend to same-sex relationships. Many do not. In the name of civic peace, the Supreme Court must do what the lower courts have largely failed to do—treat Americans holding opposing views on this question as honorable participants in a debate over a question of profound civic importance.

But a decision from the Court declaring a constitutional right to same-sex marriage would have the opposite effect. Inevitably, it would validate in the public mind the numerous decisions that have characterized this issue, not as a debate between good people on either side, but as a battle between those who love individual freedom and those who cling blindly to tradition. That would do incalculable damage to our civic life in this country.

How much better for this issue to play out, state by state, with citizens engaged in urgent but respectful disagreement. That is precisely what was happening before the courts began to intervene two years ago. The Supreme Court should let that process of self-governance continue.

Kyle Duncan is a lawyer in private practice in Washington, DC. This article is adapted from an amicus brief he filed in the same-sex marriage cases on behalf of fifteen States.

By Kyle Duncan, General Counsel for the Becket Fund for Religious Liberty

This is an important week in the Supreme Court for religious freedom. This Wednesday, the Justices will hear argument in T*own of Greece v. Galloway*. The case asks whether a municipal board unconstitutionally "establishes" an official religion merely by allowing volunteer chaplains from a variety of religious faiths to pray before the opening of board meetings. The Court has not considered this issue since its 1982 decision in *Marsh v. Chambers*, which upheld our nation's two-centuries-old tradition of such invocatory prayers before federal and state governmental bodies. T*own of* Greece gives the Court an opportunity to reaffirm Marsh and explain in greater depth why invocations like these violate no one's rights and bear no resemblance to the religious "establishments" outlawed by the First Amendment. Lyle Denniston at Scotusblog provides an excellent preview of the case here. The Becket Fund's amicus brief contains a wealth of original historical research supporting the constitutionality of the prayers.

This week also sees the completion of briefing in the HHS mandate cases currently pending before the Supreme Court. In three separate cases, petitioners have asked the Court to review whether religious business owners can be coerced by a federal regulation into providing insurance coverage for contraceptives, sterilization, and abortion-inducing drugs. In one of those cases, the Becket Fund obtained a landmark victory before the full Tenth Circuit Court of Appeals on behalf of the Green family and their businesses, Hobby Lobby Stores and Mardel Christian. The U.S. Solicitor General and Hobby Lobby have agreed that the issues presented in the case are exceptionally important, implicate a rapidly deepening circuit split, and should be resolved by the Court. (Indeed, just last week, the D.C. Circuit issued an opinion in yet another HHS mandate challenge, *Gilardi v.* Sebelius, agreeing in part with the Tenth Circuit and splitting the lower courts even further). The Solicitor General's final brief, filed today, agrees that *Hobby Lobby* "presents an excellent vehicle" for resolving the critically important religious freedom issues presented by these cases.

The Supreme Court will consider these petitions at its November 26 conference.

Duncan Attach 0040

FIRST THINGS

HOW FARES RELIGIOUS FREEDOM?

by
Kyle Duncan
October 2013

Over two years ago, the federal Department of Health and Human Services unveiled the "HHS mandate," a regulation requiring private health insurance to cover all FDA-approved contraceptive and sterilization methods, including the "emergency contraceptives" that cause early abortions by acting (as the FDA confirms) to prevent an embryo from implanting in the womb. The mandate co-opts the existing employer-insurance system to encourage greater use of contraception and sterilization. This, the government asserts, will improve the health of women and their children and put women on a more equal footing with men.

Certain religious employers, however, take a sharply different view of the morality (and the promised benefits) of contraception, sterilization, and abortion-inducing drugs, and they cannot in good conscience cover them in their insurance. Beginning in late 2011 with a lawsuit by Belmont Abbey College, some two hundred religious universities, dioceses, charities, businesses, and individuals have filed over sixty lawsuits seeking to enjoin the mandate and restore their religious freedom.

This is a watershed moment in American religious liberty. The litigation"relying on 1993's Religious Freedom Restoration Act, which provides heightened conscience protection against federal law"tests believers' ability to resist what they see as coerced complicity with immoral practices. And it does so against the politically explosive backdrop of a regulation issued under the authority of the Patient Protection and Affordable Care Act.

The ultimate resolution"likely by the Supreme Court"will guide future disputes sure to arise over future mandates that could encompass all manner of controversial practices from surgical abortion to euthanasia to sex-change surgery. Moreover, the first wave of appellate decisions on the current mandate adds yet more complexity by addressing whether conscience claims can be asserted by commercial business owners.

The struggle has now reached two inflection points. First, this June HHS produced its long-promised "accommodation," an adjustment to the mandate designed to assuage the objections of nonprofit organizations. It remains to be seen whether courts will agree that it does: Numerous suits, postponed by courts while the accommodation gestated, will now continue.

Second, also in June, the first federal appellate ruling on the mandate emerged with the Tenth Circuit's dramatic decision in *Hobby Lobby Stores v. Sebelius* (holding that a for-profit corporation can exercise religion), followed in July by the Third Circuit's decision in *Conestoga Wood Specialties v. Sebelius* (reaching the opposite conclusion). Other circuits will soon follow. These decisions are doubly significant: They not only address whether the mandate can apply to religious objectors, but they do so in the special context of commercial businesses.

Although filed earlier than the business cases, lawsuits by more traditional religious plaintiffs"including Notre Dame, Wheaton College, Catholic Charities USA, and EWTN"were stalled by the delayed accommodation. Mid-litigation, HHS had promised not to enforce the mandate against nonprofits until the accommodation was finalized. Of course, the department could have *exempted* nonprofits altogether and promptly ended the litigation. It refused. Exemptions were for "religious" employers, which in its view means only churches and religious orders, not enterprises such as religious schools, charities, and hospitals.

Sticking with that approach, the now-released accommodation offers no exemption. Employees will still receive free contraception coverage, albeit through putatively separate payments from their employer's insurer or third-party administrator. Thus, a self-insured organization like

EWTN must "designate" its administrator to "make or arrange for" contraceptive payments. HHS assures employers that those payments are not benefits of their plans and thus that the scheme absolves them from complicity in the coverage.

How this will work is unclear. For instance, the administrator of a self-insured employer can simply refuse to participate. It is also uncertain where the government gets authority to order insurers to make unreimbursed contraceptive payments.

What is clear, however, is that the scheme fails in its stated goal of *morally* insulating employers. Despite the government's theological assurances, several objecting employers have already concluded that they remain the principal cog in a system (albeit a complex and opaque one) for delivering free contraception, and have filed new lawsuits. After all, if the government really intended to sever any connection between objecting employers and contraception coverage, why didn't it simply offer them an *exemption* like those given churches?

The lawsuits by religious owners of businesses are a different story. From the beginning, HHS deemed commercial businesses "secular": As profit makers, they and their owners could have no religious claim against the mandate and would receive no accommodations or delays. The mandate took effect against them on August 1, 2012, enforced with an array of penalties including excise taxes of $100 per employee per day. Businesses began to sue in mid-2012.

And they began to win. By mid-2013, most of the federal trial courts"over twenty in all"had found business owners likely to prevail under RFRA, rejecting the argument that religion can *never* be exercised in a for-profit corporation.

Not all business owners, though. The most prominent early setback involved Hobby Lobby Stores and its founders, the Green family. Based in Oklahoma City, Hobby Lobby is a nationwide arts and crafts chain run according to the Greens' Evangelical Christian faith. Hobby

Lobby closes on Sundays, employs chaplains, offers employees spiritual counseling, and, every Christmas and Easter, takes out newspaper ads proclaiming "Jesus as Lord and Savior."

While not against all contraception, the Greens object profoundly to covering "emergency contraceptives" that cause early abortions. In September 2012, represented by the Becket Fund for Religious Liberty, the Greens, Hobby Lobby, and Mardel (an affiliated chain of Christian bookstores) sued in Oklahoma City, seeking a preliminary injunction. The trial court denied it.

Hobby Lobby had no religious liberty claim, the court reasoned, because "general business corporations . . . do not pray, worship, observe sacraments or take other religiously motivated actions separate and apart from the intention and direction of their individual actors." Nor did the Green family have a claim, because the mandate technically applied only to the company. At most, the Greens were merely being asked to "subsidize *someone else's* participation in an activity that is condemned by [the Greens'] religion."

Hobby Lobby appealed to the Tenth Circuit Court of Appeals and asked the entire court for an *en banc* hearing. This rare procedure, in which the whole court hears a case instead of the usual three-judge panel, is reserved for unusually difficult matters where there is likely to be disagreement internally or with other circuits. Remarkably, the Tenth Circuit granted Hobby Lobby's request and heard lively arguments before eight judges. On June 27, a five-judge majority (including President Obama's newest appointee) reversed the lower court.

Judge Timothy Tymkovich's majority opinion held that neither RFRA nor the First Amendment excludes religious exercise by a for-profit corporation: "A religious individual may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values. As a court, we do not see how we can distinguish this form of evangelism from any other." In a concurring opinion, Judge Harris Hartz made a similar point: "The Constitution does not require compartmentalization of the psyche, saying that one's religious persona can participate only in non-profit activities."

The majority also said the issue was not, as the lower court saw it, whether Hobby Lobby or the Greens had to contribute fungible dollars toward someone else's contraceptive use. Properly framed, the issue was whether the government could, on pain of draconian fines in excess of $1 million per day, "demand that Hobby Lobby . . . enable access to contraceptives that Hobby Lobby . . . ?deem[s] morally problematic." Following the Tenth Circuit's ruling, the district court preliminarily enjoined the mandate on July 19.

The Tenth Circuit's decision deftly weaves together several legal principles. It first notes that RFRA protects religious exercise by any "person," a term which includes "corporations . . . as well as individuals." Nonprofit corporations routinely exercise religion, but the court explains that there is nothing magical about "nonprofit" status. When addressing claims by Jewish furniture retailers (*Braunfeld v. Brown* in 1961) and an Amish carpenter (*United States v. Lee* in 1982), the Supreme Court did not question that religious exercise could occur in a commercial business.

And"although the principle has been obscured by recent controversies over corporate political speech"corporations have been exercising rights under the First, Fourth, Fifth, Sixth, Seventh, and Fourteenth Amendments for over a century. As the Supreme Court explained in 1978 in *Monell v. Department of Social Services* , "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." Religion is practiced as naturally by groups as by individuals, and so it fits within the sweep of rights capable of exercise within the corporate form.

Yet, three weeks later, another circuit reached the opposite conclusion. In *Conestoga* , the Third Circuit "respectfully disagree[d]" with the Tenth in a case involving a cabinet manufacturer owned by the Hahns, a Mennonite family. Despite an "extensive list" of cases recognizing corporate speech rights, the majority found no "similar history of courts providing free exercise protection to corporations." Citing the lower court's (reversed) opinion in *Hobby Lobby* , the

majority concluded that "we simply cannot understand how a for-profit, secular corporation"apart from its owners"can exercise religion."

The owners' claims fared no better: The majority held that the mandate falls on Conestoga only and "does not actually require *the Hahns* to do anything." Judge Kent Jordan's sixty-five-page dissent called the majority decision "genuinely tragic," adding that the government's position "appears to be itself a species of religion, based on the idea that seeking after filthy lucre is sin enough to deprive one of constitutional protection."

These lengthy and fractured decisions appear to set the stage for Supreme Court review. The disagreement will quickly deepen: the Sixth and Seventh Circuits will weigh in soon. Moreover, the growing conflict concerns basic questions that will essentially determine the outcome of some thirty other business cases now in court. Indeed, following entry of the injunction in *Hobby Lobby* , the Department of Justice had the case stayed until October 1 to consider whether to seek Supreme Court review.

Hobby Lobby and the other business cases present fundamental religious freedom questions, triggered by a divisive, nationwide regulation of health insurance. The government itself has raised the stakes of these cases by taking a legal position that would deprive an entire class of Americans"business owners"of *any* conscience rights.

That is alarming. It is one thing to say that a business owner's religious convictions must be weighed against a public interest in workplace regulation. That is all RFRA requires"admittedly with a presumption toward accommodating religion. But it is entirely another thing to say, as the government does, that the business owner has no religious claim *at all* . Surely a Kosher deli has a religious claim against a law forcing it to sell pork. Surely a pro-life physician's practice has a religious claim against a law making it perform surgical abortions. Yet, if these businesses are for-profit, the government says they have forfeited any conscience claim. That cannot be the law.

Religious freedom is not extinguished when a business turns a profit. As the Tenth Circuit wrote in *Hobby Lobby* , the authors of the Free Exercise Clause deliberately "chose *exercise* , indicating that . . . the protections of the Religion Clauses extend beyond the walls of a church, synagogue, or mosque to religiously motivated *conduct* , as well as religious belief."

The religious conduct at issue in these cases is familiar to any believer bound to avoid certain practices, whether Sabbath work, eating pork, or manufacturing the implements of war. The conviction that such practices must be avoided has precisely the same force whether the occasion for sin arises in a church, a charity, or a business. The believer's conscience cries out for protection, even when he sells a product to make a living.

Kyle Duncan is general counsel of the Becket Fund for Religious Liberty and lead counsel for Hobby Lobby Stores and EWTN.

By: *Kyle Duncan, General Counsel at The Becket Fund for Religious Liberty*

The American legal system doesn't do theology. Thank heavens. No one wants judges telling us whether the Nicene Creed is correct, whether the Red Sea really parted, or whether reincarnation happens. Yes, religious believers sometimes go to court when their rights are violated, but they typically argue that theology is none of the government's business. And the government almost always agrees.

Strange, then, that the Department of Justice recently went out of its way to inject theology into a nationwide religious liberty dispute. *Conestoga Wood Specialties* is one of over thirty challenges by business owners to the HHS mandate, a regulation requiring health insurance to cover contraception and sterilization. During oral argument last May, Circuit Judge Kent Jordan stressed that the *Conestoga* plaintiffs object only to covering specific "abortifacient" drugs and devices, triggering this exchange with the DOJ attorney (italics mine):

DOJ: If I may just interrupt with… abortifacients… just to make clear… the Court is using a theological term. If the Court wants to refer to IUDs and Plan B and Ella, that's [sic] neutral terms. For federal law purposes, a device that prevents a fertilized egg from implanting in the uterus is not an abortifacient. Abortifacient would be a drug like RU-486, that has an effect only after the woman is pregnant. So if, if the court wants a neutral description, we're talking about drugs and devices that could prevent a fertilized egg from implanting in the uterus.

JORDAN: I'm not, I'm not sure… I'm not sure where you're…

DOJ: I'm just urging the Court not to adopt theological terminology in trying to operate…

JORDAN: How is that theological? I thought that was… I thought, having read the amicus briefs, several

> of them in this case, that that was an accepted scientific term. But if that's troubling to you, we'll call it "Ella," okay?
>
> DOJ: That's fine. Or an IUD, about which there's actually more evidence.
>
> JORDAN: Let's just say "Ella" for purposes of discussion. Okay…

This was a remarkable moment for three reasons.

First, "abortifacient" is obviously not a theological term. Rather, as Judge Jordan's voluminous dissent explains, it is a "scientific medical term" which the McGraw-Hill Dictionary of Scientific and Medical Terms defines as "[a]ny agent that induces an abortion." Divine revelation is not necessary to grasp what the word means.

Second, disagreement over whether the mandated drugs cause "abortion" turns, not on theology, but on a far more arcane discipline: federal regulatory terminology. Federal regulation defines "pregnancy" as beginning at "implantation" and not conception, allowing the government to say that the mandated drugs do not cause abortions "within the meaning of federal law." But these semantics are irrelevant to the *Conestoga* plaintiffs' claims, which center on the fact that Plan B, Ella, and certain IUDs—all included in the mandate—can destroy an embryo by preventing it from implanting in the womb. DOJ has already conceded this fact in multiple HHS cases, which is why the *en banc* Tenth Circuit, addressing the same question in its *Hobby Lobby* decision, held that "there is no material dispute" about it.

Third, while there's nothing theological about the term "abortifacient," the government's own defense of the mandate is, ironically, saturated with theology. Its basic position is that a profit-making entity cannot exercise religion. That is theology, not law. As Judge Jordan's Conestoga dissent put it, the government's position:

> appears to be itself a species of religion, based on the idea that seeking after filthy lucre is sin enough to deprive one of constitutional protection, and taking the theological position that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time.

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(internal quotes omitted). In *Hobby Lobby*, the Tenth Circuit (which expressly disagreed with the Third Circuit on whether commercial businesses can exercise religion) made a similar point. Judge Tim Tymkovich wrote for a five-judge majority that "[a] religious individual may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values. As a court we do not see how we can distinguish this form of evangelism from any other." Indeed, a civil court cannot make such distinctions because they would be inherently theological.

Which brings us back to the beginning: American courts don't do theology. They do law, and the HHS business cases present a maze of legal issues. Does the way a business is organized somehow determine whether it can exercise religion? If a sole proprietor can exercise religion, why can't a partnership? An LLP? An LLC? An S-Corp? Does it matter whether the business is structured as a non-profit or a for-profit? If a business can't exercise religion in its own right, can its owners? These questions have already provoked a clear split between the Third and Tenth Circuits, and the disagreement will quickly deepen with decisions expected soon from the Sixth and Seventh Circuits. The stage appears set for Supreme Court review. Let us give thanks that these questions are merely legal ones, because law is hard enough.

Abortion-Drug Mandate Unaffected by Delay of Obamacare's Employer Mandate

By Kyle Duncan | July 3, 2013 | 12:21 PM EDT

In a blog post yesterday afternoon, the Treasury Department announced that it will delay enforcing three sections of the Affordable Care Act (ACA) until 2015.

This announcement says nothing about the HHS abortion-drug mandate, which has now been finalized and **which continues to severely burden the religious liberty of millions of Americans.** The HHS mandate is being challenged with increasing success in numerous lawsuits around the country.

According to the Treasury statement, employers will now have until 2015 to comply with two of the ACA's technical reporting requirements, and will also have an additional year before they must pay the $2-3,000 per year "employer shared responsibility payments" imposed on large employers who fail to offer any health insurance at all.

The Treasury, however, does not announce any plans to suspend or delay the requirement that all large group employer health plans comply with the HHS abortion-drug mandate. **The HHS mandate therefore remains fully in force.**

The announcement also says nothing about the $100 per employee daily tax penalty, which is in a different statute and subject to an entirely separate reporting requirement not mentioned in the Treasury statement.

We will continue to defend the conscience of millions of Americans impacted by the HHS abortion-drug mandate.

There are now 62 separate lawsuits challenging the HHS mandate. The Becket Fund led the charge against the unconstitutional HHS mandate. The Becket Fund currently represents: Hobby Lobby, Wheaton College, East Texas Baptist University, Houston Baptist University, Colorado Christian University, the Eternal Word Television Network, Ave Maria University, and Belmont Abbey College.

Editor's Note: The Becket Fund for Religious Liberty is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions-from Anglicans to Zoroastrians. For 18 years its attorneys have been recognized as experts in the field of church-state law. The Becket Fund recently won a 9-0 victory in Hosanna-Tabor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half century."

The Greens are simply saying, "Leave us and our business out of this." Not a difficult concept to grasp. What is puzzling is why the EEOC gets it, but HHS doesn't.

By Kyle Duncan

Two weeks ago, the EEOC sued a Peoria trucking company for violating the religious liberty of two of its Muslim drivers when it fired them after they asked not to haul alcohol in their trucks. The EEOC found the trucking company "could have readily avoided assigning these employees to alcohol delivery" but instead "chose to force the issue" and fire them. However the case comes out, the EEOC is right about one thing: the Muslim drivers have a genuine objection to being forced to transport alcohol, because it is an act forbidden by their faith. It is beside the point that the drivers are not being made, say, to drink alcohol themselves or to hand out drinks at a party. As the EEOC correctly recognizes, transporting alcohol is also a practice the drivers' religion forbids, every bit as much as taking a drink themselves.

Meanwhile, 600 miles away in Oklahoma City, another federal agency, HHS, has taken a narrower view of religious faith. HHS is arguing that a devout Christian family, the Greens, must use their family business, Hobby Lobby, to deliver a different product—emergency contraceptives—or face draconian fines. HHS fails to recognize that the Greens object, not only to using the drugs themselves, but also to providing them to employees through their health plan. The district court agreed with HHS, however: it found that the Greens' real objection was merely to contributing funds that "might, after a series of independent decisions by health care providers and patients covered by [Hobby Lobby's] plan, subsidize someone else's participation in an activity that is condemned by plaintiff's religion." *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012). That decision is now before the en banc Tenth Circuit.

Imagine if the EEOC had taken the HHS mandate approach to the Muslim truck drivers. Instead of accepting their beliefs at face value, the EEOC could have said the drivers' real objection was merely to furnishing transportation services that "might, after a series of independent decisions" result in "someone else's participation in an activity that is condemned by [their] religion." EEOC didn't take that position, of course, because it would have rewritten the drivers' beliefs. They object to their own coerced participation in delivering alcohol, not to whether *other people* drink it. They are simply saying, "Leave us and our trucks out of this."

The Green family is saying the same thing. They object to the government forcing them and their businesses to deliver a specific product against their consciences. They are not trying to limit anyone else's freedom to use emergency contraceptives; they are simply saying, "Leave us and our business out of this." Not a difficult concept to grasp. What is puzzling is why the EEOC gets it, but HHS doesn't.

Kyle Duncan is General Counsel for The Becket Fund for Religious Liberty.

By: Kyle Duncan, General Counsel

If a city includes a nativity scene in its holiday display, must it also include a sign mocking the Christmas story as a toxic myth? If the scene has an angel, must it have a devil, too? Raising these strange questions is a new strategy adopted by militant atheist organizations like Freedom from Religion Foundation (FFRF). These groups—not content to practice their atheism privately—seek to scour public life of all religious references: nativity scenes, "Under God," Ten Commandment monuments, and the like. Recently, however, they have advanced the argument that, if there are to be any religious messages in the public square, then there must be equal space for their anti-religious messages. A kind of religious fairness doctrine. Accepting this premise has resulted in some bizarre spectacles—as when a Northern Virginia county allowed "Skeleton Santa" to be crucified on its courthouse lawn, or when the City of Santa Monica sponsored a homage to the "Pastafarian" deity, the Flying Spaghetti Monster. Indeed, the Spaghetti Monster's incarnation convinced Santa Monica to ban all holiday displays. This new atheist strategy still seeks a "Naked Public Square," but it gets there by first creating what one might call a "Stupid Public Square."

The U.S. Sixth Circuit Court of Appeals recently struck a powerful blow against this tactic. Freedom from Religion Foundation v. City of Warren, Michigan, concerned a holiday display placed annually in Warren's civic center, featuring secular and religious symbols, such as a tree, reindeer, Santa's mailbox, nutcrackers, candy canes, a "Winter Welcome" sign, and a nativity scene. This last item drew the atheists' anathema. After repeatedly petitioning Warren's Mayor James Fouts to remove the nativity scene, FFRF finally threatened to sue unless the City added an "sandwich board" announcing this:

At this season of
THE WINTER SOLSTICE
may reason prevail.
There are no gods,
no devils, no angels,
No heaven or hell.
There is only our natural world, [sic]
Religion is but
Myth and superstition
That hardens hearts
And enslaves minds.

While more nuanced than Flying Spaghetti Monster, the verses did not soften the heart of Mayor Fouts, who fired back a letter rejecting the sandwich board because he thought its message "antagonistic toward all religions." The Mayor added that he had "allowed a display in city hall celebrating Ramadan," but that he "would never have allowed a sign next to the Ramadan display mocking or ridiculing the Moslem religion." The Mayor ended with this plea: "During this holiday season, why don't we try to accomplish the old adage of 'Good will toward all'?" Unmoved, FFRF sued.Writing for a unanimous panel, Sixth Circuit Judge Jeffrey Sutton easily found the nativity scene did not establish religion. There was really no serious question about that: the Supreme Court approved virtually the same display over three decades ago. Of greater significance is Judge Sutton's methodical demolition of the argument that the City of Warren must balance the nativity scene with an anti-religious message. Judge Sutton explained that the holiday display is the city's speech and no one else's. By selecting items for its display, Warren crafts its own message; it does not create "a seasonal public forum" to host competing views of the holidays. The city therefore gets to choose messages and symbols it likes (like "Winter Welcome," Santa's mailbox, and a nativity scene), and to exclude those it doesn't (like a sandwich-board proclamation that "Religion is but / Myth and superstition / That hardens hearts / And enslaves minds").

To be sure, Judge Sutton explained, the First Amendment and our political process give atheists every right to use their own speech to protest the nativity scene. They can stage an anti-nativity rally outside city hall. They can run likeminded candidates against the Mayor. They can complain at city council meetings. They can pass out leaflets and write op-ed columns. They can produce infomercials warning Warren's citizens about the heart-hardening and mind-enslaving powers of a group of statues representing Jesus, Mary, Joseph, the three Magi, shepherds, an Ox and an Ass. But what they cannot do, as Judge Sutton explained, is "commandeer the [city's] own voice to deliver its message."

Forget law; a basic knowledge of civics is enough to demolish this new atheist tactic. Government lives by words and symbols. Any government doomed to give "equal time" to objectors whenever it speaks would collapse into incoherence. The postal service couldn't issue a stamp honoring Martin Luther King, Jr., without also honoring the Ku Klux Klan. The National Holocaust Museum would have to include the Joseph Goebbels Wing. Lincoln's statue would have to stare at a Jefferson Davis Memorial. And, as Judge Sutton asked, "[c]ould [the government] urge people to 'Register and Vote,' 'Win the War,' Buy U.S. Bonds' or "Spay and Neuter Your Pets' without incurring an obligation to sponsor opposing messages? Doubtful."

One doesn't have to dream up hypotheticals. When local governments have felt pressured by FFRF's specious argument, absurdity has soon followed. Children in Loudoun County, Virginia were terrorized during the Christmas season by the county-approved Passion of Skeleton Santa. Santa Monica found itself sponsoring a shrine to the Flying Spaghetti Monster before simply exiting the holiday display business altogether. And Warren was nearly forced to adorn its display with the poetic equivalent of a sign saying, "You religious folk sure are mean and dumb."

The evangelical atheist strategy is not subtle. Where courts cannot be convinced to erase all religious symbolism from public space, those spaces must be made safe for religion to be mocked and degraded until the only hope of civic peace is to ban displays altogether. Where the Naked Public Square cannot be commanded directly, the Stupid Public Square is a promising first step.

Judge Sutton's exposure of the legal and intellectual bankruptcy of this pernicious tactic is crisp, funny, and devastating. May it stiffen the spines of city council members the next time some proselytizing atheist delivers the threat, perhaps in verse:

Let reason prevail:
Lose the nativity scene,
or we crucify Santa.

Read the Sixth Circuit opinion here.

Photo credit: candgnews.com

Duncan Attach 0054

NATIONAL CATHOLIC REGISTER

HHS Threat Undiminished

ELECTION ANALYSIS

By KYLE DUNCAN – Posted 11/8/12 at 1:35 PM

SPECIAL TO THE REGISTER

The Affordable Care Act's threat to religious liberty remains undiminished with the re-election of President Barack Obama.

Prior to Election Day, the number of lawsuits against the federal mandate to provide free insurance for contraception, sterilization and abortion-causing drugs had grown to 40, on behalf of some 100 plaintiffs — including the University of Notre Dame, the Archdiocese of Washington, Wheaton College, EWTN (the Register's parent company) and Hobby Lobby stores.

Decisions had begun to trickle out of federal courts: Two had already issued injunctions on behalf of religious business owners to prevent them from being forced to subsidize contraception, sterilizations and drugs like the abortifacient "morning-after pill." Now that the presidential election is over, these fights will intensify.

This is the second time in six months that the mandate has escaped being swept away by national events. Last June, the U.S. Supreme Court came within one vote of invalidating the Affordable Care Act, which would have stripped federal authority for the mandate. But the act survived review, leaving the rapidly increasing number of lawsuits against the mandate as the last bulwark against the mandate's affront to conscience.

Given its campaign promises, a Romney administration presumably would have rescinded the mandate or broadened protections for religious objectors. The Obama administration has given less hope that, in a second term, there will be any meaningful change to the mandate.

After all, this is the administration that authored the mandate to begin with and — heedless of public pleas from religious leaders across the spectrum of faiths — constructed a "religious employer" exemption so narrow that the ministries of Jesus Christ, St. Francis of Assisi and Mother Teresa would not qualify.

Back in February, the administration promised an "accommodation" for certain religious organizations, but it has left the details fuzzy and postponed finalizing it until August 2013.

But religious organizations trying to plan for the future are being harmed by the mandate now. And now that the election is past, many religious organizations are rightly skeptical that the alleged accommodation will resolve their basic concerns.

What's Next

Going forward, the federal lawsuits against the mandate fall into two general camps.

On the one hand are some 30 lawsuits on behalf of nonprofit organizations. These include Catholic and evangelical schools like the aforementioned Notre Dame and Wheaton, as well as The Catholic University of America, Ave Maria University, Franciscan University of Steubenville, Belmont Abbey College and Louisiana College.

They also include major Catholic archdioceses, Catholic social-service providers and the world's largest Catholic broadcasting network (EWTN).

The federal government has not responded to the merits of these lawsuits, but has instead sought to have them thrown out as premature. The government says that its non-binding promise of an "accommodation" by August 2013 means that the courts should not hear the lawsuits now — even though the mandate is a final rule that is now harming these plaintiffs' ability to plan, hire and budget.

Unfortunately, in two of the cases (Belmont Abbey and Wheaton), the courts have agreed with the government and dismissed the lawsuits. Those dismissals will be reviewed by the D.C. Circuit Court of Appeals in December.

On the other hand are increasing numbers of lawsuits by religious business owners. These include Catholic businesses such as Hercules Industries (a heating, ventilation and air conditioning manufacturer in Colorado) and Weingartz Supply Company (an outdoor power equipment company in Michigan), as well as Hobby Lobby, an Oklahoma-based arts-and-crafts chain founded and run by the Green family, who are evangelical Christians.

The rights of religious business owners like these have been utterly disregarded. They would not benefit from the promised "accommodation" (because it would apply only to nonprofits), and the mandate's fines will start accumulating against them very soon.

For instance, in less than two months, Hobby Lobby faces fines of about $1.3 million *per day* if it refuses to include abortion-causing drugs in its plan.

The business owners have met with more success in court to date. Both Hercules and Weingartz have received preliminary injunctions from federal judges in Colorado and Michigan. A federal judge in Oklahoma heard Hobby Lobby's injunction motion last week, and a decision is expected any day. (A fourth business, O'Brien Industrial, was denied an injunction and has appealed.)

Because these business lawsuits are not subject to any delays, the government has had to respond on the merits. Its response is startling.

The government has flatly stated that a person who goes into business to make a profit loses any right to exercise religion in his business pursuits. A kosher butcher, for instance, would presumably have no religious rights associated with his decision to stock only kosher products. A Bible seller would have no religious rights associated with the sacred texts she is selling.

The profit motive alone dissolves these individuals' rights to exercise religion. The government apparently wants to enforce its own theology of how God and mammon should mix. But its interpretation would bar individuals from providing for their families in ways consistent with their religious beliefs.

No Legal Authority

The government's arguments are all the more remarkable for having no legal authority to support them.

The Supreme Court has long recognized that even corporations themselves may exercise free speech rights. No one doubts, for instance, that The New York Times Company has the right to decide which articles to print and which advertisements to run.

The mandate suits are merely asking courts to recognize that business owners have some right to weave their faith into how they run their businesses — including the right not to cover drugs the owners believe implicates them in abortion. The government says they have no religious rights at all.

The administration's unyielding posture towards religious business owners in its first term will presumably continue in its second. And the government has identified no feasible accommodation that would satisfy the concerns of other religious organizations like Notre Dame and EWTN that cannot insure drugs that violate their consciences. This election gave no indication that these violations will abate. It will be up to the courts to vindicate them.

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Duncan Attach 0058

One HHS Mandate Case Dismissed, Don't Read Too Much Into It

By: Kyle Duncan

Today's decision by a federal district court in Nebraska to dismiss one of the many pending lawsuits against the HHS abortion-drug, contraception and sterilization mandate is unfortunate (and in one respect, seriously mistaken). But the decision turns on technicalities and doesn't decide the merits of the dispute. Bear this context in mind if you should hear anyone trumpeting this decision as some sort of "victory" for the federal government on the religious-liberty questions at the heart of the HHS mandate litigation. It's nothing of the sort.

The lawsuit was brought by Nebraska and seven other states, as well as three Catholic non-profit organizations (a high school, a charity, and a mutual society), and two individuals. The federal court (senior judge Warren Urbom, a 1970 Nixon appointee) dismissed the lawsuit without prejudice, finding that none of the plaintiffs had "standing" — which means that the court thought that the plaintiffs hadn't properly claimed any real "injury" from the mandate in their complaint.

As for the non-profits and the individuals, the court relied on a true technicality: It found they hadn't given specific-enough reasons for why they weren't "grandfathered." "Grandfathering" is the idea that you can keep the health plan you had on March 23, 2010 — and so avoid the HHS mandate — provided that you keep it the way it existed on that date in perpetuity. The court simply reasoned that the plaintiffs hadn't provided enough detail on why their plans weren't "grandfathered" (one of the plaintiffs, in fact, had admitted their plan was grandfathered). This is a technicality because, presumably, the plaintiffs could simply amend their complaints to provide the necessary details on "grandfathering" the next time around. But, in any event, the decision has nothing to do with the main question of why the mandate violates the Constitution and federal religious-liberty law. It is merely a decision that these particular insurance policies don't appear to be subject to the mandate to begin with.

As for the states, the court also found they hadn't alleged a sufficient injury, and so lacked standing. There was a slightly different reason for this conclusion. The states had said they were injured because the mandate would result in employers dropping employee health coverage, and the resulting exodus of employees would swell the Medicaid rolls and throw the states' budgets into disarray. The court thought this was too conjectural to support standing. Again, this conclusion has nothing to do with the underlying claims about the mandate's unconstitutionality.

The only place in the decision where the court went seriously awry is on the question of ripeness. (Judge Urbom admitted that this part of the ruling was non-precedential dicta, because he did not have standing to reach it.) Some readers may recall that the federal government announced a "safe harbor" last February, by which it would delay implementation of the HHS mandate for certain religiously-affiliated employers for one year; during that year, said the government, it would come up with some form of "accommodation" that would solve the religious liberty violations in the mandate. Under the "accommodation" the government sketched out, it would (magically?) deem contraception and sterilization "cost neutral" and force insurance companies to provide these drugs and services "for free" to the employees of religious organizations. Religious organizations were quick to point out that, even if this "accommodation" became the law (which it still hasn't), it wouldn't solve the mandate's religious-liberty problems. Organizations would still be facilitating access to the objectionable services through insurance. What's more, many religious organizations are self-insured, and so the accommodation would be particularly meaningless for them.

And yet Judge Urbom accepted the government's argument that the promise of this fanciful "accommodation" rendered the lawsuits premature. This is hard to understand. After all, the HHS mandate itself is a final administrative rule; also final is the narrow "religious employer" exemption (which would exclude the ministries of certain well-known religious figures like Jesus and Mother

Teresa, because they insisted on ministering to those of other faiths). The government is not proposing to alter either one of those rules. All the government has done is conveniently postpone enforcement of the mandate as to certain objectors for one year, while it promises to brainstorm about ways to make contraceptives "free" and force insurance companies to provide them at no charge and without using taxpayer dollars. Good luck with that.

The bottom line is that Judge Urbom's ruling today has nothing to do with the fundamental question of freedom: Does the federal government violate religious liberty by forcing religious objectors to pay a fine for the privilege of practicing their faith? At present, there are 22 other cases pending before other federal courts that are poised to answer that question. And even assuming the technical reasons given by the Nebraska court hold water on appeal (which is highly debatable), many of the other pending cases feature plaintiffs who are indisputably not "grandfathered," who are palpably "injured" by the HHS mandate, and who will feel the ugly effects of that injury as soon as this Fall. Stay tuned for a decision in one — or many — of those cases that will answer the real question of religious freedom at issue in these crucial cases."

Kyle Duncan is general counsel at the Becket Fund for Religious Liberty.

Duncan Attach 0060

Kyle Duncan (Courtesy the Louisiana Department of Justice)

| JAN. 21, 2012

The Other Health-Care Mandate: Good Samaritan Turned Upside Down

President Obama's latest move will certainly end up in federal court.

KYLE DUNCAN

One might have expected that, after losing the signature religious-liberty case of the past two decades earlier this month with arguments that his own Supreme Court appointees called "extreme," President Barack Obama would have learned that conscience is something to be taken seriously.

Alas, no. Yesterday, in a statement from Health and Human Services Secretary Kathleen Sebelius, the Obama administration announced it would not reconsider its "contraceptive mandate" — that is, the unprecedented command it issued last August forcing all private health plans to cover contraceptive and sterilization services, including drugs that cause early-term abortions.

From the outset, the administration sought to camouflage the mandate's radical assault on conscience by inserting an exemption for "religious employers" who objected to paying for

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contraception and abortion. It is a pitifully small fig leaf, however.

An organization cannot qualify if it has a "non-religious" aim (such as caring for the sick or feeding the hungry), or if it hires or serves persons of different faiths. In other words, the administration has managed to legislate a grotesque inversion of the parable of the Good Samaritan: A religious group loses the protection of the law precisely because it reaches across boundaries to help the outsider.

Obama's contraceptive mandate violates the Constitution in several ways. First, it represents an ugly form of what the courts call a "religious gerrymander." As the administration knew, most employer-based plans already covered contraceptives, but objecting employers — mostly Catholic — were still free not to offer it. The mandate squashes that freedom by filling the so-called "Catholic gap" in coverage. The Free Exercise Clause does not tolerate such blatant discrimination.

Second, the mandate hijacks the governance of religious organizations. As the Supreme Court dramatically (and unanimously) confirmed earlier this month in *Hosanna-Tabor Church v. EEOC*, the Constitution forbids government interference in the internal affairs of religious organizations.

That underscores why the mandate is unconstitutional: What could be more intrusive than forcing a religious employer to pay for conduct that violates its own moral code?

Most disturbing, however, is the "religious employer" exemption. The shockingly narrow criteria — modeled on a California law ghost-written by the ACLU — segregate religious organizations into favored and disfavored classes. Who gets the exemption? Organizations that focus inwardly on "religious" matters. Contemplative monks might qualify, provided they do not sell Christmas fruitcakes.

Who doesn't get the exemption? Organizations that undertake projects such as educating students, treating the sick or feeding the poor. Because these groups leave the cloister, the government now declares their consciences unworthy of protection.

This kind of religious quarantine is patently unconstitutional. The First Amendment forbids the state from picking favorites among religious groups. In their comments protesting the exemption, the U.S. Conference of Catholic Bishops put it well: "In effect, [the administration] is purporting to distinguish between religious denominations and organizations that are, so to speak, insular in their workplace and ministry and those that have a missionary outlook. That is blatantly unconstitutional."

Animating these measures is a sinister form of "tolerance" that should make religious Americans shudder. It is a cast of mind that relegates the genuinely religious to the margins of polite society. It tolerates countercultural views on sexual morality — provided they are kept safely out of sight.

But there is a world of difference between merely "tolerating" religion and guaranteeing its "free exercise."

Our Constitution does the latter, embracing the distinctive contributions of religious institutions to civil society. Lamentably, the federal government's contraceptive mandate takes the opposite approach, acting on the crabbed premise that the rights of conscience are a gift of the state, not of God.

Encyclical Eve Delivered

7. Mary's Provid Bridge to Islar

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9. Cardinal Pell Reprimands V Real Estate B Exceeding Its Authority

10. Meet the Teer Work Inside tl Vatican and S Pope

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Given the mandate's multitude of flaws, one might have expected Obama at the very least to expand the religious-employer exemption. After all, this is the president who told Notre Dame graduates in 2009 that we should "honor the conscience of those who disagree with abortion and draft a sensible conscience clause."

Yesterday revealed how empty that promise was, when Sebelius announced there would be no change to the exemption. Objecting religious employers would merely get "an additional year, until August 2013, to comply with the new law."

This perverse grace period would, Sebelius soothingly assured, "allow these organizations more time and flexibility to adapt to the law." It is safe to say that thousands of religious employers do not agree. An additional year — an additional thousand years — will not be sufficient to erode what their consciences tell them about the sacredness of sexuality and human life.

Given the administration's intransigence, it is becoming increasingly apparent that the contraceptive mandate is headed for its reckoning in federal courts and ultimately in the Supreme Court. When it does, the court should find that it violates our Constitution's most basic commitment to religious liberty.

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View Comments

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THE ESTABLISHMENT CLAUSE AND THE LIMITS OF *PURE* HISTORY

BY KYLE DUNCAN*

Introduction

For the Supreme Court, history has always been the key to understanding the Constitution's command that "Congress shall make no law ... respecting an establishment of Religion." Proponents both of mainstream and revisionist histories of the Clause would together affirm with former Chief Justice Rehnquist that the "true meaning of the Establishment Clause can only be seen in its history."[1] History also continues to be a major preoccupation of Establishment Clause scholarship.[2] This paper does not contest the premise that historical study should be a major ingredient in any compelling account of the Clause's meaning. Rather it asks whether another ingredient has been neglected, and whose refinement would help discipline how justices and scholars employ history to interpret the Clause. Ironically, as this paper argues, the missing ingredient is a coherent account of the how the words of the Establishment Clause themselves work to clarify the Clause's meaning and its function within the overall constitutional structure.

Wide disagreements about the historical meaning of the Clause are nothing new, but my attention to the subject was renewed by the testy exchanges among Justices Souter, Stevens and Scalia in the 2005 Ten Commandments cases, *McCreary County* and *Van Orden*.[3] In particular, Scalia's *McCreary County* dissent has drawn overheated criticism that misses what Scalia is attempting to do out of an understanding of history.[4] My own view is that Scalia wants to refine the typical originalist use of Establishment Clause history by treating a public tradition of religious practices as an amplification of original meaning across time.[5] Scalia, that is, seeks to use history in a more concrete and disciplined way than the Court has in past anti-establishment cases.

But Scalia's historical experiment cannot deliver fully on its promise, primarily for the same reason that the Court itself has never been able to draw consistent lessons from history. Neither approach has developed an account of what tangible *legal* limits are set by the text of the Establishment Clause. Thus even Scalia's more disciplined approach likely will not reliably channel the use of historical materials in future cases.

The basic problem seems to be this: the circle of government actions forbidden by the Clause has been drawn too vaguely and too broadly — around something perhaps described as "bad relationships between religion and government." The circle needs to be far tighter — drawn in terms of "establishment" as a legal construct and less as a cultural, sociological or theological construct; drawn in terms that restrain distinct institutional relationships between the state and actual "churches," instead of policing the vague boundaries between the "religious" and the "secular."

This paper will use the disagreement among the Justices in the Ten Commandments opinions to discuss the limits of *pure* history in Establishment Clause jurisprudence. It will then sketch what is needed to discipline the use of historical materials — a better textual account of what legal limits the Establishment Clause places on government.

I. Historical Januses

The Establishment Clause's text should be understood as placing a specific kind of "frame" within which to process the bewildering mass of historical materials that vie for an interpreter's attention.[6] First, to understand why *any* frame is inevitably necessary, it will be useful to review a few iconic pieces of historical evidence and show how they could easily stand for diametrically opposed meanings of the Establishment Clause. These bits of history are "Janus-faced," that is, depending on one's frame of reference, they look in two directions — either toward an expansive, aggressive Clause or a narrow, modest Clause.[7] What is missing is a well-defined frame within which to interpret such evidence.

The central conceit of modern anti-establishment jurisprudence is a good example. *Everson* unanimously read the Clause as an act of collective repentance, wrung from the "consciences" of "freedom-loving colonials" that had been "shock[ed]" into a "feeling of abhorrence" by their own oppressive religious establishments.[8] *Everson* takes this evidence — the persistence of religious establishments in the colonies and early States — and creates a frame for interpreting the Clause. The Clause becomes an instrument designed to purge certain unpalatable church-state relationships from our civic memory. It is an agent of aggressive, secularizing change. But, with a minor viewpoint adjustment, the very same evidence cuts the opposite way. The state establishments, after all, survived the ratification of the Constitution and in some cases persisted well into the Nineteenth Century.[9] The Establishment Clause did *nothing* to alter that situation, but instead maintained the political conditions under which state establishments could flourish or wither of their own accord. Thus, Gerard Bradley describes ratification of the Religion Clauses as "deeply conservative in its celebration of the present and immediate past and in its insistence that the prevailing regime need be preserved inviolate."[10] Now, the same historical fact means that the Establishment Clause is an agent of conservation and stability, promoting the church-state status quo, and sublimely agnostic about the value of establishments.

Much the same can be said for another historical pillar of Clause meaning: the Virginia Assessment Controversy. *Everson* deemed it an interpretative watershed and, consequently, canonized Madison's and Jefferson's views of the Controversy for interpreting the later Establishment Clause.[11] On this view, the Establishment Clause is a transformative provision, hardwired to propel us out of the thickets of state-fostered religion and to salve taxpayer consciences from even "three pence" of clergy taxes.[12] And yet, at the time of *Everson*, a commentator as astute as Father John Courtney Murray jeered at the historiography of Justices Black and Rutledge. "The tricks," Murray wrote in a famous article, "that they play on the dead are astonishing."[13]

For Murray (and other scholars since), the context of the Assessment Controversy showed Madison's and Jefferson's views of the Virginia tax were *foreign* to the content of the Establishment Clause. As a Virginia legislator, Madison had championed *avant garde* church-state views, but things changed when he became a federal congressman. Madison explicitly set aside his personal church-state views when he shepherded the Religion Clauses through the First Congress, precisely because the object was to make them non-controversial and politically palatable.[14] The text of the Clauses hints at this — it is nothing remotely like Madison's *Memorial and Remonstrance* or Jefferson's *Bill for Establishing Religious Freedom*. On this view, the Madison of the federal Religion Clauses simply sought non-controversial measures that would not forestall ratification of the new Constitution — a far cry from the Madison championing progressive church-state views in Virginia.[15] And, as a final irony, Murray indicates that "the First Amendment met sharp and serious objection in the Virginia senate, on grounds of its inadequacy in comparison to the Virginia statute."[16] In sum, on this view of the evidence, the inference to be drawn from the Virginia Controversy is that, whatever the Establishment Clause was designed to do, it was something *deliberately different* from what Madison and Jefferson had sought to accomplish in Virginia.

Examples could be multiplied, but I will close with two pieces of evidence that are typically cited for one view of the Clause, but that, on closer inspection could well stand for the opposite view. They are Janus-faced *par excellence*. The first is James Madison's 1822 letter to Edward Livingston.[17] It is often cited as evidence that the Establishment Clause, properly understood, creates a strictly secular government and would rule out legislative chaplains or executive proclamations of thanksgiving and fasts. After all, in the letter Madison reaffirms his commitment to "[t]he immunity of Religion from civil jurisdiction," distances himself from paid legislative chaplains, and laments his own (albeit toned-down) proclamations while President. Surely this is evidence of what the Establishment Clause means? Yes, but only if one's frame for Clause meaning is something like "The Establishment Clause rules out the kinds of religion-and-government interactions that James Madison privately condemned."[18] It is a very different story if one's frame is: "The Clause does not reach those religion-and-government interactions that were commonly thought at the time to be a matter of politics, or at least were not commonly thought to present any *constitutional* question." It is important to see that, under this frame of reference, Madison's letter is strong evidence that the practices at issue *were perfectly constitutional*. After all, in the 1822 letter Madison *affirms* that he "found it necessary on more than one occasion to follow the example of predecessors" with regard to proclamations. The inference is that such practices were commonly thought to be unproblematic for purposes of the Establishment Clause. Indeed, Madison's own scruples shrank before the political realities created by such a common understanding. His own reservations, whether felt at the time or expressed decades later, are at best evidence that his own philosophy of church-state relationships was out-of-step with the times.

Finally, passages from Justice Story's *Commentaries on the Constitution* are often cited as -

evidence of an original understanding that the Religion Clauses were meant to protect Christianity only.[19] After all, goes the argument, didn't Story write that "[t]he real object" of the Religion Clauses "was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects ...."?[20] This quote not only appears to buttress a pro-Christian original understanding of the First Amendment, but also makes Story a prototypical Judge Roy Moore and the antithesis of such forward-thinking figures like Madison or John Locke. This, then, is evidence for what the Clauses "meant" to the founders, if, again, one's reference point is their personal religious predilections or perhaps their predictions about the effect of the Clauses.

But some further reading in the *Commentaries* reveals Story's point is exactly the opposite: the Clauses denied federal power to patronize *any* religion, including Christianity. Story recognized that the "general, if not universal sentiment, in America" at the founding was "that Christianity ought to receive encouragement from the state," but he immediately went on to write that confiding such a power to the nascent federal government would have been courting disaster. Given the "dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of the sects," Story explained that in the Religion Clauses "it was deemed advisable to exclude from the national government all power to act upon the subject."[21] Thus, if we change the frame of reference from Story's assessment of the founding generation's *personal religious predilections* to their *legal methods* in crafting the Religion Clauses, the *Commentaries* reveal a starkly different view about the substantive content of the Clauses. One evolves from the unjustifiable caricature of Story the "Christian nationalist," to the Story who wrote — again, in the same *Commentaries* held up to buttress a pro-Christian original understanding — that the Religion Clauses meant that "the Catholic and the Protestant, the Calvinist and the Arminian (sic), the Jew and the Infidel, may sit down at the common table of national councils, without any inquisition into their faith, or mode of worship."[22] And whom did Story cite to support his view of universal religious freedom and anti-coercion, which he thought was enshrined in the Religion Clauses? None other than the progressive political philosopher, John Locke.[23]

But someone will say, "So what? It isn't news that historical 'facts' can be made to stand for contradictory propositions." Quite so, but the point here is that one's understanding of what the Establishment Clause is supposed to *do* (what I have been calling the "frame") strongly influences the inferences one pulls out of historical facts. One who sees the Clause as repenting for illiberal establishments, and another who sees it as stubbornly clinging to those establishments, will infer very different Clause meanings from the persistence and contours of state establishments after the framing. One who sees the Clause as embodying collective notions about what church-state relationships were beyond the pale, and another who sees it as embodying James Madison's experimental church-state philosophy, will read the Assessment Controversy very differently as regards Clause meaning. The fundamental point is that historical materials cry out for a frame of reference within which to assess them. We will now turn

to a recent controversy over the use of history and see if the Justices have made any progress toward such a goal.

II. The Clause's Historical Meaning: Typical Treatments and Scalia's Experiment

In the Justices' sharp debates in the Ten Commandments opinions, one can see two strikingly different approaches to the derivation of Establishment Clause meaning from historical materials. In Justice Souter's *McCreary County* majority opinion, and in Justice Stevens's *Van Orden* dissent, what one might call the typical or mainstream approach is on display.[24] But Justice Scalia's *McCreary County* dissent appears to be attempting something new — a refinement of how historical data should be deployed to illuminate Clause meaning.

The Court's mainstream approach to history — going back to *Everson* — involves drawing abstract lessons from key historical events and applying those lessons to a modern world the Justices perceive, in crucial aspects, to have moved on from the religious worldviews of the 18th century. Souter's statement in *McCreary* that the command of "neutrality" emerges from a "sense of the past" captures this perfectly.[25] Historical data are either too inconclusive or too rooted in uncongenial religious outlooks to furnish precise answers to today's religious controversies, and therefore must be treated only as signposts. From the mists of the past, they point in broad directions toward a religious future unknown to the founding generation. This is a form of highly abstracted originalism, from which the Court has derived principles such as "neutrality," "non-endorsement," "non-coercion," and (increasingly making a comeback) "non-divisiveness."

Take "non-endorsement," for instance. Drawing on a congeries of historical religious acknowledgments and symbolism — and perhaps *despite* such a history — the Court has divined the principle that the Establishment Clause forbids the government from thereby making "religious outsiders" of some of its citizens.[26] While any strictly original version of this "outsider" principle would operate only in concrete civil and political terms — such as in a denial of voting rights or access to public services — today's non-endorsement principle functions in the realm of a "reasonable observer's" perception of his place in civil society. This approach obviously creates a broad arena for judicial discretion and creativity in "updating" the operation of the Clause for (what at least the Justices perceive as) a religiously-altered modern society.

In his *McCreary* dissent, Justice Scalia launches his most forceful rejoinder yet to this typical treatment of history. Scalia's project is "new" in the sense that he is applying to the Establishment Clause his approach to legal traditionalism in other areas. But, at bottom, Scalia's approach to the Clause is a refinement of the usual "accomodationist" historical answer to a "separationist" Clause — of the kind seen, for instance, in the legislative chaplain case, *Marsh v. Chambers*.[27] More importantly, however, Scalia is attempting to invert the usual relationship between history and general principle in the Court's Establishment Clause jurisprudence.

Scalia's use of historical materials to interpret the Clause must be understood in light of his constitutionalism. Scalia sees the Establishment Clause as a time-bound limit on governmental power and majoritarian change. Like other guarantees in the Bill of Rights, the Clause "pre-

vents the law from reflecting certain changes in original values" and is "designed to restrain transient majorities from impairing long-recognized personal liberties." Historical materials, in the form of a persistent tradition of official actions, projects the contours of those constitutional limitations across time. An "open, widespread, and unchallenged" legal tradition serves to "validate" or "clarify" the common, public understanding of what limits the Clause was supposed to place on government and ensuing majorities.[28] History thus becomes a kind of running commentary on original understanding.

On this view, historical materials in the form of legal traditions are more likely to say what governmental actions the Establishment Clause was *not* intended to restrain. Why? Tradition, for Scalia, concretely reflects society's on-going resolution of "the basic policy decisions governing society," revealing the "accepted political norms" that lie *outside* the Constitution's areas of exclusion. Consequently, persistent legal traditions will sketch areas of policy-making freedom, untouched by the prohibitions of the Clause. By the same token, tradition tends to cabin judicial power. Scalia says that long-standing traditions "are themselves the stuff out of which the Court's principles are to be formed," and "the very points of reference by which the legitimacy or illegitimacy of other practices is to be figured out."[29]

What hermeneutic of history emerges from Scalia's traditionalism? First, history helps Scalia sketch the central purpose of the Establishment Clause. The Clause is, at its most basic, intended to identify two mutually-exclusive forms of government "religious" actions. The constitutionally off-limits area contains actions that history instructs us were commonly understood at the framing to be beyond governmental power. These are the easy cases: if the United States founded an entity called the "Church of the United States" or if it made the *1928 Book of Common Prayer* normative in all Episcopalian Churches, history would clearly teach that such actions were placed beyond the pale by the Establishment Clause. In *McCreary*, Scalia himself affirmed that if the government promulgated an "official" version of the Ten Commandments, such an action would easily fall within the anti-establishment prohibition.[30] But the flip-side of the "constitutionally off-limits" area is the area of political prudence. Government religious action is plainly constitutional where historical materials show unambiguously that "government conduct that is claimed to violate the [Establishment Clause] ... [was] engaged in without objection at the very time the [Clause] ... was adopted."[31] In these easy cases, a public consensus on founding-era practices is virtually conclusive evidence for Scalia on the common, public understanding of the reach of the Clause — either placing a practice firmly in the forbidden area or in the political prudence area.

Scalia, of course, recognizes that hard cases will often arise where historical materials do not speak to a contested practice — either because the record is thin or inconclusive, or because the practice itself was unheard of. There would consequently be a zone of uncertainty between the areas of clear prohibition and clear political prudence. For Scalia, a post-adoption tradition of laws or other official actions may clarify the parameters of the Clause by helping to narrow that zone of uncertainty. As to particular governmental religious practices, the

reach of the Establishment Clause may be uncertain, because of shortcomings in the original historical materials, but post-enactment traditions may help develop the contours of the original reach of the Clause. That this is no easy task is revealed by the question Scalia would then pose about the disputed governmental action: is that action "consonant with [the original] concept of the protected freedom?"[32] As discussed later, here is where cracks begin to appear in Scalia's method, even taken on its own terms.

At this point, however, we can draw some broad comparisons between the Court's typical approach to history and Scalia's approach. Most generally, for the Court, the Establishment Clause itself is a source of general abstract norms that superintend historical traditions. Even longstanding public traditions fall under the sway of such norms, which give the Court a broad revisionary authority when scrutinizing the present manifestations of those traditions. Scalia's approach is diametrically opposed. For Scalia, it is persistent, public traditions themselves that clarify the contours of the Establishment Clause. Provided those traditions are sufficiently indicative of a relatively uncontested public understanding of a particular practice's permissibility, those traditions amplify across time what the Clause originally permits and prohibits to majorities.

On a more specific level, the Court tends to draw abstract norms from historical materials, norms that are relatively detached from the historical circumstances from which they emerge. The paradigm example is "neutrality." Having drawn that norm from controversies such as the Virginia Assessment Act, the Court has not limited the contours of "neutrality" to the historical dynamics surrounding the controversy. In other words, the Court's "neutrality" is not necessarily Madison's or Jefferson's, nor is it a public understanding of "neutrality" circa 1787. Instead, "neutrality" becomes a relatively free-floating principle to be elaborated by the Justices themselves according to their own notions of how the concept ought to apply in modern situations. Much the same could be said for the Court's notion of what counts as "secular."

Scalia's derivation of norms from historical materials appears to be less abstract and more wedded to the particular milieu out of which the norm arose. The overarching point of Scalia's *McCreary* dissent, for example, was to contest the one-size-fits-all application of a "neutrality" principle to an issue on which historical traditions appeared to paint a starkly different picture. As Scalia controversially argued, neutrality may well be a sensible principle in the area of funding religious institutions, but that does not necessarily mean it works for government religious symbolism. Scalia does not explain the basis for that distinction, but as I have argued elsewhere, the basis that immediately comes to mind is the idea that historical traditions outline different contours for the Establishment Clause when it comes to funding, as opposed to symbolism.[33] Much the same can be said for Scalia's treatment of a broad norm like "secular purpose." The kind and degree of secularity that the Establishment Clause imposes on the government depends for Scalia on the particular practice at issue — and the matrix of legal traditions underpinning it — rather than on what *a priori* definition of "secular" or "religious" should be derived from the Clause.

Finally, it should be said that the Court's typical use of history has led it to make rather broad conceptual distinctions in its Establishment Clause jurisprudence, for example, "religious" purpose versus "secular purpose"; "endorsement" of religion versus "acknowledgment" or "accommodation" of religion. On this basis, the Court has crafted a Clause that often forces Justices to theorize about the possible motivations or effects of a law and how those fall on a conceptual spectrum with "religious" at one end and "secular" on the other. By contrast, the Clause Scalia discerns from historical materials, appears more concerned with the relationships between government and religion as institutions. Thus, Scalia is not interested in asking to what degree the Ten Commandments displays are motivated by "secular" or "religious" purposes, or whether they send messages of "endorsement." On the other hand, he admits that if the government legally promulgated an "official" numbering or interpretation of the Commandments themselves, then the anti-establishment prohibition would be triggered.

Scalia's use of history would produce an Establishment Clause strikingly different from the mainstream Clause — both in overall purpose and particular results — and so it is worth asking what would be the pros and cons of Scalia's approach to Clause history. One benefit of Scalia's approach is that it rejects a one-size-fits-all Clause. The subject of "religion and public life" in this country assumes so bewildering an array of forms that it seems sensible to posit a Clause that adapts to different situations. "Neutrality," as Scalia points out, may work in some areas and fail in others. Yet, on the other hand, would Scalia's flexible Clause produce an even messier jurisprudence than the Court's already convoluted one? Would it be intolerably unpredictable and, more importantly, inherently malleable? For instance, in the Ten Commandments cases, Scalia and Souter adopted starkly different understandings of what symbolic content the displays had. Were the displays generalized affirmations of the importance of religion to American legal traditions or rather were they official state encouragement to follow the Commandments (or to become a Christian or a Jew?)? Such diverging perceptions will surely influence how one uses history to determine what the Establishment Clause says about such a display. If Scalia's historical method is susceptible to that kind of manipulation, it may be no better than the "non-endorsement" test, or Justice Breyer's "no test-related substitute for legal judgment" test.

Another plus to Scalia's approach is that it would explicitly avoid the "founder intention" problem that has plagued so much Establishment Clause jurisprudence. Too often, disputes in the case law have seemed to turn *whose* intention or church-state philosophy served the deeper policy goals of a particular opinion. Thus, James Madison (or at least Madison the 1785 Virginia Legislator) is recruited to underwrite a separationist ideology that, if openly pressed in 1791 at the federal level, would have torpedoed the Establishment Clause itself. In *McCreary*, Scalia disclaims any reliance on private opinions or private writings, but would instead mine historical materials only for commonly-held public understandings of the Clause's content. This presumably meets the objection raised by Souter and Stevens that over-reliance on history raises the problem of "what religion?" or "which God?" was secretly privileged by

the founding generation. Scalia's method is not interested in the problem, because it is not interested in secret intentions.

But by restricting his historical palette to public understandings, has Scalia thinned the historical record too much? If it is difficult to come up with *the* Madisonian intention about the constitutionality of legislative chaplains, imagine how daunting it would be to piece together a compelling account of the overall public understanding of that issue. Such an understanding, if it existed, may not be discernible from any existing public record of the time. At best, the process might lead to all manner of tenuous inferences, particularly in borderline cases. So, again, does Scalia's method actually promise to relieve us from the kinds of flighty extrapolations the endorsement test forces upon the Justices?

Whatever the balance of costs and benefits, there is a deeper problem with Scalia's historical method. Scalia's key move is to say that post-adoption tradition provides an extended gloss on the Clause's original meaning. But, as Scalia would recognize, tradition cannot simply construct a free-floating "meaning" for the Establishment Clause, building up gradually like a pearl in an oyster shell. Tradition, even as Scalia understands it, is too unwieldy: it must be channeled by some legal standard laid down by the terms of the constitutional provision. The Establishment Clause cannot plausibly function as an empty vessel for tradition as, for instance, "due process" does in Scalia's jurisprudence, in which longstanding public legal traditions are *by definition* the baseline for "due process of law." The Establishment Clause must have a more concrete referent than simply the "law of the land regarding religious matters." While the Clause is not likely to have as much "counter-traditional" content as Scalia's Equal Protection Clause, it must have some degree of concrete, textual specificity.

For Scalia, constitutional provisions are super-majoritarian instruments for placing something beyond the reach of ensuing "transient majorities." But *what* does the Establishment Clause place beyond majoritarian reach: certain kinds of "long-recognized personal liberties"; a particular historical class of church-state relationships; certain prohibited intersections between government and "religion"? On its own terms, Scalia's method requires an answer to these questions, because otherwise tradition has nothing solid with which to interact. So, what is really missing from Scalia's use of history to interpret the Establishment Clause? Perhaps it is an adequate account of the textual meaning of the Clause itself. This comes as no small irony for Scalia the arch-textualist.

An example will show this more clearly. Suppose the State of Mississippi decides to adopt as a motto, "In Jesus We Trust"? Would Scalia's historical method avoid the problems of other approaches? Would it give us a firmer ground on which to say Mississippi is *constitutionally* forbidden from adopting this motto? Presumably a majority of the Court today would apply some form of the endorsement test and conclude, unsurprisingly, that the motto impermissibly endorsed Christianity and alienated non-Christians. Of course, in doing so the majority would have to face the usual pitfalls of the non-endorsement analysis. It would, for instance, have to explain[34] why our national motto, "In God We Trust," does not just as unequivocally endorse

monotheism and alienate atheists, Buddhists, and Hindus. It would have to explain why a motto, which people could blithely ignore, was more of a religious alienation of non-believers than prayers said by paid legislative chaplains before every legislative session. It might also offer to explain how a secular Court can make such distinctions without essentially deciding theological questions and violating the Court's own doctrine forbidding governmental entities from making religious decisions. Would Scalia's legal traditionalism promise a cleaner solution to this problem?

The answer depends on the very thing that Scalia has not sufficiently elaborated: that is, what is the textual referent of the Establishment Clause prohibition? If the Establishment Clause merely forbids a certain kind or degree of "government religiosity," then Scalia would have to deploy historical traditions to figure out *what* kind and *what* degree. In other words, Scalia would have to ask whether "In Jesus We Trust" was in the same sort of symbolic ballpark as other religious manifestations our governments have typically made. This could easily lead to the sort of outcome that Scalia's critics have vociferously accused him of *wanting* to reach — namely, a constitutional privileging of a sort of generalized "monotheism." Or perhaps Scalia's parsing of historical traditions would only set a baseline of permissible government symbolism, theoretically permitting "In Jesus We Trust" or "In Zeus We Trust." As I have argued elsewhere, I think that is a far more plausible reading of how Scalia is deploying tradition in these cases.

But that would still not answer the question of the constitutionality of the motto. According to Scalia's own method, he would then have to ask whether Mississippi's use of the disputed motto were "consonant with the [original] concept" of the "freedom" protected by the Establishment Clause. Not an easy question, to say the least, and particularly if you have not decided ahead-of-time what manner of "freedom" is supposed to be protected by the Clause. This is to say, simply, that Scalia's method needs an adequate account of what the *text* of the Establishment Clause is doing. Without it, he will likely end up having to say why "In Jesus We Trust" *is* or *is not* constitutionally similar to "In God We Trust" or "God save this honorable Court." In other words, without a textual anchor, Scalia's method may well force him to make *theological* determinations that no judge ought to make, that he himself would say judges have no competence to make, and that the Establishment Clause itself probably forbids judges from making.

In the next section, we will return to the "In Jesus We Trust" problem and see if Scalia's method, supplemented with some textual help, might after all reach a reliable constitutional outcome. But for the time being, it is worth noticing that Scalia has apparently been unwilling to embrace another possible solution to Establishment Clause meaning that would solve the motto problem. That is the jurisdictional/federalism understanding of the Clause, elaborated by scholars such as Steven D. Smith and adopted in some form by Justice Thomas.[35] This view *does* confront the problem of textual Clause meaning and gives a controversial answer: what the Clause originally placed beyond the reach of "transient *federal* majorities" was the

entire subject-matter of *state* religious establishments. That would cleanly solve our motto problem. The Establishment Clause is agnostic about the motto: if you like it, Mississippi, go with it! Something tells me, however, that many people would feel unsatisfied with this solution. Not to mention the fact that the jurisdictional thesis needs to explain in what way the Establishment Clause *also* restrains the actions of the federal government itself. And then there's the delicate problem of incorporating such a provision against the States. But that goes well beyond the scope of this paper. It is enough to note here that Scalia has thus far shown no enthusiasm about embracing a purely jurisdictional account of the Clause's textual meaning.

So, does Scalia's historical method simply fail to deliver on its promise, or can it be helped? Is there a way of specifying the textual range of the Establishment Clause so that Scalia's use of legal traditions can be more reliable and less manipulable? More broadly, can we find an Establishment Clause that, together with the disciplined use of historical materials, will allow judges to reach reliable, predictable legal outcomes based on objective non-theological principles? Or are we stuck with a Clause, smack at the head of the Bill of Rights, that inevitably leads to a jurisprudential Babel, constructed from the clashing of individual Justices' hunches, guesses, predictions, and religious worldviews?

III. Tightening the Circle

The Babel just alluded to rises on the following questionable, but almost never questioned, foundation: that the Establishment Clause is a source of judicial solutions to all "religion and government problems." Imagine a vast sphere, representing the length and breadth and height of all those problems in our dizzyingly pluralistic American society. Then comes the Clause, dividing light from darkness in that sphere, creating the firmament, segregating land from sea. "It shall be secular." "It shall be neutral." This must be the intuitive view of the Clause taken by Justices when they warn that departing from the Court's jurisprudence will transform middle America into Northern Ireland, Mississippi into Beirut.[36]

But surely this is not the only view one can take. Can we instead read the Clause as operating within our vast void, not to catalogue and categorize every problem, but rather to specify a narrower field of "religion and government" problems? Call them "religious establishment problems," and understand the word "establishment" as so many other well-chosen words in our famously reticent Constitution — as a legal term of art, clothed with all the historical and conceptual finery of such terms.[37] The field of religion-and-government problems specified by the Clause would begin from those history teaches were present to the minds of the framing generation as being susceptible of legal resolution.

The power the Clause denies to government would thus be akin to a clause forbidding government from entering into an definable legal arena (such as coining money or issuing "Letters of Marque and Reprisal"), or to one inviting government to occupy an arena (such as the power to construct a uniform rule of bankruptcy, or to rule on admiralty and maritime matters).[38] If we could understand the "anti-establishment" prohibition of the First Amendment as withdrawing governments from such matters, then perhaps that one gesture might

strip the Establishment Clause of its most unappealing adornment — its tendency to invite flights of cultural, sociological, and theological fancy. Instead, Justices could concentrate on the idea of an establishment of religion as a legal and not a cultural construct — as a demarcation of institutional human relationships, and not as a *Maginot Line* between clashing concepts or theologies or states of mind. This would tighten the circle of the Clause's prohibitions from cultural, sociological, and theological matters to *legal* matters. If possible, perhaps the most immediate benefit of doing this would be to discipline the way historical materials are used to interpret the Clause. Restricting the target, the "object,"[39] of the Clause to concretely identifiable relationships between institutional government and institutional religion would give interpreters a matrix within which to process history.

For instance, in trying to solve the modern riddle of government religious symbolism, no longer would we be forced to speculate endlessly and pointlessly about the kind and degree of theological content, or lack thereof, in George Washington's Farewell Address or in the motto "In God We Trust." Instead, we would ask whether the use of such religious language presented to the generation that framed the First Amendment a species of relationship between state and church — between the *real* institutions of government and religion — that they sought to outlaw by ratifying the Amendment. Such evidence in American history appears to be sparse, which is why even separationist scholars commonly observe that government religious language or symbolism would have been thought by the founding generation to present no constitutional issues, as opposed to issues of political prudence. This historical datum ought to have significance about the reach of the Establishment Clause. It ought to mean that the Clause simply does not speak to the issue of government religious speech and symbolism — not because of some particular kind of theological content or message in the symbols, but because the symbols typically do not betray the presence of any form of historically prohibited institutional relationship between church and state.

Consider how this simplifies the "In Jesus We Trust" problem from the previous section. For both the Court majority and for Scalia, the solution to that problem comes down to analyzing the theological-symbolical content of the motto in light of some broader principle — for the majority, the motto's "endorsement" value, and for Scalia, its theological fit with our legal traditions. Thus, in a way, Scalia and the majority are both analyzing, inappropriately, the theological content of the motto, albeit at different levels of abstraction. But if the Establishment Clause is not concerned about semiotics or theology, but instead about concrete, legally-discernible institutional relationships, the problem becomes soluble by conventional legal standards. Now we can ask whether the motto betrays some kind of forbidden institutional relationship between the state and an actual religious institution. There are historical antecedents for such an inquiry. For instance, during the Elizabethan phase of the English Reformation, the government legally mandated certain changes in public religious symbolism — for instance, replacing images of the Blessed Virgin Mary with images of Elizabeth — in order to cement the increasingly stringent Anglican establishment. Or, again, in the late

Fourth Century A.D. the Roman emperor Gratian very publicly renounced his traditional title "Pontifex Maximus" and transferred it to the Pope, demonstrating a withdrawal of the Roman state from religious governance.[40] In these cases, the government's deployment of religious symbolism was in the service of strengthening (or dismantling) a concrete legal relationship between state and church. Such examples at least furnish a starting point for thinking about how "In Jesus We Trust" might function in a genuine religious establishment, and would therefore be prohibited by the Establishment Clause. Of course, this also means that if the motto is pure window-dressing then its deployment might be insensitive or blasphemous, but not constitutionally forbidden. More importantly, however, the analysis of the constitutionality of the motto does not turn on spurious distinctions between the "sectarian" motto and the "monotheistic" motto, or between the "endorsing" motto and the merely "solemnizing" one. It cannot be said too many times that, even were inquiries of that nature coherent (which is doubtful), judges are not equipped to make them.

But at this point, it will be objected, what we have is mere intuition. Granted, the prohibitory circle of the Establishment Clause must be tightened from cultural-theological constructs to institutional-legal constructs. Granted, this would have the likely effect of disciplining Justices' use of history in solving anti-establishment problems by channeling historical materials into a concrete legal matrix. Granted, the resulting anti-establishment jurisprudence would probably be more consistent and coherent because it would now be keyed to concrete institutional relationships — and judges are better equipped to analyze such things as opposed to semiotics and theology. But, even granted all that, how can the proposed "legal-institutional" recasting of the Establishment Clause be justified or defended? Is it a pure preference, foisted on the Clause by those (like me) who are dissatisfied with the Court's jurisprudence and who want to find a way to discipline and regularize it?

The obvious place to begin is with the text of the Clause. Any account of the Clause as keyed to institutional legal relationships — and not to cultural-theological concepts — ought to tie itself to the words. Both Court and scholars have appeared to shy away from the words of the Clause, particularly the key phrase "establishment" of religion.[41] Indeed, it is possible that in the Court's jurisprudence the word "respecting" functionally determines the reach of the Clause more than what must obviously be the central focus of the Clause — "an establishment of religion." That is, by interpreting "respecting" to mean something like "leading up to" or "tending towards" establishing religion, it is as if interpreters have absolved themselves from doing the hard work of defining what the term of art "establishment of religion" actually means as a legal concept. After all, if the phrase "respecting an establishment of religion" simply means, at the end of the day, "somewhere within shouting distance of a religious establishment," then we are excused from having to be too precise about what the Clause actually prohibits. A convincing jurisprudence of the Establishment Clause cannot rest on such verbal laziness.

Looking at the words of the Clause with fresh eyes, isn't it plain, isn't it *obvious*, that the

term "establishment of religion" is a legal term of art, just as much phrases in other parts of the Constitution such as "Letter of Marque and Reprisal" or "Bill of Attainder" or "Corruption of Blood"? This certainly doesn't make "establishment of religion" easy to define, but it would discernibly change the whole approach to specification of what is prohibited. It would change it from a mystical to a legal inquiry. It would dispense with the historically implausible assumption that "establishment of religion" *really* just means "bad religious characteristics in a secular government"? Nor would this approach mean that the concept of "establishment of religion" is somehow frozen in time. Leading scholars have asked whether the concept of "establishment" or "separation of church and state" could somehow evolve over time, or indeed be transformed by the Fourteenth Amendment.[42] But the premise of such scholarship is that the original concept of an "establishment of religion" must have a fairly concrete, definable legal architecture. Otherwise, how could anyone — not to mention a judge — even begin to chart how the concept would change over time, or be transformed from what into what. It would be as if the evolutionist were trying to account for the development of *homo sapiens* with no fossil record at all.

Conclusion

Thus the re-imagination of the anti-establishment prohibition does not promise easy answers, but it does furnish a starting point in relatively definite legal categories. Foundational assumptions for a jurisprudence as volatile as the Establishment Clause are — to say something utterly banal — critical. We should not be content to start building on generalities such as "neutrality" and "non-endorsement," because we will keep circling the problem, endlessly restating it in terms of vague principles that do not promise objective solutions. "Does the religious symbol unconstitutionally endorse religion to the reasonable observer by sending the message that he is a second-class citizen and political outsider, or does the religious symbol merely acknowledge citizens' religious convictions?" Who knows? Merely posing such questions fatigues the mind and heart.

Are there scholarly foundations already being laid for such a re-thinking of the Establishment Clause? I think so. Michael McConnell's magisterial taxonomy of founding-era establishments in the first part of his *Establishment and Disestablishment at the Founding* is a good example.[43] McConnell tackles the problem of religious establishments as if they were composed of a discernible, definable matrix of legal characteristics such as the following: government control over church doctrine and structure; mandatory church attendance and prohibitions on non-official forms of worship; certain forms of public financial support, and so on. McConnell's stated intention in that article is not to revolutionize the jurisprudence, but instead to call it back to a kind of historical realism.[44] In my view, this is only way forward in Establishment Clause jurisprudence. Our three-part tests have become untethered from the historical milieu in which the anti-establishment prohibition was generated, and are flailing in mid-air. It is no response to say, "That is as it should be. The constitutional guarantees are supposed to evolve." It is no response because, if the jurisprudence lacks roots in historical

reality to begin with, the evolution of the jurisprudence is unreliable and directionless, virtually by definition. We need to revolutionize Establishment Clause jurisprudence by reading the Clause in a revolutionary way — as a legal prohibition, and not as a theological manifesto. Otherwise, interpreting the Clause will continue to lead us toward such sentiments as the Psalmist felt when pondering the omniscience of God: *Such knowledge is too wonderful for me; It is high, I cannot attain to it.*[45]

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[1] *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, C.J., dissenting).

[2] *See, e.g., Symposium: The (Re)Turn to History in Religion Clause Law and Scholarship*, 81 NOTRE DAME L. REV. 1697-1843 (2006) (featuring articles by Steven K. Green, Marci A. Hamilton & Rachel Steamer, Douglas Laycock, and Steven D. Smith).

[3] *McCreary County v. ACLU*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

[4] *See, e.g.*, Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 Nw. U. L. Rev. 1097 (2006).

[5] *See* Kyle Duncan, *Bringing Scalia's Decalogue Dissent Down From the Mountain*, 2007 UTAH L. REV. 287 (2007).

[6] I will sketch out what sort of frame I believe is suggested by the text of the Clause in Part III, *infra*.

[7] *See, e.g., Van Orden*, 545 U.S. at 683 (observing that the Court's "cases, Janus like, point in two directions in applying the Establishment Clause").

[8] *Everson v. Board of Educ.*, 330 U.S. 1, 11(1947); *see also Engel v. Vitale*, 370 U.S. 421, 428-29 (1962) (reading same historical motivations for Establishment Clause).

[9] *See, e.g., Everson*, 330 U.S. at 14 (observing that, after ratification of the First Amendment, "some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups"); *see also* ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 64-82 (1964) (discussing establishments in states before and after First Amendment).

[10] GERARD BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 80 (1987).

[11] *See, Everson*, 330 U.S. at 11-13.

[12] *See, e.g., Flast v. Cohen*, 392 U.S. 83, 103-04 (1968) (constructing unique taxpayer standing doctrine for Establishment Clause cases based on Madison's "three pence" argument in his *Memorial and Remonstrance*); *see also Hein v. Freedom From Religion Foundation, Inc.*, 127 S. Ct. 2553, 2583 (2007) (Scalia, J., concurring) (disputing reliance on Madison's *Memorial* for Establishment Clause interpretation).

[13] *See*, John Courtney Murray, *Law or Prepossessions?*, in ESSAYS IN CONSTITUTIONAL LAW (Robert G. McCloskey ed., 1957).

[14] *See, e.g.*, BRADLEY CHURCH-STATE RELATIONSHIPS, *supra*, at 87-88 (arguing that "Madison's personal philosophy ... has nothing to do with the meaning of the Establishment Clause").

[15] *See, id* at 88 (asserting that "'[n]oncontroversial' understates the banality of the liberties championed by Madison").

[16] Murray, *Law or Prepossessions*, supra.

[17] *See*, 5 FOUNDERS' CONSTITUTION 105-06 (Philip B. Kurland & Ralph Lerner, eds. 1987).

[18] *See, e.g., Van Orden*, 545 U.S. at 724-25 (Stevens, J., dissenting) (citing Madison's 1822 letter).

[19] *See, e.g., McCreary County*, 545 U.S. at 880 (citing Story's *Commentaries* as primary support for proposition that "the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no Member of this Court takes as a premise for construing the Religion Clauses"); *Wallace*, 472 U.S. at 52 (citing Story's *Commentaries* to support proposition that the Religion Clauses "merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism").

[20] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §991 (Ronald D. Rotunda & John E. Nowak, eds. 1987).

[21] STORY COMMENTARIES §992.

[22] *Id.*

[23] *Id.* at §990.

[24] Former Chief Justice Rehnquist's *Van Orden* plurality presents the usual counterpoint to the mainstream approach to history. That approach is not new, but I will discuss it insofar as Justice Scalia's approach attempts to refine it.

[25] *See, e.g., McCreary County*, 125 S. Ct. at 2742-43.

[26] *See, e.g., County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

[27] 463 U.S. 783 (1983).

[28] *See* generally ANTONIN SCALIA, A MATTER OF INTERPRETATION 38-40 (1997); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95-96 (Scalia, J., dissenting).

[29] *See Rutan*, 497 U.S. at 95-96 (Scalia, J., dissenting).
[30] *See McCreary County*, 545 U.S. at 894 n.4 (Scalia, J., dissenting).
[31] *Id.*
[32] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting).
[33] *See* Duncan, *supra* note 5, at 322-23.
[34] Or better yet, it *should* have to explain such things. What it would actually do, of course, is ignore the problem altogether or fall back on empty explanations such as "the motto has become a ceremonial deism."
[35] *See, e.g.*, STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17-34 (1995); *Zelman v. Simmons-Harris*, 536 U.S. 639, 677-680 (2002) (Thomas, J., concurring).
[36] *See, e.g., McCreary County*, 545 U.S. at 882 (O'Connor, J., concurring) (observing that "[a]t a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish"); *Zelman*, 536 U.S. at 685-86 (Stevens, J., dissenting) (admitting that his views regarding the constitutionality of school voucher programs "have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another").
[37] *See, e.g., Calder v. Bull*, 3 U.S. 386, 390 (1798) (op. of Chase, J.) (explaining the technical legal meaning of the constitutional term "*ex post facto* law").
[38] See, *e.g.*, U.S. CONSTITUTION arts. I §9 (denying States power to "grant Letters of Marque and Reprisal" and "coin Money"); I §8 (granting Congress power to "establish ... uniform Laws on the subject of Bankruptcy throughout the United States"); III §2 (granting federal jurisdiction over "all Cases of admiralty and maritime Jurisdiction").
[39] *See, e.g., M'Culloch v. Maryland*, 17 U.S. 316, 423 (1819) (recognizing power to invalidate congressional laws "should congress, under the pretext of executing its powers, pass laws for the accomplishment of *objects* not intrusted to the government") (emphasis added).
[40] *See* HUGO RAHNER, CHURCH AND STATE IN EARLY CHRISTIANITY 70 (1961).
[41] *See, e.g., McCreary County*, 545 U.S. at 874-75 ("The First Amendment contains no textual definition of 'establishment,' and the term is certainly not self-defining. No one contends that the prohibition of establishment stops at a designation of a national (or with Fourteenth Amendment incorporation [...] a state) church, but nothing in the text says just how much more it covers.").
[42] *See, e.g.*, Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 Ariz. St. L. J. 1085 (1995); Kent Greenawalt, *History As Ideology: Philip Hamburger's* Separation of Church and State, 93 Cal. L. Rev. 367 (2005).
[43] Michael W. McConnell, *Establishment & Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003).
[44] *Id.* at 2205-08.
[45] Psalm 139:6 (RSV).

MISUNDERSTANDING *FREEDOM FROM RELIGION*: TWO CENTS ON MADISON'S THREE PENCE

Kyle Duncan*

ABSTRACT

Forty years ago in Flast v. Cohen, *the Supreme Court created, for the Establishment Clause only, a dramatic exception to the bedrock principle barring general taxpayer standing. The Court's new exception was based on one catchy phrase from a famous historical document—James Madison's 1785 Memorial and Remonstrance Against Religious Assessments. The Court has been notoriously bad at Establishment Clause history, but* Flast *seemed to push the envelope. Yet neither the Court nor commentators have questioned* Flast's *historical credentials over the last four decades. Recently, the Supreme Court took up the taxpayer standing question again in* Hein v. Freedom From Religion Foundation, Inc. *Unhappily, the Justices' various opinions did not clarify the matter, and only obliquely addressed the credibility of* Flast's *use of history. This Article goes where the Court should have gone, and scrutinizes the historical underpinnings of the* Flast *exception to generalized taxpayer standing in Establishment Clause cases. The Article concludes that Madison's Memorial offers little support for that doctrine.* Flast *lifted a political argument from one context and applied it uncritically in a different context and to a different issue. It confused what Madison thought about the substance of religious liberty in general, with what he thought about how religious liberty should be posited and enforced in particular legal provisions. Most fundamentally, it failed to consider Madison's larger argument and objectives in the Memorial. The Article concludes by placing this failure of analysis in the broader context of Establishment Clause jurisprudence.* Hein *may well presage the Court's reconsideration of* Flast's *taxpayer standing exception. That reconsideration would itself be part of a much needed refinement of the Court's treatment of historical materials in Establishment Clause jurisprudence.*

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INTRODUCTION

In *Hein v. Freedom From Religion Foundation, Inc.*, the United States Supreme Court recently reconsidered whether taxpayers have standing to sue the government for Establishment Clause violations.[1] The Court's strange doctrine in this area needed clarifying. Forty years ago, in *Flast v. Cohen*, the Court had created, for the Establishment Clause alone, an exception to the otherwise "impenetrable barrier" against taxpayer standing.[2] *Flast* grounded that exception on a single historical document—James Madison's 1785 *Memorial and Remonstrance Against Religious Assessments*.[3] Indeed, the Court seemed to rely not so much on the document itself, as on Madison's memorable jeremiad against "three pence . . . for the support of any one establishment."[4] *Hein* gave the Court an opportunity to explain *Flast*, or to overrule it, but the Court did neither. Instead, a three-Justice plurality merely refused to extend *Flast*, while showing evident distaste for the precedent.[5]

The precise legal question in *Hein*—whether to extend the *Flast* exception from congressional spending to executive action—was not terribly interesting in its own right. That question depends on whether *Flast* itself was correct. But the opinions in *Hein* offer precious little insight. After four decades, the question still seems to boil down to Madison's "three pence." This Article addresses that strange state of affairs. Can a unique and important exception to the taxpayer standing bar be justified by one line from a famous document? Does the Court even need to engage in such special pleading for the Establishment Clause? Maybe the Clause supports taxpayer standing for reasons other than Madison's catchy turn-of-phrase?

Prompted by the Court's failure to confront the issue squarely in *Hein*, this Article reconsiders *Flast*'s own explanation for its taxpayer standing doctrine. It proceeds as follows. First, it briefly examines the development of that doctrine from *Flast* to *Hein*. Second, it asks whether *Flast* can be justified by analogy to other standing precedents, as Justice Souter argues in his *Hein* dissent.[6] Third, it asks whether *Flast* is supported, as the decision claimed, by Madison's *Memorial and Remonstrance* and his "three pence" argument. Finally, if *Flast* is not persuasively supported by the *Memorial*, the Article explores the implications for the Establishment Clause itself.

The Article concludes that Madison's *Memorial* offers little support for *Flast*'s doctrine of taxpayer standing in Establishment Clause cases. *Flast* lifted a political argument from one context (a 1785 legislative proposal in Virginia) and applied it uncritically in a different context and to a different issue (the enforceability of a federal constitutional guarantee). It confused what

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[1] Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553 (2007).

[2] Flast v. Cohen, 392 U.S. 83, 85, 105-06 (1968).

[3] *Id.* at 103-04 & n.24. *See also* JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 82, 82-84 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter MEMORIAL].

[4] MEMORIAL, *supra* note 3, at 82.

[5] Two Justices would have overruled *Flast*, while four would have reaffirmed it and extended its doctrine. *See infra* Part I.

[6] *See, e.g.*, *Hein*, 127 S. Ct. at 2563 (analogizing *Flast* standing to cases recognizing other forms of intangible harms).

Madison thought about the substance of religious liberty in general, with what he thought about how religious liberty ought to be posited and enforced in particular legal provisions. Most fundamentally, it failed to consider the "three pence" language in the context of Madison's larger argument and objectives in the *Memorial*. The Article concludes by placing this failure of analysis in the broader context of Establishment Clause jurisprudence. *Hein* may well presage the Court's reconsideration of *Flast*'s taxpayer standing exception. That reconsideration would itself be part of a more general and much needed refinement of the Court's treatment of historical materials in Establishment Clause jurisprudence.

I. TAXPAYER STANDING: FROM *FLAST* TO *HEIN*

Unlike certain European courts, federal courts in the United States cannot offer advice about the constitutionality of government action.[7] The Constitution itself insures this by vesting judicial power only over "cases" or "controversies."[8] To enforce this limitation of judicial power, the Supreme Court has elaborated the doctrine of standing.[9] Central to standing is the idea of injury. To show standing, and thus to present a genuine "case or controversy," a plaintiff must prove some personal injury caused by the challenged government action.[10] But not all claimed injuries will suffice. Injuries far removed from traditional property or bodily damage, such as claims of symbolic or stigmatic harm, usually fail to create standing. This is the bar against "generalized grievances," which Professor Chemerinsky describes as arising in cases "where the plaintiffs sue solely as citizens concerned with having the government follow the law or as taxpayers interested in restraining allegedly illegal government expenditures."[11] Thus, a citizen's interest *as a taxpayer* in seeing tax dollars legally spent cannot create standing. The citizen may be correct that tax money was spent improperly, but without a *personal* injury, his indignation must be redressed by the political process rather than by federal adjudication.

On its face, this principle would foreclose a significant kind of Establishment Clause challenge to state action. Suppose someone claims that government spending amounts to a "law respecting an Establishment of religion," and seeks to adjudicate that claim based on his status as taxpayer. The rule against general taxpayer standing bars the claim for two, interrelated reasons. First, the claimed injury is not sufficiently personal: the challenged expenditure does not uniquely harm *this* plaintiff compared to three hundred million other taxpay-

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[7] *See generally* NORMAN DORSEN, MICHAEL ROSENFELD, ANDRAS SAJO & SUSANNE BAER, COMPARATIVE CONSTITUTIONALISM 113-133 (2003) (discussing abstract vs. concrete models of judicial review); MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, COMPARATIVE LEGAL TRADITIONS 88-121 (3d ed. 2007) (discussing different models of judicial review in France, Germany and Italy).

[8] U.S. CONST. art. III, § 2, cl. 1.

[9] *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES § 2.5 (3d ed. 2006); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-14 to -16 (3d ed. 2000).

[10] *See, e.g.*, TRIBE, *supra* note 9, § 3-16 (discussing "injury-in-fact" component of standing).

[11] CHEMERINSKY, *supra* note 9, § 2.5.5, at 91.

ers.[12] Second, the nature of the claimed injury eludes definition. The plaintiff is not claiming back taxes on the expenditures. Nor does the plaintiff allege a special kind of personal affront: he does not claim, for instance, to have been exposed to the government program and injured psychologically or stigmatically.[13] Instead, the plaintiff seeks redress for a dramatically attenuated kind of symbolic injury. Again, one might intuit that this amounts to some kind of harm, but articulating the harm in traditional categories of injury is difficult. Perhaps the injury lies in the knowledge that funds are spent in an illicitly "religious" manner, perhaps in some prophetic dread of the consequences that might flow from the transgression. But, however described, those appear to be precisely the kinds of injuries the standing doctrines were designed to weed out.

In *Flast*, the Supreme Court abruptly changed that.[14] The Court allowed plaintiffs to bring an Establishment Clause challenge to a federal educational spending program, based "solely on their status as federal taxpayers."[15] To relax the traditional bar against taxpayer standing, the Court would require plaintiffs to show a two-part "nexus" between their federal taxpayer status and the lawsuit. Taxpayer status must be linked to the "type of legislative enactment attacked," as well as to "the precise nature of the constitutional infringement alleged."[16] The first part means that plaintiffs may attack an exercise of Congress' Article I power to tax and spend, but not "an incidental expenditure of tax funds in the administration of an essentially regulatory statute."[17] The second part means that plaintiffs must allege the violation of a "specific constitutional limitation[ ] imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the power delegated to Congress by Art[icle] I, § 8."[18] The Court found both parts met in *Flast*. The plaintiffs were challenging a "substantial expenditure of federal tax funds" to state and local educational agencies.[19] And, they claimed the expenditures violated the Establishment Clause, which the Court said was "designed as a specific bulwark against" improper government use of its taxing and spending powers.[20]

The new doctrine seemed tailor-made for Establishment Clause challenges, because of the unique role the Court ascribed to that constitutional provision. The Clause, argued that majority, grew out of the "specific evils feared" by its drafters and supporters, namely that "the taxing and spending power would be used to favor one religion over another or to support religion in general."[21] Concurring, Justice Stewart reasoned that, "[b]ecause that [C]lause plainly prohibits taxing and spending in aid of religion, every taxpayer can

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[12] *See, e.g.*, *id.* § 2.5.2, at 64; TRIBE, *supra* note 9, § 3-16, at 400, § 3-17, at 421.
[13] *See, e.g.*, CHEMERINSKY, *supra* note 9, § 2.5.2, at 70; TRIBE, *supra* note 9, § 3-16, at 400.
[14] On the *Flast* exception to taxpayer standing, see generally CHEMERINSKY, *supra* note 9, § 2.5.5, at 92-95; TRIBE, *supra* note 9, § 3-17, at 421-24.
[15] Flast v. Cohen, 392 U.S. 83, 85 (1968).
[16] *Id.* at 102.
[17] *Id.*
[18] *Id.* at 102-03.
[19] *Id.* at 103.
[20] *Id.* at 104.
[21] *Id.* at 103.

claim a personal constitutional right not to be taxed for the support of a religious institution."[22] Similarly, Justice Fortas was willing to subscribe to the "thesis that this Clause includes a *specific* prohibition upon the use of the power to tax to support an establishment of religion."[23]

But the Court saw far more in the Establishment Clause than a mere limit on Congress' taxing and spending powers. In the Clause, the Court discerned a crucial defense against vast dangers—crucial enough to justify a pointed exception to the usual standing rules and, consequently, a massive expansion of potential Establishment Clause plaintiffs. Justifying the link between taxpayer status and the Clause's protections, Justice Fortas opined that

> [i]n terms of the structure and basic philosophy of our constitutional government, it would be difficult to point to any issue that has a more intimate, pervasive, and fundamental impact upon the life of the taxpayer—and upon the life of all citizens.[24]

Justice Douglas went even further. Deriding the idea that the taxpayer's interest was "infinitesimal," Justice Douglas intimated that even minuscule amounts of tax dollars could "signal a monstrous invasion by the Government into church affairs, and so on."[25] The "mounting federal aid to sectarian schools" was in his view "notorious[,] and the subterfuges numerous."[26] To support his argument, Justice Douglas footnoted some remarkable passages from a scholarly article:

> Tuition grants to parents of students in church schools is [sic] considered by the clerics and their helpers to have possibilities. The idea here is that the parent receives the money, carries it down to the school, and gives it to the priest. Since the money pauses a moment with the parent before going to the priest, it is argued that this evades the constitutional prohibition against government money for religion! This is a diaphanous trick which seeks to do indirectly what may not be done directly.[27]

Justice Douglas likened such "tricks" to "the host of devices used by the States to avoid opening to Negroes public facilities enjoyed by whites."[28]

Thus, the *Flast* Justices cast the Establishment Clause as a specific, and crucial, limitation on the federal taxing-and-spending power. This was the lynchpin for creating a unique exception to what the Court termed an otherwise "impenetrable barrier" against generalized taxpayer standing.[29] But what was the historical evidence on which the Court based this understanding of the Establishment Clause? Remarkably, the Court relied on a single historical document—Madison's *Memorial and Remonstrance Against Religious Assessments*—a document that was, incidentally, not written in support of the Establishment Clause. Literally not one other piece of historical evidence was cited. But speaking here of "citing" or "relying" on a document does not, as discussed below, do justice to the Court's approach. The Court and individual

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[22] *Id.* at 114 (Stewart, J., concurring).
[23] *Id.* at 115 (Fortas, J., concurring).
[24] *Id.*
[25] *Id.* at 108 (Douglas, J., concurring).
[26] *Id.* at 113.
[27] *Id.* at 113 n.9 (quoting Editorial, CHURCH & ST., June 1968, at 5).
[28] *Id.* at 112-13. On Justice Douglas's views of Catholic education, and on his citation of anti-Catholic writings in his judicial opinions, see generally JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY 184-85, 264 (2003).
[29] *See Flast*, 392 U.S. at 85, 105-06.

Justices relied on just *one phrase* in the *Memorial*—Madison's "three pence" language—as the sole, rhetorical touchstone for their new doctrine.

Madison's "three pence" argument figures in one of the most famous slippery slope arguments in American legal history.[30] Urging the 1785 Virginia Legislature to reject Patrick Henry's proposed tax for support of Christian ministers, Madison masterfully reasoned that the very smallness of the tax was ominous. "The free men of America," rang out Madison, "did not wait till usurped power had strengthened itself by exercise," but instead "t[ook] alarm at the first experiment on our liberties."[31] Madison's vigilant countrymen "saw all the consequences in the principle, and they avoided the consequences by denying the principle."[32] What consequences did Madison see, and wish to avoid, in the Virginia ministry tax?

> [T]hat the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects[.] [T]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever[.][33]

Madison's pamphlet was addressed to the Virginia Legislature, and his position triumphed.[34] Henry's tax was defeated, and instead Thomas Jefferson's "Act for Establishing Religious Freedom" became law later that year.[35] Jefferson's Act contained language that seemed to vindicate Madison's "three pence" argument. The Act's preamble declared that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[36] It added that even "forcing him to support this or that teacher of his own religious persuasion" amounted to "depriving him of the comfortable liberty" of deciding which minister deserved his patronage.[37]

Like an architect designing a home around a particularly beautiful view, the *Flast* Justices built their new exception to taxpayer standing around Madison's "three pence" verbiage. The majority quoted the language verbatim, as its first step to explaining why the individual taxpayer could claim that "his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power."[38] Justice Douglas was even plainer. Observing that "Madison in denouncing state support of churches said the principle was violated when even 'three pence' was appropriated to

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[30] On the historical background to MEMORIAL, see generally THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 142-46 (1986); Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 783-86 (2002).

[31] MEMORIAL, *supra* note 3, at 82.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See* CURRY, *supra* note 30, at 146.

[36] *See* ACT FOR ESTABLISHING RELIGIOUS FREEDOM (1785), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 84, 84-85 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter ACT FOR ESTABLISHING RELIGIOUS FREEDOM].

[37] *Id.* at 84.

[38] Flast v. Cohen, 392 U.S. 83, 106 (1968) .

that cause by the Government," Justice Douglas concluded that "[i]t *therefore* does not do to talk about taxpayers' interest as 'infinitesimal.'"[39] For Justice Douglas, then, the case involved not the judicial oversight of political matters, but instead judicial vindication "where wrongs to individuals are done by violation of specific guarantees."[40] Justices Stewart and Fortas joined the chorus, referring explicitly to Madison's "three pence" language, and to nothing else.[41] Indeed, no Justice offered any support beyond this specific passage in the *Memorial* for the proposition that the Establishment Clause created a specific exception to Congress's taxing authority that would justify a unique exception to otherwise universal bar on taxpayer standing.

In dissent, Justice Harlan took particular exception to this aspect of the Court's methodology. Making an observation that, today, sounds shocking, Justice Harlan asserted that "the evidence seems clear that the First Amendment was not intended simply to enact the terms of Madison's [*Memorial*]."[42] While denying neither the relevance of the document to Establishment Clause interpretation, nor the possibility that forbidden establishments could be constructed from federal funds, Justice Harlan nonetheless rejected the majority's uncritical reliance on the *Memorial* as a means of distinguishing the Establishment Clause for standing purposes:

> I say simply that, given the ultimate obscurity of the Establishment Clause's historical purposes, it is inappropriate for this Court to draw fundamental distinctions among the several constitutional commands upon the supposed authority of isolated dicta extracted from the clause's complex history.[43]

Like Justice Douglas, Justice Harlan showed he too could drop cutting footnotes. Justice Harlan approvingly cited a *Supreme Court Review* article arguing that "to treat [the *Memorial*] as authoritatively incorporated in the First Amendment is to take grotesque liberties with the simple legislative process, and even more with the complex and diffuse process of ratification of an Amendment by three-fourths of the states."[44]

This, then, is the curious origin of *Flast*'s exception to taxpayer standing. In the thirty-nine years between *Flast* and *Hein*, the Court did not really alter or explain the doctrine. Consistent with *Flast*'s letter, the Court did refuse to extend the exception from congressional taxing-and-spending to a federal agency's transfer of property under Article IV.[45] But the Court never questioned, nor further elaborated, *Flast*'s theoretical or historical underpinnings. Madison's "three pence" continued to be the only investment the Court had ever made in the matter. Thus, the time seemed ripe when the Court granted certiorari in *Hein* to reconsider the scope of *Flast*. The *Hein* plaintiffs brought an Establishment Clause challenge to executive orders aimed at facilitating

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[39] *Id.* at 107-08 (Douglas, J., concurring) (emphasis added).
[40] *Id.* at 111.
[41] *Id.* at 114 (Stewart, J., concurring); *id.* at 115 & n.24 (Fortas, J., concurring).
[42] *Id.* at 126 (Harlan, J., dissenting).
[43] *Id.* (Harlan, J., dissenting).
[44] *Id.* at 126 n.15 (quoting Ernest J. Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1, 8 (1963)).
[45] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 479-80 (1982).

religious groups' equal access to federal assistance.[46] The orders were not issued pursuant to any congressional legislation, and were funded by general executive branch—not congressional—appropriations.[47] The sole basis for plaintiffs' standing was their status as federal taxpayers.[48] What emerges from the Court's *Hein* opinions, however, does not bring closure to the matter of taxpayer standing. The controlling opinion in *Hein* is neither a ringing endorsement nor a complete repudiation of *Flast*.[49]

Justice Alito's three-Justice plurality opinion (joined by Chief Justice Roberts and Justice Kennedy) merely "decline[s] [plaintiffs'] invitation to extend [*Flast*'s] holding to encompass discretionary Executive Branch expenditures."[50] But the opinion holds *Flast* itself at arms' length. Justice Alito repeatedly emphasizes *Flast*'s "narrowness," and essentially confines it to its facts—i.e., to Establishment Clause challenges to "a specific congressional appropriation" disbursed "pursuant to [an express] congressional mandate."[51] The plaintiffs protested that such a distinction between congressional and executive action was arbitrary: their "injury" arose from the expenditures themselves and were thus identical in either case.[52] But in response, Justice Alito simply points to *Flast*'s emphasis on Congress' taxing-and-spending power, and reminds plaintiffs that *Flast* was a "narrow" precedent that has never been extended.[53] He does say that extending *Flast* would "raise serious separation-of-powers concerns," but quickly adds that *Flast* itself "gave too little weight to these concerns."[54] Justice Alito's response to Justice Scalia's sharp dissent is especially curious. Justice Scalia's point, discussed below, is that *Flast*'s implicit logic demands that *Flast* either be extended to executive branch spending or overruled.[55] Justice Alito responds that Justice Scalia's position "is wrong," but does not explain why.[56] Instead, Justice Alito simply repeats that *Flast* made such distinctions and has never been extended.[57] His final rejoinder to Justice Scalia is that "[w]e need go no further to decide this case," intimating that perhaps he would go along with Justice Scalia in a case squarely presenting *Flast*'s viability.[58]

Despite the controlling opinion, then, six Justices agree that the distinction between congressional and executive appropriations makes little sense. But two of them (Justices Scalia and Thomas) would overrule *Flast* outright, while

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[46] Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553, 2560 (2007).
[47] *Id.* at 2559.
[48] *Id.* at 2561.
[49] For another recent discussion of *Hein*, see Douglas W. Kmiec, *Standing Still—Did the Roberts Court Narrow, But Not Overrule,* Flast *To Allow Time To Re-Think Establishment Clause Jurisprudence?*, 35 PEPP. L. REV. 509, 511-13 (2008).
[50] *Hein*, 127 S. Ct. at 2568.
[51] *See, e.g.*, *id.* at 2565. By contrast, Justice Kennedy's concurrence, while joining Justice Alito's opinion "in full," says explicitly that "*Flast* is correct and should not be called into question." *Id.* at 2572 (Kennedy, J., concurring).
[52] *Id.* at 2568 (plurality opinion).
[53] *Id.*
[54] *Id.* at 2569.
[55] *See infra* notes 59-62 and accompanying text.
[56] *Hein*, 127 S. Ct. at 2572.
[57] *Id.*
[58] *Id.*

four (Justices Souter, Stevens, Ginsburg and Breyer) would reaffirm and extend *Flast*.[59] Justice Scalia's concurrence is the most explicit in attacking *Flast*'s credentials. First, Justice Scalia argues that *Flast*'s taxpayer standing exception for Establishment Clause cases conflicts with the Court's consistent denial of such standing in all other cases.[60] Fundamentally, the injury implicitly recognized as the basis for *Flast* standing—what Justice Scalia derisively calls "Psychic Injury" at seeing tax money illegally spent—is precisely the kind of injury the Court had denied as a basis for standing elsewhere.[61] Second, Justice Scalia rejects as irrelevant to the standing question "whether the Establishment Clause was originally conceived of as a specific limitation on the taxing and spending power."[62] Confronting *Flast*'s reliance on Madison's *Memorial* head-on, Justice Scalia argues that the document "has nothing whatever to say" about whether taxpayer-based grievances confer federal standing under the Establishment Clause.[63] In his dissent, Justice Souter disagrees with Justice Scalia on both points. First, Justice Souter reads Madison's *Memorial* as evidence that "the importance of [taxpayer] injury has deep historical roots," and that the injury is linked to rights of conscience far deeper than mere "disagreement with the policy supported."[64] Second, Justice Souter argues that the injury recognized in *Flast* finds analogous support in precedents recognizing standing for injuries such as "esthetic harms," "inability to compete," and "living in a racially gerrymandered electoral district."[65] Justice Souter also recruits Madison for this final point, observing that "[t]he judgment of sufficient injury takes account of the Madisonian relationship of tax money and conscience . . . ."[66]

So runs *Hein*, a doubly disappointing performance by the Court. At the level of precedent, the Court has reaffirmed *Flast*, but by damning it with faint praise. Two Justices, Alito and Roberts, think *Flast* is worth saving for now, but imply that it is badly flawed. Oddly, Justice Kennedy joined their opinion, but wrote separately that *Flast* is correct and should not be overruled.[67] Two Justices, Scalia and Thomas, think *Flast* is badly wrong and should be overruled immediately. Four Justices—Souter, Stevens, Ginsburg and Breyer—think *Flast* is doctrinally sound and should be extended beyond its holding. Such is the precedential mess. Furthermore, at the level of doctrine, we have no majority explaining *Flast*'s underpinnings. The plurality glosses over them. Justice Scalia's concurrence repudiates them. The dissent merely recapitulates what little *Flast* said about them forty years ago.

This is not pretty jurisprudence, but perhaps no one should be surprised that the confluence of standing and the Establishment Clause has generated a perfect storm of incoherence. Six Justices do recognize, albeit from opposite

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[59] *Compare id.* at 2573 (Scalia, J., concurring), *with id.* at 2584 (Souter, J., dissenting).
[60] *Id.* at 2574 (Scalia, J., concurring).
[61] *Id.* at 2573-2584.
[62] *Id.* at 2583.
[63] *Id.*
[64] *Id.* at 2585 (Souter, J., dissenting).
[65] *Id.* at 2587.
[66] *Id.* at 2587-89.
[67] *Id.* at 2572 (Kennedy, J., concurring).

perches, that the path to greater clarity lies, not in anything the controlling opinion said about *Flast*, but in *Flast*'s own credibility. The remainder of this Article attempts to assess that.

II. *FLAST* AND STANDING PRECEDENTS

Flast recognized that a distinct kind of injury in Establishment Clause claims would confer standing. This injury lies precisely in the improper "extraction" and "spending" of tax dollars.[68] The most straightforward way to validate *Flast* is to analogize this injury to other injuries the Court has accepted for standing purposes, while at the same time explaining why such an injury does not fall under the general ban on taxpayer standing. This would be a better course than *Flast* itself took, because it avoids the burden of special pleading for the Establishment Clause. The Court would not have to theorize about why the Establishment Clause is a "special" part of the Bill of Rights that demands the recognition of a basis for standing denied in every other area of constitutional law.

Perhaps this validation is impossible, which is why the Court felt impelled toward such special pleading in *Flast*. But the possibility is worth exploring because the major weakness in *Flast* appears to be its thin reasoning about why the Establishment Clause deserves a special standing doctrine. Justice Souter senses this problem, for in his dissent he includes a separate section explaining why *Flast* standing is not as unusual as it appears. "[I]t would be a mistake," Justice Souter argues, "to think [*Flast*] is unique in recognizing standing in a plaintiff without injury to flesh or purse."[69] He analogizes the *Flast* injury to cases where plaintiffs were allowed to complain about "esthetic harms," or about the harm of being forced to compete on a racially-biased playing field.[70] Is this the way to justify *Flast*? Is it as simple as saying, as Justice Souter does, that "seeing one's tax dollars spent on religion" is just as "concrete" as injury as in these other cases?[71]

Justice Souter's focus on "esthetic" or "stigmatizing" harms appears to be the most promising avenue. By definition, the standing-conferring injury in a *Flast* case cannot lie in the economic effect of the tax on the plaintiff's pocketbook, because the injury would then be indistinguishable from any other complaint about improper taxation. Nor is plaintiff alleging that he was personally affected in a distinctive way by the spending of the tax funds (otherwise, no reason would exist for claiming standing on the basis of being a taxpayer). Thus, the precise injury must lie in the realm of the plaintiff's perception of the constitutional imbalance created by the improper taxing-and-spending. Perhaps here is where one might search for the link between the injury and the taxpayer's "conscience." That is, if the locus of the injury is perceptive, then involvement of the taxpayer's conscience is at least prima facie plausible. Of

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[68] *See* Flast v. Cohen, 392 U.S. 83, 106 (1968) (stating a taxpayer has standing based on the allegation that "his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power").

[69] *Hein*, 127 S. Ct. at 2587 (Souter, J., dissenting).

[70] *Id.*

[71] *Id.*

course, one would still need to explain why the injury to "conscience" is cognizable *only* in this area and not elsewhere (such as conscientious scruples about tax money being spent on what one perceives to be an unjust war, or what one perceives to be the killing of unborn human beings). But Justice Souter clearly sees a constitutionally-distinct impact on conscience in this area, because he connects the "Madisonian relationship of tax money and conscience" to the modern-day endorsement test. In Justice Souter's view, the spending of tax money for religious purposes gives rise to the perceptive or stigmatizing harm by "send[ing] the . . . message to . . . nonadherents 'that they are outsiders, not full members of the political community.'"[72]

Is this kind of perceptive or stigmatizing harm sufficient to confer standing under existing precedent? Note that we are not yet asking whether the Establishment Clause supports, as a doctrinal or historical matter, the recognition of such a special harm; we are merely asking whether this sort of perceptive harm is analogous to injuries in other cases. Justice Souter cites *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, in which the Court found standing where "a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms."[73] The "aesthetic" or "perceptive" harms consisted in plaintiffs' avoidance of the affected areas either because of their fear of physical harm or because they perceived the area actually "looked and smelled polluted."[74] Another case cited by Justice Souter, *United States v. Hays*, presents a different kind of "perceptive" harm caused by racial classification.[75] If a person is subject to classification on the basis of race, then the stigmatic harm caused by the classification itself is sufficient to confer standing. More specifically, if a person resides in a racially gerrymandered electoral district (the issue in *Hays*), then she suffers a concrete "representational harm" tied to the fact that "the plaintiff has been denied equal treatment."[76] This harm would not, however, extend to a person not included in the gerrymandered district.[77]

The harms recognized in cases such as *Friends of Earth* and *Hays* are perceptive or aesthetic in the sense that the injuries manifest themselves to the plaintiffs primarily through their own perceptions, instead of through economic

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[72] *Id.* at 2588 (quoting McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 860 (2005)).

[73] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 184 (2000).

[74] *Id.* at 181.

[75] United States v. Hays, 515 U.S. 737, 744 (1995).

[76] *Id.* at 745. As the Court explained in *Hays*, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id.* at 744 (quoting Shaw v. Reno, 509 U.S. 630, 648 (1993)).

[77] *See id.* at 745:

> On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference. Unless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve.

or physical impact. Those decisions thus extend our thinking about cognizable injuries. As Professor Tribe explains, the interests vindicated in such cases "need only be expressible in terms of the individual's concrete satisfactions or experiences . . . ."[78] But these are not "generalized grievance" situations, because the plaintiffs are differently situated from other persons: only because of personal circumstances (living near a polluted river, or residing in a gerrymandered district) are they actually subject to such perceptive or stigmatic harms. Professor Tribe clarifies that such cases recognize standing for aesthetic or recreational harms "only if such injury represents an individuated interest of the litigant as distinguished from the polity as a whole."[79] Thus the harms do not lie *purely* in the plaintiffs' perceptions. Rather, through their perceptions, the plaintiffs become aware of concrete harms (the polluted river, the gerrymandered district) outside themselves.

One might construct an analogy, as Justice Souter does, between such harms and those at issue in *Flast* and *Hein*, but the analogy cannot go far enough. True, *Flast* and *Hein* present plaintiffs who have been made aware of allegedly illegal activity (the expenditure of money for religious purposes) and are thereby wounded. They claim harm to conscience through their perceptions. One could analogize that to the perception of a polluted river, or to the perceived unfairness of a racial gerrymander. But *Flast* and *Hein* contain an additional, crucial component. The perceptive harms in those cases are mediated to plaintiffs solely through the tax system. The plaintiffs are *not* complaining about their own personal exposure to an illegally-funded government religious program. Rather, they are complaining about their exposure to a tax system that collects and spends money in an allegedly unconstitutional endorsement of religion. This factor decisively distinguishes the "perceptive/stigmatic/esthetic" harms claimed in *Flast* and *Hein* from those already validated by the Court elsewhere.

The Court's decision in *Allen v. Wright* makes this difference plain.[80] There, the plaintiffs claimed standing based on the stigma caused them by an IRS policy of providing tax exemptions to private schools that discriminated by race.[81] But the Court disagreed. "[Stigmatic injury]," explained the Court,

> accords a basis for standing only to 'those persons who are personally denied equal treatment' . . .
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> . . . .
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> If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school . . . .[82]

This point was implicit in the other stigmatic harm cases. The plaintiffs in *Friends of the Earth*, for instance, would not have had standing based *purely* on their perception of environmental harm, had they not also lived near the polluted waters or desired to use them. The plaintiffs in *Hays* would have

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[78] TRIBE, *supra* note 9, § 3-16, at 404.
[79] *Id.*
[80] Allen v. Wright, 468 U.S. 737 (1984).
[81] *Id.* at 739-40.
[82] *Id.* at 755-56. *See also* CHEMERINSKY, *supra* note 9, § 2.5.2, at 74 (discussing *Allen*).

lacked standing if they had not been included physically within the gerrymandered district.

Justice Souter's *Hein* dissent obliquely concedes this point. At the close of his attempted analogy between the perceptive harm cases and *Flast*, Justice Souter drops a revealing footnote. Observing that not "any sort of [ ]injury will satisfy Article III" and that the requisite "intangible harms must be evaluated on a case by case basis," Justice Souter admits that there is an *entire class* of injuries, which typically never confer standing :

> Outside the Establishment Clause context, as the plurality points out, we have not found the injury *to a taxpayer* when funds are improperly expended to suffice for standing."[83]

But that is precisely why Justice Souter's analogy does not work. Only in Establishment Clause cases have the required perceptive or esthetic harms been premised on the general operation of the tax system. The plaintiffs asserting such a unique basis for standing are not saying they have been personally exposed to a religious program that was improperly funded by the government. That would at least be analogous to the polluted river and the racially gerrymandered district. Instead, they claim harm from perceiving that the *tax system* is being used to fund activities they believe improperly endorse religion. But no perceptive harm case recognizes *that* perception as sufficient to confer standing.

Justice Souter's analogical argument fails, in sum, because it completely discounts the function of the tax system in the claimed injury. The Supreme Court has been willing to recognize perceptive harm for standing, even if the harm perceived emerges from a lengthy and attenuated chain of circumstances. For instance, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, the Court allowed a student environmental group standing to complain of aesthetic harms stemming from environmental degradation.[84] The degradation, the plaintiffs alleged, was the end result of a chain of causation starting with a hike in railroad freight rates that would supposedly discourage the use of recycled goods. While admitting this was an "attenuated line of causation," the Court found standing because the plaintiffs credibly alleged that "that the specific and allegedly illegal action of the Commission would directly harm them in their use of the natural resources of the Washington Metropolitan Area."[85] The important point about *SCRAP* is that, notwithstanding the somewhat fanciful chain-of-circumstances argument, the Court took pains "to stress the importance of demonstrating that the party seeking review be himself among the injured . . . ."[86] But in the Establishment Clause taxpayer case, the only way the "party seeking review" can claim to be "among the injured" is to recruit the tax system as the instrument of his injury. This, however, is exactly the posture that the standing cases reject by requiring "personal injury." As Professor Chemerinsky explains, cases like *SCRAP* "establish that an ideologi-

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[83] Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553, 2587 n.4 (2007) (Souter, J., dissenting) (emphasis added).

[84] United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686-87 (1973).

[85] *Id.* at 687-88.

[86] *Id* at 687.

cal interest in a matter is not enough for standing."[87] But the intrusion of the tax system into the argument obliterates the distinction between cases, like *SCRAP*, where there is a real, albeit highly attenuated injury, and cases where plaintiffs merely have an ideological interest.

The exercise done in this Section has been to abstract the kind of injury allegedly suffered in taxpayer Establishment Clause cases, and compare it to other injuries the Court has accepted for standing purposes. But doing that reveals that *Flast* is not justifiable by analogy to those cases. The perceptive or aesthetic harms felt, via the tax system, from Establishment Clause violations may be genuine, but other areas of standing doctrine require a more directly-mediated form of personal injury to justify standing. This exercise has been an elaborate, but instructive, way of showing that there is nothing about such Establishment Clause claims, in the abstract, that escapes the general bar against taxpayer standing. Consequently, if taxpayer standing is to be justified, there must be something peculiar to the Establishment Clause itself that demands a departure from the general rule against taxpayer standing.

III. *FLAST* AND MADISON'S THREE PENCE

Flast's unique doctrine was based entirely on Madison's argument in the *Memorial and Remonstrance* that "the same authority that can force a citizen to contribute three pence only of his property for the support of one establishment, may force him to conform to any other establishment in all cases whatsoever[.]"[88] Of the *Flast* Justices, only Justice Harlan disputed this line of reasoning. While granting that the *Memorial* could shed light on the nature of the Establishment Clause, Justice Harlan denied that Madison's 1785 arguments in Virginia simply mapped onto the later federal constitutional provision.[89] Nor did he believe that, based on such evidence, the Court could distinguish among different constitutional provisions based on whether they limited Congress' taxing-and-spending powers.[90] Nothing, Harlan reasoned, marked out the Establishment Clause as a limitation more "specific" to taxing-and-spending than any other provision.[91] Virtually *every* constitutional limitation on Congress operated to limit its taxing and spending authority, given that "Congress' powers to spend are coterminous with the purposes for which, and methods by which, it may act . . . ."[92] This debate among the *Flast* Justices is the last time the Court has squarely confronted the matter.

Thus, four decades later, the question still begs for an answer: Does Madison's *Memorial and Remonstrance* demonstrate, of its own force, that the Establishment Clause deserves a unique standing doctrine, sufficient to overcome the bar against taxpayer standing in every other area? Testing *Flast*'s reliance on the *Memorial* is a delicate matter, however, because it risks wander-

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[87] CHEMERINSKY, *supra* note 9, § 2.5.2, at 65.
[88] *Memorial*, *supra* note 3, at 82. *See supra* notes 28-41 and accompanying text.
[89] *See supra* notes 16-27 and accompanying text.
[90] *See supra* notes 16-27 and accompanying text.
[91] *See supra* notes 16-27 and accompanying text.
[92] Flast v. Cohen, 392 U.S. 83, 127 (1968) (Harlan, J., dissenting). *See also supra* notes 16-27 and accompanying text.

ing into the murky question of Madison's precise relevance to the meaning of the Establishment Clause.[93] The Supreme Court has generally treated Madison as a touchstone for what the Clause means, perhaps no more so than in this area.[94] Even where the Court has not followed Madison's hypothetical lead on a particular issue, dissenting Justices often recruit Madison to refute their colleagues.[95] A vigorous scholarly debate persists about the nature of Madison's influence on the religion clauses.[96] And Madison's views were protean, depending on whether he was occupying the role of Virginia legislator, constitutional advocate, First Amendment draftsman, President, or former President.[97] One can easily pit statements of these various Madisons against each other, effectively obscuring what Madison "really thought" about the clauses.[98] Madison, of course, did have historically verifiable views about what the religion clauses meant. But the variety of historical evidence cautions one about recruiting particular quotes or arguments from Madison as expressing his thoughts about the clauses.

This Article need not resolve those difficult questions, because they would simply overwhelm the distinct argument about standing. Quite frankly, if the question of taxpayer standing and the Establishment Clause hinges on correctly appraising Madison's relevance to the meaning of the religion clauses, then the question will never be answered. Establishment Clause standing doctrine would fluctuate according to differing opinions about Madison's significance to religion clause meaning. But surely one cannot be satisfied with that answer. One should be able to accept that certain of Madison's opinions are relevant to what the Establishment Clause *substantively* means, but perhaps not relevant (or relevant in a different way) to the question of *which parties* and *what interests* support adjudication of an Establishment Clause matter. Standing questions can overlap to some extent with merits questions, but the two are

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[93] *See, e.g.*, Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 592-600 (2006) (discussing varying interpretations of Madison's relevance to Establishment Clause interpretation).

[94] *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 11-16 (1947). Richard Albert observes that, in *Everson*, "[t]he Court's review of Jeffersonian and Madisonian thought . . . com[es] astonishingly close to declaring that the Court should rule in a particular way only because Jefferson and Madison would have done so." Richard Albert, *Beyond the Conventional Establishment Clause Narrative*, 28 SEATTLE U. L. REV. 329, 338 (2004).

[95] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 724-29 (2005) (Stevens, J., dissenting).

[96] *Compare* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 86-87 (1987) (arguing that "Madison's personal philosophy, whatever it may have been, has nothing to do with the meaning of the Establishment Clause"), *and* 2 JAMES HITCHCOCK, THE SUPREME COURT AND RELIGION IN AMERICAN LIFE: FROM "HIGHER LAW" TO "SECTARIAN SCRUPLES" 22-30 (2004) (characterizing Madison's and Jefferson's views on church-state relations as novel for their time and hence not "command[ing] a consensus in their own day"), *with* CURRY, *supra* note 30, at 193-222 (treating Madison's views and influence as deeply influential on the content of the Establishment Clause), *and* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 390-93 (2002) (same).

[97] *See, e.g.*, GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT 151-72 (2006) (discussing problem of Madison's different personae).

[98] *See, e.g.*, STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 10-26 (2001) (discussing the tension between egalitarian and pluralist views in Madison's writings).

nonetheless distinct.[99] The doctrine of standing delimits the kinds of interests plaintiffs can pursue in federal court, while at the same time furthering other values such as separation of powers, judicial efficiency and effectiveness, and fairness.[100] Standing is not simply a stand-in for the merits question. Otherwise, the "case or controversy" requirement of Article III is superfluous.

Thus, the question is not whether Madison's opinions can help one understand the object and content of the Establishment Clause. Instead, the precise question is whether Madison's "three pence" argument in his *Memorial* supports the recognition of a unique form of taxpayer standing in Establishment Clause cases. That question will intrude somewhat on *how* Madison's opinions bear on Establishment Clause meaning, but they are nonetheless two distinct questions. Madison had definite and well-known ideas about the large subject of religious liberty, but he may well have entertained very different views about whether those ideas were embodied in judicially enforceable legislation or constitutional provisions. More specifically, Madison may have thought a strategy appropriate for Virginia legislative contests would have been highly inappropriate, and politically inopportune, during the framing and ratification of a federal constitution. These different threads must be teased out if one is to arrive even at a tentative conclusion about the relevance of Madison's "three pence" argument to standing. The *Flast* court, incidentally, did none of this work. It simply compacted all such questions into this syllogism:

1. Madison is the father of the Establishment Clause;
2. Madison said taxpayers should not be taxed even three pence for an establishment;
3. Therefore, every taxpayer has standing to sue for Establishment Clause violations.[101]

Let us try to do better than that. We will start by making a few brief points to set the general context of Madison's *Memorial* and his arguments against the General Assessment. Doing so reveals the obvious point that Madison's "three pence" rhetoric arose during a legislative and not a judicial dispute. It was a political, not a constitutional, argument that called for, and won, a legislative and not an adjudicatory remedy. Thus, on its face, Madison's argument—of which the "three pence" point was a part[102]—did not call for any particular kind of adjudicatory stance toward religious establishments. Our argument then moves on to the deeper points about the substance of Madison's claims in the *Memorial*, in contrast to his views about religious liberty in general and about the Federal Constitution in particular. These show that Madison was probably not invoking the "three pence" argument to empower taxpayers in general, but rather to vindicate particular taxpayers

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[99] *See, e.g.*, TRIBE, *supra* note 9, § 3-17, at 418 (observing that "the availability of citizen standing must be analyzed with reference to the substantive right asserted").

[100] *See* CHEMERINSKY, *supra* note 9, § 2.5, at 61-62. At the same time, Professor Chemerinsky notes that scholars have increasingly called for an abandonment of the doctrine. *Id.* at 62 n.16 (citing William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988)).

[101] Flast v. Cohen, 392 U.S. 83, 103 (1968).

[102] And, notwithstanding the phrase's popularity as a separationist epigram—a tiny part, the *Memorial* runs to fifteen meaty paragraphs. The three pence line is one part of one sentence of paragraph three. *See* MEMORIAL, *supra* note 3, at 82.

whose religious exercise was uniquely compromised by the Virginia scheme. Furthermore, understanding the "three pence" argument as a literal call for widespread adjudication by taxpayers would be out of character for Madison. Madison was more inclined to rely on indirect structural mechanisms for protecting religious liberties than on judicially enforceable guarantees found in bills of rights. Finally, even if Madison's "three pence" argument in Virginia was championing religious liberty through taxpayer adjudication, his later arguments in Philadelphia over the federal religion clauses portray a markedly different character and strategy. Unlike the Madison of 1785 Virginia, the Madison of 1790 Philadelphia sought modest, politically achievable guarantees of religious liberty that would not have exacerbated national disagreements on church-state matters. The 1790 Madison would have a shunned a federal constitutional remedy that risked entangling the federal courts in the delicate matter of religious taxpayer disputes.

The first and most obvious point is that Madison's *Memorial* was not an argument about judicial review at all. Madison was addressing the Virginia legislature about a matter up for popular determination. The *Memorial* pleads in the name of "[w]e the subscribers, citizens of the said Commonwealth."[103] The thrust of the argument is "that the General Assembly of this Commonwealth" has "no authority to enact into law the Bill under consideration."[104] This is a political argument about popular legislation, not a legal argument about adjudication. As Professor Vincent Blasi explains, in the *Memorial*, "Madison was not making a constitutional argument before a court of law; he was appealing to the general public to bring pressure against a proposed piece of legislation."[105] The question of judicial enforcement of statutes or constitutions was not on the table, much less the finer points of adjudicating a federal constitutional provision still six years in the future.

Thus, the fact that Madison included taxpayers' interests in his catalogue of objections to the General Assessment does not, of its own force, mean he was claiming such interests should be vindicated by adjudication. The idea of taxpayers' objections was an important device exploited by Madison, as we will see below, but his audience was a legislative assembly and, logically, he sought arguments couched to spur legislative action. We should thus not reflexively read Madison's "three pence" argument as addressing whether taxpayers (or anyone else) should be allowed to bring a lawsuit against the Assessment.[106] This obvious point is typically overlooked when arguing about the significance of Madison's *Memorial* to the federal religion clauses. Institutions and structures were every bit as, if not more, important to the framing genera-

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[103] *Id.*

[104] *Id.* at 84.

[105] Blasi, *supra* note 30, at 807.

[106] This distinction would hold even if, when Madison was participating in drafting the federal religion clauses six years later, he was thinking: "That three pence argument I made back in Virginia should apply to these new, federal religion clauses." Of course, Madison said nothing of the kind during the debates on the Federal Constitution, as will be discussed below. But the point here is that, *even if* Madison had been silently rehearsing the three pence argument in 1790 Philadelphia, that alone fails to show Madison was *also* thinking about the requirements for judicial review of establishmentarian tax schemes.

tion as the judicial enforcement of rights.[107] One should not anachronistically project onto Madison's comments about taxpayers' concerns our modern preoccupations with constitutional judicial review.

Another basic point concerns the responses to Madison's *Memorial*. When the General Assessment was defeated, the Virginia legislature ended up passing Jefferson's Act "for Establishing Religious Freedom."[108] The Act stated explicitly that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . . ."[109] It enacted that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."[110] If one wanted to argue that Madison's "three pence" language sought, as a remedy, something akin to general taxpayer standing to contest assessment-style taxes, then the language of Jefferson's Act furnishes a plausible textual hook by providing that "*no man* shall be compelled . . . ."[111] Other state constitutions of the period contained similar language.[112] Such provisions might plausibly support general taxpayer standing by explicitly empowering anyone subject to the levies (or at least anyone whose religious freedom was impacted by the levies) to contest them. But

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[107] Madison himself argued in *The Federalist* that, given the "compound republic of America," in which power was divided between state and federal governments, and then further divided at the federal level, "a double security arises to the rights of the people." THE FEDERALIST NO. 51, at 270 (James Madison) (George W. Carey & James McClellan eds., 2001).

[108] *See, e.g.*, CURRY, *supra* note 30, at 146.

[109] ACT FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 36, at 84.

[110] *Id.* at 85.

[111] *Id.* (emphasis added). This leaves aside the point, discussed below, whether the "compulsion" to "furnish contributions of money" would impact every taxpayer, or rather only those taxpayers who could claim their "free exercise" rights were peculiarly affronted by the tax. *See infra* notes 118-130 and accompanying text. The narrower point here is whether the response to Madison's three pence argument showed at least some textual intent to allow *someone* to claim injury on the basis of the levy itself.

[112] For instance, the Vermont Constitution of 1777 provided that "no man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience . . . ." VT. CONST. of 1777, ch. 1, § 3, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 75, 75 (Philip B. Kurland & Ralph Lerner eds., 1987). *See also*, DELAWARE DECLARATION OF RIGHTS AND FUNDAMENTAL RULES § 2 (1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 70, 70 (Philip B. Kurland & Ralph Lerner eds., 1987) (language similar to Vermont Constitution of 1777); N.J. CONST. of 1776, art. XVIII, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 71, 71 (Philip B. Kurland & Ralph Lerner eds., 1987) (providing "nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.").By the same token, state constitutions also knew how to provide for the opposite—i.e., that contributions might be required by law to support ministers. The Massachusetts Constitution of 1780 provided that:

> [T[he legislature shall, from time to time, authorize and require, the several towns, precincts, and other bodies-politic or religious societies to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily.

MASS. CONST. of 1780, pt. 1, art. 3, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 77, 77-78 (Philip B. Kurland & Ralph Lerner eds., 1987).

no such language, of course, appears in the federal religion clauses. Nor was any such formulation proposed by any state.[113] Even Madison's own Virginia failed to put forward such language. Virginia's proposal did lift passages verbatim from the *Memorial*, but not those addressing forced exactions of money.[114] Nor was such language ever proposed during the recorded debates on the drafting of the religion clauses, by Madison or anyone else.[115] Thus, if one were looking for a plausible textual justification for general taxpayer standing (or, indeed, standing for *any* taxpayers), one might claim to find it in Jefferson's 1785 Act, but not in the federal religion clauses, whether in their proposed or final formulations. This does not mean that the idea of "compelling" someone to "frequent or support" religious worship is irrelevant to the substantive meaning of the federal religion clauses. The point is only to draw attention to the absence of the textual clues supporting the idea that taxpayers are empowered to litigate those clauses *as taxpayers*.

Beyond these contextual points, consider what Madison was substantively arguing in the *Memorial*, an argument in which the "three pence" idea figured as only one part. Simply put, with regard to taxpayers, Madison appears to have been making what we would today call a "free exercise" claim, as opposed to an "establishment" claim. Madison was asserting that the General Assessment violated the Virginia Declaration of Rights.[116] As to religious liberty, that 1776 Declaration provided that, since "religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence . . . therefore, all men are equally entitled to the free exercise of religion, according to the dictates of

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[113] *See* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 63-64 (2000) (discussing religious liberty provisions proposed by state ratifying conventions).

[114] With respect to religious liberty, the Virginia Ratifying Convention proposed a provision exempting from military service "any person religiously scrupulous of bearing arms . . . upon payment of an equivalent[,]" as well as the following passage lifted in large part from Madison's *Memorial*, *supra* note 3, at 89, which in turn had quoted the 1776 Virginia Declaration of Rights:

> That religion or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by Law in preference to others.

VIRGINIA RATIFYING CONVENTION, PROPOSED AMENDMENTS (1788), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 89, 89 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter VIRGINIA RATIFYING CONVENTION].

[115] *See* WITTE, *supra* note 113, at 64-72 (explicating various formulations of the religion clauses during the House committee debates).

[116] As Professor Blasi explains, "[e]ight years earlier [in 1776] [Madison] had helped to draft and steer to enactment the religious liberty clause of the new Virginia Constitution. Madison viewed the General Assessment as a patent violation of that constitutional commitment and a profound threat to Virginia's experiment in republican government." Blasi, *supra* note 30, at 784. *See also* CURRY, *supra* note 30, at 143 ("[The *Memorial*] declared that the proposed bill violated the free exercise of religion guaranteed by the Declaration of Rights . . . .").

conscience . . . ."[117] Madison's *Memorial* arguments converge around that idea, and, in fact, Madison quoted that identical language at the very beginning of the *Memorial*.[118] Those attacking the 1785 Assessment, as Professor Thomas Curry explains, considered the tax to violate the "free exercise" rights enshrined in the 1776 Declaration—rights which the Assessment controversy had enabled them to deepen and refine.[119] Far less important, however, was whether the Assessment constituted a religious "establishment." While both proponents and opponents of the measure may have considered it to be some novel form of an "establishment," that was not the issue: the principal ground of dispute was over what we would identify today as "free exercise" values. "Whether the assessment bill violated the Declaration of Rights," Professor Curry asserts, "not what kind of establishment it represented or even whether it represented an establishment at all, proved to be the crux of the dispute."[120] Disputes over ministerial taxes in other states underscore the point. Religious dissenters, such as northeastern Baptists, commonly attacked ministerial taxes as interfering with the free exercise of their religion.[121] The interference sprang from the fact that the assessments were earmarked for support of ministers.[122] Dissenters argued that this hampered religious exercise by tainting what they believed was a sacred, voluntary relationship between pastor and

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[117] VIRGINIA DECLARATION OF RIGHTS § 16 (1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 70, 70 (Philip B. Kurland & Ralph Lerner eds., 1987).

[118] MEMORIAL, *supra* note 3, at 82.

[119] CURRY, *supra* note 30, at 146 (explaining that, "in the decade following the Declaration of Independence, Virginians debated and clarified for themselves the meaning of the *free exercise of religion*," and that in the later Assessment controversy, "a majority of the people construed the *free exercise clause* of the Declaration of Rights to mean that religion had to be supported by voluntary means, and that state support of churches was incompatible with religious liberty") (emphasis added). *See also* Blasi, *supra* note 30, at 793 (explaining that "[Madison's] concern was that the clumsy effort to use religion to teach public virtue interjected the civil mechanism of compulsory taxation into the relationship of voluntary support that some denominations considered of the essence"). *But see* Bradley, *supra* note 96, at 39 (arguing that Madison's "interpretation of section 16 [of the Declaration of Rights] was certainly not the accepted one in Virginia").

[120] CURRY, *supra* note 30, at 148. *See also id*. at 191-192 ("Concerned primarily to show that it did not violate the free exercise of religion, proponents of a general assessment showed no consciousness of a need to develop such a distinction [i.e., between a 'preferential' and a 'non-preferential' establishment]."). Along these lines, in a draft of his Bill Exempting Dissenters from Contributing to the Support of the Church, Thomas Jefferson wrote that dissenters "consider the Assessments and Contributions which they have been hitherto obliged to make towards the support and Maintenance of the [Church of England] and its Ministry as grievous and oppressive, and an Infringement of their religious Freedom." THOMAS JEFFERSON, DRAFT OF BILL EXEMPTING DISSENTERS FROM CONTRIBUTING TO THE SUPPORT OF THE CHURCH (1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 74, 74 (Philip B. Kurland & Ralph Lerner eds., 1987).

[121] *See* CURRY, *supra* note 30, at 172 (noting that "Massachusetts's voluminous discourse on Church-State matters during the revolutionary period focused almost entirely on the meaning of freedom of religion" and that dissenters "generally did not raise the issue of an establishment of religion"); s*ee generally id.* at 168-77 (detailing opposition by Massachusetts Baptists against ministerial taxes).

[122] CURRY, *supra* note 30, at 137-39.

congregation.[123] As Professor Curry explains, "like their counterparts in other states, [Massachusetts dissenters] opposed the system primarily as a violation of religious freedom, rather than as an establishment of religion."[124]

How does this historical context help determine whether the *Memorial* supports, on its own terms, general taxpayer standing to adjudicate Establishment Clause violations? The Court's crucial analytical move in *Flast* was to paint Madison's "three pence" argument as a broad-based mandate for "taxpayers in general." But this rips Madison's argument out of its context. Madison is better understood as championing *those particular taxpayers* who had a precise personal and theological complaint against the interference in their religious practice caused by the ministerial tax. This reading harmonizes Madison's arguments with the general tenor of arguments in Virginia and elsewhere against ministerial taxation schemes. Madison's "three pence" argument thus vindicates a peculiar type of religious injury—specifically, an injury to freedom of association between ministers and congregation that is inflicted by the operation of the assessment tax system. What Madison does not do is lodge a generalized complaint about the "religious" use of tax revenues.

Put in its proper historical context, then, Madison's "three pence" argument looks more like a modern "free exercise" claim than a modern "establishment" claim. Modern Establishment Clause doctrine, as is well known, agonizes over which kinds of taxation schemes amount to a forbidden establishment.[125] But Free Exercise Clause doctrine has been comparatively clearer. The imposition of a tax, by itself, rarely amounts to a free exercise violation.[126] Even in the days of *Sherbert* balancing, the Supreme Court found, for instance, that paying sales taxes on religious publications or paying social security taxes did not even amount to the "significant burden" on religious exercise that would trigger balancing.[127]

But what does this perspective mean for standing? For standing purposes, a free exercise argument based on taxation would demand the plaintiff be the

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[123] *See, e.g.*, *id.* at 168 (explaining that Massachusetts Baptists "fundamentally disagreed with Congregationalists on the narrow ground of organization and support of churches" and that, among other things, "both church and minister should be supported voluntarily"); *id*. at 175 (explaining that "[t]o Baptists, who 'owned that religion must at all times by a matter between God and individuals,' the very idea of state support—even impartial state support—was by nature wrong and an imposition of the Congregational way of religion"); Bradley, *supra* note 96, at 25 (explaining that, given the "Baptist disavowal of professional clergy" that "they chose ministers from their own congregation to serve without compensation . . . Baptists therefore did not need the system at all, and its burdens fell on them with no immediate tangible benefit"); Blasi, *supra* note 30, at 806 ("A crucial source of [Madison's] concern was the claim by some denominations, especially the more evangelical Christian sects such as the Baptists, that *compulsory* support of their clergy impaired the fundamental relationship that must obtain between preachers and their congregations.").

[124] CURRY, *supra* note 30, at 169.

[125] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002) (addressing whether allowing use of tax-derived voucher payments at religious schools violates the Establishment Clause); Mueller v. Allen, 463 U.S. 388, 390 (1983) (addressing whether tax deductions for religious education violate the Establishment Clause).

[126] *See* Jimmy Swaggart Ministries v. Bd. of Equalization of Ca., 493 U.S. 378, 392 (1990); United States v. Lee, 455 U.S. 252, 261 (1982).

[127] *Id.*

particular person whose religious exercise is burdened by the tax. This would rule out granting standing to any taxpayer *qua* taxpayer because of a generalized complaint about the allegedly unconstitutional operation of the tax system. Consequently, when we translate Madison's "three pence" argument into modern doctrinal categories, it fails to support an exception to the ban on generalized taxpayer standing. In other words, we should not read Madison's "three pence" rhetoric as literally calling on public authorities to track down every religious penny. Instead, the argument was Madison's effective way of dramatizing the harm to free exercise rights of those whose religious relationships the assessment threatened to corrupt.

Another facet of Madison's broader argument further contextualizes his "three pence" language. Professor Blasi points out that Madison's objection to the assessment hinges on the idea of the government taking "cognizance" of religion.[128] By this, Madison meant that the government wrongly assumed "responsibility" or "jurisdiction" for religious matters. For Madison the assessment did just this by seeking to "stimulate religious belief" through tax-supported funding of ministers.[129] It was not the *amount* of taxes, large or small, that Madison was drawing attention to. Rather, it was the violation of his underlying view of church-state separation, a violation underwritten by those tax funds. As Professor Blasi explains, this is why

> Madison, a realist in politics, could have insisted that the state cannot require a citizen to "contribute three pence only of his property" to support a religious establishment. Surely he realized that some portion of a dissenter's taxes pays for public services, such as law enforcement and roads, that benefit churches no less than other members of the community. What coerced taxes, no matter how small, could not support, in Madison's view, was a religious "establishment," by which he meant any instance of government taking "cognizance" of, that is responsibility for, religion. Madison's concept of separation could be severe, but it was a separation of functions and purposes, not some quixotic attempt to achieve a hermetically sealed spatial separation.[130]

On this view, the modern reading of Madison's "three pence" argument—the one *Flast* depends on—confuses the "three pence" of taxes for the religious establishment itself. But to Madison, the central flaw in the assessment scheme was the cooperative relationship set up between government and certain Christian churches.[131] The "government cognizance" angle thus illuminates Madison's "three pence" argument just as the free exercise angle did. Madison was not seeking to empower private attorneys general to demand every religiously-tinged penny back from government coffers. Instead, he was drawing attention to what he believed was a dangerous structural union between government and churches.[132] A taxpayer standing argument based on the "three pence" language misses Madison's actual target.

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[128] Blasi, *supra* note 30, at 789-91. *See, e.g.*, MEMORIAL, *supra* note 3, at 82 ("We maintain therefore that in matters of Religion, no mans [sic] right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.").

[129] Blasi, *supra* note 30, at 790.

[130] *Id.* at 791.

[131] *See, e.g.*, MEMORIAL, *supra* note 3, at 82-83, ¶ 4.

[132] Professor Kmiec makes this point well in a recent essay on *Hein*. Kmiec writes that Madison's "famous *Remonstrance* challenged the coercive taking of even 'three pence' not

In sum, reconstructing Madison's argument along free exercise or structural lines clarifies the function of his "three pence" rhetoric. Specifically earmarked taxes were underwriting the scheme he wanted the legislature to oppose, and that useful fact allowed Madison to make his powerful point: extracting the tiniest trickle of tax funds today *to fund this establishment* would be precedent for forcing you to give up larger amounts tomorrow *to fund future establishments*.[133] Essentially, Madison's is the same argument that politicians make today (less artfully, of course) when they criticize a government program on the basis that "Your tax dollars are being used to fund [insert politically unpopular project]." That may or may not be an effective argument, but it is unmistakably political; no one thinks the politician is making a legal point about standing to sue. Madison wasn't, either.

Consequently, Madison's "three pence" argument, properly understood on its own terms, provides no foundation for a modern exception to the ban on taxpayer standing. This alone is a crippling blow to *Flast*. It means that, even if we *hypothesize* that Madison exported his "three pence" argument from 1785 Virginia to 1790 Philadelphia (a proposition for which, as discussed below, there is no evidence), he was not exporting the particular idea of widespread taxpayer adjudication on religion clause matters. But what if we reverse matters? Let us assume that Madison's "three pence" argument *was*, in fact, a plea for something like standing for taxpayers generally to contest taxes based on religious objections. That does not solve the *Flast* problem, however, because we would then have to show that Madison successfully embedded *that* idea about constitutional adjudication in the federal religion clauses. But whatever the evidence shows about Madison's personal influence on the substance of the federal clauses, it fails to show Madison making any equivalent of our hypothesized "three pence" argument during the ratification debates.

When Madison changed his role as Virginia legislator in 1785, for the role of federal constitutional advocate in 1788, his arguments did not sound like someone who was holding up adjudication as the key to protecting religious liberty—much less adjudication employing general taxpayer standing. Instead, Madison explicitly downplayed the role of bills of rights in protecting religious liberty. This appears most clearly in Madison's 1788 remarks to the Virginia Ratifying Convention. There, in support of the proposed Constitution, Madison mocked the notion that a bill of rights would act as a "security for religion":

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for the otherwise disinterested taxpayer 'upset' by the inclusion of faith groups in a general program, but for the compelled support of an established church and coerced 'conformity' thereto. That is a substantial difference." Kmiec, *supra* note 49, at 513.

[133] This is, not to put too fine a point on it, precisely what Madison wrote in the *Memorial*: "Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" MEMORIAL, *supra* note 3, at 82. The "three pence" here was not the "establishment" itself, but rather a seemingly innocuous and minimal burden that a taxpayer might not notice and therefore not object to. Madison was arguing, in effect, "You *should* object to the establishment underwritten by the Assessment, even though you might not notice the burden." He was *not* arguing, "The three pence, in and of themselves, are the establishment." Professor Blasi makes a similar point. *See* Blasi, *supra* note 30, at 791 & n.34.

> Would the bill of rights, in this state, exempt the people from paying for the support of one particular sect, if such sect were exclusively established by law? If there were a majority of one sect, a bill of rights would be a poor protection for liberty.[134]

Notice that the specific example Madison used: an assessment, or "paying for the support of one particular sect." Madison instead argued that the "utmost freedom of religion . . . arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society."[135] This mirrors Madison's arguments in *The Federalist* that the best protection for individual rights lies in the checking function of a thriving variety of factions, including religious factions. This was Madison's famous "republican remedy for the diseases most incident to republican government": the "variety of [religious] sects dispersed over the entire face of [the confederacy], must secure the national councils against any danger from that source."[136] Madison contrasted this method of controlling factious majorities—which he said was "exemplified" in the Constitution—with the method of "creating a will in the community independent of the majority," which by implication Madison must have thought alien to the new constitutional system.[137]

Thus, as advocate for the new Constitution, Madison downplayed judicial review of specific constitutional guarantees as a means of protecting religious liberty. But this is unsurprising given "Madison's penchant for thinking about issues of liberty and legitimacy in structural terms."[138] Professor Blasi elucidates this aspect of Madison's approach to protecting religious freedom:

> [Madison] had little faith in legalistic guarantees—'parchment barriers' he dismissively called them. Instead, he focused on such matters as institutional incentives, checks and balances, object lessons from the past, and scenarios of decay and abuse. . . . He sought to forestall and contain abuses of power be means of perspicacious institutional design. His approach to the subject of church and state was in this spirit.[139]

None of this suggests that Madison was pressing broad-gauged adjudication and judicial review as the bulwark of religious liberty in the Federal Constitution.[140] It does not matter that *today* we prefer such means. But it does matter that the *Flast* Court uncritically drafted Madison as the spokesman for an exceptionally broad form of such a remedy, and pressed his "three pence" argument into service as its ur-text.

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134 VIRGINIA RATIFYING CONVENTION, *supra* note 114, at 88.

135 *Id.*

136 THE FEDERALIST NO. 10, at 48 (James Madison) (George W. Carey & James McClellan eds., 2001); *see also* THE FEDERALIST NO. 51 (James Madison) (setting out general theory of checking function of numerous factions in an extended republic).

137 THE FEDERALIST NO. 51, at 270 (James Madison) (George W. Carey & James McClellan eds., 2001).

138 Blasi, *supra* note 30, at 788.

139 *Id.* at 788-89.

140 As Professor Steven Smith points out, the "pluralism" Madison evidenced in *Federalist* 10 and 51 and at the Virginia Ratifying Convention militates strongly against the Madison of the *Memorial*, assiduously protecting taxpayers' consciences against "three pence" of improper taxation. STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 10-26 (2001).

When in 1790 Madison again changed hats, and proposed amendments to the Constitution in the First Congress, his overall strategy and recorded comments during the debates further undermine the notion that he was pressing an aggressive version of his "three pence" argument (as understood here only *arguendo*) at the national level. At that point, Madison willingly suspended his private views of church-state relationships in favor of more politically expedient measures that would command broad support. Madison would likely have supported far-reaching alterations in church-state relationships at the federal and state level, but, as Professor Thomas Curry observes, "[r]epeatedly, in his correspondence, as well as in his speeches, [Madison] asserted that he sought achievable amendments that would eschew controversy and gain ratification . . . ."[141] According to Professor Gerard Bradley, "[t]he truth is that Madison's personal philosophy, whatever it may have been, has nothing to do with the meaning of the Establishment Clause."[142] In the House debate, Madison minimized the substance of, and even the necessity for, the religion clauses.[143]

Even more revealing was Madison's response to Representative Benjamin Huntington of Connecticut during the debate. Representative Huntington feared that a broad interpretation of the religion clauses would grant a federal court jurisdiction to interfere in New England states' enforcement of compulsory support for ministers' salaries. But Madison assured him it would not.[144] Representative Huntington, as Professor Bradley explains, "was asking Madison whether the New England system, much more coercive than even the general assessment opposed by Madison in 1785, might be an establishment."[145] Madison "alleviated this fear, clearly indicating that there was no conflict."[146] Admittedly, Madison's somewhat cryptic response might be interpreted along federalism lines: the religion clauses would have had nothing to do with New England states' arrangements, and federal courts would not have likely had jurisdiction to meddle in them. But Madison's response shows he was talking about more than federalism—he was in fact addressing the substance of what he thought the Establishment Clause outlawed. Madison proposed that the word "national" be inserted before "religion," since, as Madison explained,

> He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform.[147]

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[141] CURRY, *supra* note 30, at 205.

[142] BRADLEY, *supra* note 96, at 87.

[143] In the debate, Madison commented that "[w]hether the words [of the religion clauses] are necessary or not, he did not mean to say, but they had been required by some of the State Conventions," who feared the implications of Congress' Necessary and Proper powers. HOUSE OF REPRESENTATIVES, AMENDMENTS TO THE CONSTITUTION (1789), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 92, 93 (Philip B. Kurland & Ralph Lerner eds., 1987).

[144] WITTE, *supra* note 113, at 66-67. Professor Bradley adds that, in *Everson*, Justice Rutledge's dissent got this exchange exactly backwards, understanding Madison to be saying that the compulsory clergy tax was in fact an "establishment of religion." *See* BRADLEY, *supra* note 96, at 91.

[145] BRADLEY, *supra* note 96, at 91.

[146] *Id.*

[147] WITTE, *supra* note 113, at 67.

In other words, Madison reassured Representative Huntington not merely because of the federalism aspects of the religion clauses, but also because the New England arrangement would not come within the purview of the substantive anti-establishment prohibition in the religion clauses.

The implications for the "three pence" question are evident. Had Madison intended to import his three pence idea into the Establishment Clause, his response to Representative Huntington would have been completely different. After all, the scheme Representative Huntington was concerned to protect was "much more coercive" than the 1785 Assessment Madison had defeated in Virginia.[148] But in response to Representative Huntington, Madison seemed to shrug—the federal clauses, he said in effect, have nothing to do with such matters, whether precisely because of their *federal* character, or because the anti-establishment prohibition would not be triggered by the New England taxation scheme. If matters stood otherwise, merely proposing the religion clauses would have immensely complicated the cause of the new Constitution. At the time, opinions diverged sharply in the states about whether religion should be supported by taxation. People even disagreed over whether mandatory assessments really amounted to full-blown "establishments" at all.[149] It would have been a particularly inauspicious time, then, for Madison to import his three pence idea (understood in its more aggressive sense) into the federal religion clauses.[150] A politician of Madison's skill would have been urging a federal constitutional right empowering every single taxpayer in the country to contest federal taxation schemes based on whether they amounted to an "establishment of religion." True, Madison knew how to introduce novel measures into the Constitution. He had unsuccessfully proposed an amendment binding the states themselves to respect freedom of conscience.[151] So one cannot rule out the possibility that he might have sought to include an aggressive anti-taxation right as part of the Federal Constitution. But the important point is that Madison's recorded comments during the drafting of the religion clauses betrayed the opposite intention. He was seeking to build consensus for the new Constitution, and to placate the fears of those who were attached to church-state relationships that Madison himself deplored. Madison the Virginia legislator was willing to fight for political goals at the state level that Madison the constitutional advocate sought to avoid at the federal level. Even *if* the Virginia legislator had been advocating for the modern equivalent of general taxpayer standing for anti-establishment claims (which is doubtful, as seen), the notion that the constitutional advocate was pushing such goals beggars belief.

CONCLUDING REFLECTIONS: THE HISTORY OF A BAD INVESTMENT

All that remains to be said for the merits of *Flast*'s taxpayer standing doctrine is: the thing is bankrupt. In forty years, no interest has accrued on the Court's original "three pence" investment, even though picked from James Madison's pocket. But this should come as no surprise. No scholar has made a

148 BRADLEY, *supra* note 96, at 91.
149 *See, e.g.*, CURRY, *supra* note 30, at 219-20.
150 *See, e.g.*, *id.* at 205; BRADLEY, *supra* note 96, at 88-89.
151 *See, e.g.*, WITTE, *supra* note 113, at 65-66.

sustained attempt to spruce up the Court's historical justification,[152] although scholars commonly assert that some form of taxpayer standing is necessary to vindicate the Establishment Clause.[153] Perhaps the standing inquiry is in fact inextricable from the underlying merits, and any attempt to separate the two ends in incoherence.[154] Perhaps the Court was wrong in the first place to make an Article III "case or controversy" depend on the existence of a personal

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[152] For instance, although criticizing *Flast*'s standing analysis, Professor Steven Winter seems to accept the Court's historical assertions about the Establishment Clause at face value. He notes that "Ms. Flast was arguing that the establishment clause protected her from a society in which tax monies would be used for impermissible, religious purposes," and that "[i]n support of this point, the majority invoked the *legislative history of the establishment clause . . . .*" Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1467 & n.543 (1988) (emphasis added). Immediately thereafter, he correctly notes that the Court's actual support for its holding was Madison's three pence language, which, as this article and many other commentators have explained, forms no part of the "legislative history" of the Establishment Clause. *Id.* at 1467 & n.544. In the same vein, Professor William Fletcher agrees with *Flast* (and would in fact extend it) on the basis that "the protection provided by the establishment clause cannot be fully realized unless there is easy and unrestricted access to the courts to challenge federal expenditures or grants that might violate the clause." Fletcher, *supra* note 100, at 269. He does not attempt to support that conclusion, however, with any evidence beyond the Court's own "historical argument that the clause was enacted to prevent the forced exaction of moneys for the support of state-sponsored religion." *See id.* Professor Carl Esbeck argues that the existence of *Flast* standing shows that the Establishment Clause is properly understood as a structural restraint on government power, rather than as a guarantee of individual rights. *See, e.g.*, Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 33-40 (1998). It is more than plausible to see the Clause as principally structural. But that is not a reason in and of itself to *require* general taxpayer standing to enforce the Clause (nor does Professor Esbeck seem to be making that point).

[153] *See, e.g.*, CHEMERINSKY, *supra* note 9, § 2.5.5, at 94-95 (criticizing the Court's failure in *Valley Forge* to extend *Flast* to Congress's disposition of property under Article IV); TRIBE, *supra* note 9, § 3-17, at 423-24 (same); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 91-92 (1991) (arguing that "a taxpayer may suffer more through the unconstitutional disposition of property . . . than through a budgetary expenditure . . . ."). For instance, in criticizing the same decision, Professor David Dow argues that the majority opinion "simply paid no heed to the nature of the establishment clause," because "[h]ad the right at issue been analyzed, it would have been clear that whenever the clause is violated, the resulting injury is necessarily widely shared." David R. Dow, *Standing and Rights*, 36 EMORY L.J. 1195, 1208 (1987). But in support of those propositions about the "nature of the establishment clause" and the "right" at issue in the case, Professor Dow cites only Justice Brennan's *Valley Forge* dissent. *Id.* at 1208 n.40. Justice Brennan's dissent, while lengthy, merely reiterates *Flast*'s historical rationale for allowing generalized taxpayer standing in Establishment Clause cases. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 499-510 (1982) (Brennan, J., dissenting).

[154] *See, e.g.*, CHEMERINSKY, *supra* note 9, § 2.5.1, at 62 (arguing that "[u]ltimately, the law of standing turns on basic normative questions about which there is no consensus"). Professor Chemerinsky here quotes Professor Fletcher for the proposition that the standing inquiry "should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked." *Id.* at 62 n.16 (quoting Fletcher, *supra* note 100, at 229). *See also* TRIBE, *supra* note 9, § 3-15, at 399 (noting that "the question of what it means to be 'injured' itself entails a complex and value-laden judgment").

injury.[155] Such profound questions are beyond the scope of this Article. Instead, the point here has been to explore the question raised but left unanswered in *Hein*: whether the taxpayer standing exception created by *Flast* stands on its own historical merits. The answer is no. This concluding Section briefly places that failure in the larger context of Establishment Clause jurisprudence.

Dramatic fallacies of historiography are nothing new in this area. The modern Establishment Clause project itself is based, say many scholars, on a misunderstanding of the function the Clause was meant to perform in our constitutional structure.[156] On that view, the Clause originally served to quarantine church-state issues at the state level, preventing such irresolvable questions from exploding onto the national scene. Such a jurisdictional provision did not, and could not, embody any grandiose "theory" of substantive church-state relationships useful for adjudicating particular controversies. To the extent that view is correct, what the Supreme Court did in 1947 by applying the Clause to the States was, as Professor Steven Smith argues, effectively to repeal it.[157] To the extent this jurisdictional thesis is wrong, many still admit that the Supreme Court's understanding of the Clause's history was grievously flawed.[158] Here,

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[155] *See, e.g.*, Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 840 (1969) (concluding "the notion that the constitution demands injury to a personal interest as a prerequisite to attacks on allegedly unconstitutional action is historically unfounded"). *See also* TRIBE, *supra* note 9, § 3-15, at 393 (observing that "[h]istorically, whether members of the public who had not suffered concrete or particularized injury could sue turned on whether substantive law . . . conferred a cause of action on them, not on any inquiry into 'injury in fact' "); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1479 & n.229 (1988) (noting originalist doubts about personal injury requirement for Article III "case or controversy").

[156] *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157-58 (1991); Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1557-63 (1995) (discussing the historical debates as evidence of the original intent of the Framers); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1206-11 (1990) (discussing incorporation and the Establishment Clause); Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 22-23 & nn.15-16 (2006) (noting that "a number of commentators have similarly argued that the Establishment Clause should never have been applied to the states, or that courts should apply a relaxed version of the religion clauses to government beneath the federal level") (citing STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995) [hereinafter SMITH, FOREORDAINED FAILURE]); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004)); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1703 n.25 (1992). For my take on this issue, see Kyle Duncan, *Subsidiarity and Religious Establishments in the U.S. Constitution*, 52 VILL. L. REV. 67 (2007).

[157] *See generally* SMITH, FOREORDAINED FAILURE, *supra* note 156, at 17-34 (summarizing the case for a jurisdictional understanding of the Establishment Clause).

[158] *See, e.g.*, *id.* at 4-5 (noting scholars who have disputed the Court's reading of Establishment Clause history) (citing Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991); BRADLEY, *supra* note 96; ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965)).

for instance, are the instructive comments in a recent essay by Professor Carl Esbeck, a prominent religion clause scholar:

> The *Everson* Court did indulged [sic] the wildly improbable assertion that the Virginia experience of 1784-86 was bootlegged by James Madison and Thomas Jefferson into the Establishment Clause of the First Amendment as it was being drafted by the First Congress meeting in New York City during the period June to September 1789. The drafting and ratification of the Bill of Rights entailed a mostly different cast of participants and an entirely new array of concerns. We have a sketchy but still informative record of the debate in both the House and Senate of the First Congress over the drafting and redrafting of the text that eventually became the Establishment Clause. There is no indication that the Virginia experience of a few years before was even mentioned during these debates or was otherwise a factor. While Madison was in the middle of things, Jefferson was in Paris serving as our ambassador to France.[159]

Given that state of affairs, *Flast*'s own historical flaws—flaws that concern the same historical materials—are par for the course.

But *Flast*'s failings raise the stakes of bad history. Standing is supposed to be, at least in some sense, distinct from the merits, and to serve distinct values such as separation of powers, judicial efficiency, and judicial competency.[160] It would seem anomalous, then, to make standing turn on highly contested questions about the merits of the provision sought to be enforced.[161] But *Flast* did just that: its standing exception subsumes a host of murky questions about Establishment Clause doctrine and history. Consequently, *Flast* undercut whatever salutary restraining role that standing doctrine could play in constitutional adjudication of the Establishment Clause, with predictable effects on the coherence of the resulting jurisprudence.

Establishment Clause jurisprudence has generated many controversial, persistent, and seemingly intractable questions.[162] The area of public funding

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[159] Carl H. Esbeck, *The 60th Anniversary of the* Everson *Decision and America's Church-State Proposition*, 23 J.L. & RELIGION 15, 27 n.40 (2007) (citations omitted). For further criticism of the Supreme Court's use of historical materials in Establishment Clause cases, see Symposium, *The (Re)turn to History in Religion Clause Law and Scholarship*, 81 NOTRE DAME L. REV. 1697 (2006) (featuring articles by Steven K. Green, Marci A. Hamilton & Rachel Steamer, Douglas Laycock, and Steven D. Smith).

[160] *See, e.g.*, CHEMERINSKY, *supra* note 9, § 2.5.1, at 61-62 (discussing values served by standing, such as separation of powers, judicial efficiency, judicial reputation, judicial competency, and fairness); TRIBE, *supra* note 9, § 3-14, at 388-91 (discussing Court's more recent emphasis on the separation-of-powers function of standing doctrines) (citing, *inter alia*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983)).

[161] *See, e.g.*, TRIBE, *supra* note 9, § 3-14, at 390 (observing that "[c]ritics have charged the Supreme Court with habitually manipulating settled standing rules to pursue extraneous, often unacknowledged ends—such as advancing the majority's view of the merits, resolving problems associated with broad equitable relief, and serving federalism values").

[162] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (asserting that "in the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified," and describing the disarray at length); *see also* Michael A. Paulsen, *Religion, Equality & the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 315 (1986) (asserting that "[f]or nearly four decades the Supreme Court has meandered through the province of church-state relations, leaving behind a serpentine trail of constitutionality") (footnote omitted).

alone has its own zip code. What is the relationship between the Establishment Clause and government taxing-and-spending? May the government spend tax money for "religious" purposes? May public funds end up in the pockets of churches, synagogues, pastors, rabbis, or other religious associations and persons? Does it matter what path the funds take? May an evenhanded public welfare program fund religious organizations directly? May it do so indirectly, through private choices? May it provide in-kind aid to such organizations directly? Indirectly?[163]

But a prior question, rarely asked, is whether such dilemmas are even susceptible to judicial resolution. Perhaps some of them are sensibly left to the political process because the Constitution furnishes no reliable standards for adjudicating them. Standing doctrine could help sort out such matters by limiting judicial resolution to cases in which plaintiffs alleged a concrete and personal injury. Thus, the courts would adjudicate only those Establishment Clause taxing-and-spending issues that impacted individual rights according to that traditional measure. Courts, then, could enforce the Establishment Clause just as far as any other constitutional protection—that is, to the extent that standing, and other justiciability doctrines, indicate that judicial enforcement is appropriate and effective.

But, whatever the proper restraints on Establishment Clause adjudication might be, *Flast* swept those concerns under the rug through historical sleight-of-hand. Prior to any merits question, *Flast* deputized *every taxpayer* to litigate taxing-and-spending issues based on the sole, undefended premise that every taxpayer *must*, by definition, have a litigable Establishment Clause interest. This is the case no matter how small the amount of the tax, no matter how or why the tax was levied, and no matter how or why the money was spent. Without saying so, then, *Flast* purported to resolve without argument profound disputes about the scope of the Establishment Clause, about what sorts of "rights" or "interests" the Clause protects, and about the proper use of historical materials to answer such questions.[164]

The Court deployed these *sub silentio* decisions to create a standing exception unheard of, and explicitly rejected, in every other area of law. And, as we have seen, the Court's sole support was a single phrase from a historical document with no relevance to the question. In its recent *Hein* decision, the Court did little to remedy this anomaly, but at least the case raised the question again after a long interlude. Perhaps *Hein*'s real significance will become evident only in a future case, when a majority of the Court finally takes a fresh and honest look at the strange doctrine created in *Flast*.[165] The Court could then

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[163] *See generally* DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 172-201 (2003) (explaining the Court's public aid jurisprudence).

[164] *Cf., e.g.*, Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2288 (1998) (arguing that, while "a coherent concept of standing grows out of a clear definition of the relevant injury," in voting rights cases, "the Supreme Court has failed to articulate any theory of injury that coherently accounts for the standing rule it has produced").

[165] *See, e.g.*, Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 1-2 (2007) (noting that "*Hein* may be the harbinger of further restrictions on standing in other types of Establishment Clause cases, such as cases involving government endorsement of sectarian religious principles and symbols."); Kmiec, *supra* note 49, at 514 (arguing that

rectify yet another instance of shoddy law office history in Establishment Clause cases. Those are my two cents' worth, anyway.

"[t]he primary benefit of the modest decision in *Hein* is that it gives the Roberts Court an opportunity to re-think the underlying religion-clause jurisprudence more carefully").

BRINGING SCALIA'S DECALOGUE DISSENT DOWN FROM THE MOUNTAIN

Kyle Duncan*

I. INTRODUCTION

Like many of Justice Antonin Scalia's opinions, his dissent in the Ten Commandments case, *McCreary County v. ACLU*,[1] emitted its share of thunder and lightning—and clouds, apparently.[2] Some profess to see in the dissent a proposition that is simply not there. That proposition is Scalia's "remarkable"[3] and "shocking,"[4] intention to embed in the Establishment Clause an illiberal and ahistorical preference for monotheistic religions. Scalia's crabbed Establishment Clause, it is claimed, would permit the government to acknowledge only monotheistic religions, and would forbid it from acknowledging polytheistic religions or atheism.[5] Has Scalia, the icon of judicial restraint, become Scalia the monotheistic activist? Reading Scalia's *McCreary County* dissent in this way highlights the perennial dispute between the Justice and his academic critics—whether Scalia's constitutional methodology of original meaning reliably delivers on its promise of restrained, non-political judging.[6] It also facilitates tarring Scalia as a hypocrite and Republican shill.[7] Unfortunately, to read Scalia's dissent as such

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[1] 545 U.S. 844 (2005). The companion case to *McCreary County* was *Van Orden v. Perry*, which concerned a Texas Ten Commandments monument. *See* 545 U.S. 677 (2005).

[2] *See Exodus* 19:16 ("On the morning of the third day there were thunders and lightnings, and a thick cloud upon the mountain, and a very loud trumpet blast, so that all the people who were in the camp trembled.").

[3] *See McCreary County*, 545 U.S. at 879.

[4] *See* Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1098 (2006).

[5] *Id.* at 1102.

[6] *See, e.g.*, Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 389–99 (2000) (criticizing Scalia's originalist methodology for failing to provide the "value-free" judging it promises); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1303–08 (1990) (discussing Scalia's approach to originalism, and his detractors).

[7] *See, e.g.*, Chemerinsky, *supra* note 6, at 391–92 (asserting that the results of Scalia's originalist method "lead[] one to believe that the original meaning of the Constitution and the Republican platform are remarkably similar"); Colby, *supra* note 4, at 1139 (arguing that Scalia's "interpretation of the Establishment Clause [in *McCreary County*] aligns almost perfectly with the political preferences of the Republican Party").

is both to misread it and to obscure what his methodology can add to the Establishment Clause interpretation debate.

Scalia's dissent provides his fullest discussion yet of how he would apply the Establishment Clause to government religious symbolism. However, his interpretative method in *McCreary County* is consistent with his approach in other cases where he has used original meaning and tradition to apply ambiguous constitutional provisions. In those cases, the sweep of tradition as reflected in legislation or other official actions serves as an interpretive grid, an intelligible background against which to measure constitutional limitations on governmental power. This methodology, as Scalia admits, raises numerous difficulties—perhaps the most daunting of which is selecting the appropriate level of generality for defining a relevant tradition. His "original-meaning-plus-tradition" method is thus not mechanical and certainly not foolproof. Scalia's use of this method invites the criticism, among others, that he does not apply the method correctly or consistently.[8]

For purposes of this Article, what is significant is that Scalia's interpretative approach is a hermeneutic of restraint, calibrated to avoid projecting substantive outcomes into the Constitution. Scalia uses tradition to validate traditional practices, where constitutional text or precedent do not impel striking them down. However, his approach leaves open the development of tradition by deference to representative bodies. Thus, reading Scalia's *McCreary County* dissent against the backdrop of his constitutional methodology shows it is unlikely that he is engaging in "monotheistic activism." A better reading is that the government's persistent acknowledgment of a generalized monotheism—especially through symbolic expressions such as our national motto, our Pledge of Allegiance, and (as Scalia argues in *McCreary County*) Ten Commandments displays—provides merely a baseline against which to interpret the Establishment Clause. Moreover, that baseline does not freeze a preference for monotheism into the Establishment Clause itself, but rather defers to representative bodies the development of our traditions to include specific monotheistic religions, non-monotheistic religions, or atheism—or to end the tradition by opting for no government acknowledgment of religion at all.

In Part II, this Article reads Scalia's *McCreary County* dissent within the context of the other Justices' opinions, and in the larger context of Scalia's jurisprudence of tradition. Part II.A sets the dissent against Justice Souter's majority opinion in *McCreary County* and Justice Stevens's dissent in *Van Orden v. Perry*.[9] It argues that—certain rhetorical excesses notwithstanding—Scalia is merely proposing a tradition of monotheistic symbolism as a baseline against which to measure government religious acknowledgments. Part II.B reinforces that reading by assessing Scalia's use of tradition in other contexts. Tradition, for Scalia, emerges as a tool of judicial restraint that reads open-textured constitutional provisions against an intelligible historical background and that tends to validate

[8] *See infra* Part III.

[9] 545 U.S. 677, 707–35 (2005) (Stevens, J., dissenting).

longstanding practices in the absence of a plainly contrary command of the Constitution or precedent. While tradition may potentially supply an independent reason for striking down a law, that positive function of tradition is limited by the practical exigencies of Scalia's jurisprudence. Moreover, in the area where tradition would most readily justify invalidating laws—the Due Process Clause—Scalia rejects the idea that any divergence from historical practices leads to automatic invalidation. Scalia's traditionalism in the First Amendment context is even more restrained. Historical practices alone (or their absence) would justify invalidating a law only if they *clearly* manifest a common understanding that a specific governmental action was unconstitutional. However, the mere fact that certain practices were engaged in is typically insufficient to infer a constitutional prohibition of other practices. In sum, Scalia has not treated tradition as exhausting the meaning of constitutional guarantees, nor has he frozen constitutional guarantees around the kernel of tradition and thereby stifled any development in the law. He simply defers that development to representative bodies.

Having contextualized Scalia's dissent, Part III specifically addresses the primary criticism of the dissent: that Scalia is projecting an exclusive preference for monotheism into the Establishment Clause. Building on Part II, this Part concludes that Scalia's deployment of tradition is not adapted to projecting his own policy choices—such as an alleged "preference for monotheistic religions"—into the Constitution. Instead, Scalia is using the prevalence of generalized monotheistic language as an intelligible baseline against which to assess the Ten Commandments displays. That baseline certainly makes this case easy for Scalia, but it does not commit him to striking down other acknowledgments simply because they diverge from monotheism. Scalia's treatment of the distinctively Christian elements in the historical record is better explained quite apart from speculation about his own religious or political preferences. More likely, Scalia is articulating the relevant tradition at the proper level of abstraction to assess what he views as simply a monotheistic religious display.

In sum, the Article concludes that Scalia's constitutional methodology generally, and his use of tradition specifically, are not some form of manipulation designed to achieve personal or political aims. Instead, Scalia is using tradition in the same manner as in other areas—to establish an objective baseline for assessing the constitutionality of modern laws.

II. THE DISSENT IN CONTEXT

A. The Conversation Among Scalia, Souter, and Stevens

To understand Scalia's interpretation of the Establishment Clause in *McCreary County*—and whether it is fair to paint him as a monotheistic activist—one should read his dissent as a dissent. Reading it against Justice Souter's *McCreary County* majority opinion and against Justice Stevens's *Van Orden*

dissent reveals a conversation about several overlapping doctrinal issues.[10] These are: (1) the overall function of "neutrality" in the Court's Establishment Clause jurisprudence; (2) the interaction of neutrality with the Court's religious symbolism precedents; (3) the characterization of the Ten Commandments displays at issue in these cases; and (4) the interaction of neutrality with the historical record. This section contrasts Souter's and Stevens's views on these issues with Scalia's, seeking a clearer picture of the claims made by Scalia's dissent. The following section fleshes out that picture by reference to Scalia's general use of tradition in constitutional analysis.

Neutrality is the master principle for both Souter's and Stevens's opinions. Souter writes that the "touchstone" for analyzing whether a law has a "secular legislative purpose" is "the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'"[11] Neutrality is the central conceit of the Court's Establishment Clause jurisprudence and also the basic theme of the American history of church-state relationships. Not only has neutrality "provided a good sense of direction" for interpreting the Establishment Clause, but it also "responds to one of the major concerns that prompted adoption of the Religion Clauses"—the prevention of religiously based "civic divisiveness."[12] Governmental neutrality is "an objective of the Establishment Clause" and simultaneously furnishes a "sensible standard for applying" it.[13] Neutrality thus encompasses the Establishment Clause on all sides; it is both the goal toward which it strives and the roadmap for getting there. Stevens also finds neutrality woven into the Establishment Clause's genetic material. Neutrality is the "first and most fundamental" principle for interpreting the "wall of separation between church and state" erected by the Religion Clauses.[14] Not flinching before criticisms that the "wall" metaphor is meaningless, Stevens asserts that the wall's contours are discerned chiefly by the principle that "the Establishment Clause demands religious neutrality—government may not exercise a preference for one religious faith over another."[15] Thus, for both Souter and Stevens, neutrality provides an interpretative key for applying the

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[10] The most relevant portions of those opinions are Part IV of Souter's opinion for the Court in *McCreary County v. ACLU*, 545 U.S. 844, 874–81 (2005), Part I of Scalia's *McCreary County* dissent, *id.* at 885–900 (Scalia, J., dissenting), and Parts I and III of Stevens's *Van Orden* dissent, 545 U.S. at 708–12, 722–35 (Stevens, J., dissenting). Other portions of those opinions will be noted where relevant.

[11] *McCreary County*, 545 U.S. at 860 (quoting Wallace v. Jaffree, 472 U.S. 38, 53 (1985); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947)).

[12] *Id.* at 876.

[13] *Id.*

[14] *Van Orden*, 545 U.S. at 709 (Stevens, J., dissenting).

[15] *Id.* For a general criticism of the "wall of separation" metaphor, see DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002).

Establishment Clause. It comes as no surprise, then, that both Justices find that the Ten Commandments displays are clear-cut violations of the Constitution.

Souter and Stevens must then reconcile a rigorous commitment to neutrality with the Court's religious symbolism jurisprudence, principally the two crèche cases (*County of Allegheny v. ACLU*[16] and *Lynch v. Donnelly*[17]) and the legislative prayer case (*Marsh v. Chambers*).[18] The Justices handle this delicate matter by reading the precedents narrowly and by characterizing the Ten Commandments displays as far outside the precedent. For instance, Stevens reads the crèche cases to mean that government may "acknowledg[e] the religious beliefs and practices of the American people" by recognizing religious symbols that have "become an important feature of a familiar landscape or a reminder of an important event in the history of a community."[19] However, Stevens would overrule *Marsh*, finding legislative prayer a violation of neutrality.[20] The symbolism precedents create more discomfort for Souter, leading him to drop the following footnote that Scalia will seize on as demonstrating the capriciousness of the neutrality principle itself:

> At least since *Everson v. Board of Ed. of Ewing*, it has been clear that Establishment Clause doctrine lacks the comfort of categorical absolutes. In special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious. No such reasons present themselves here.[21]

Later in his opinion, Souter creates further nuance by disclaiming any intention to hold that "a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history," provided the display would not "strike an observer as evidence that that [government] was violating neutrality in religion."[22] However, at bottom, both Souter and Stevens read the Court's religious symbolism precedent through the lens of neutrality. Neither doubts for a moment, as Scalia does in his dissent, that neutrality should apply to government religious symbolism just as readily as it does to other areas of Establishment Clause jurisprudence.

Any difficulty with the religious symbolism precedent is facilitated by the way Souter and Stevens characterize the Ten Commandments displays at issue in *McCreary County* and *Van Orden*. Both Justices see the displays as going beyond

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[16] 492 U.S. 573 (1989).

[17] 465 U.S. 668 (1984).

[18] 463 U.S. 783 (1983).

[19] *Van Orden*, 545 U.S. at 711 (Stevens, J., dissenting).

[20] *Id.* at 723 n.22.

[21] McCreary County v. ACLU, 545 U.S. 844, 859 n.10 (2005) (citing *Marsh*, 463 U.S. 783 (holding legislative prayer did not violate the Constitution)) (other citation omitted).

[22] *Id.* at 874.

the typical government "acknowledgment" of religious history or sentiments.[23] To the contrary, they interpret the displays as an official adoption of the specific precepts of the Ten Commandments by the governments of Texas and McCreary County, Kentucky.[24] For instance, in distinguishing them from "'the inclusion of a crèche or a menorah' in a holiday display," Souter characterizes the purpose of the displays as "subjecting individual lives to religious influence," as "insistently call[ing] for religious action on the part of citizens," and as "urg[ing] citizens to act in prescribed ways as a personal response to divine authority."[25] Stevens is even more explicit. Part II of his *Van Orden* dissent explains why Texas—by placing the monument on capitol grounds in "a large park containing 17 monuments and 21 historical markers"[26]—is explicitly instructing its citizens to adopt the Decalogue's theology and moral precepts.[27] Texas is not only "prescribing a compelled code of conduct from one God, namely a Judeo-Christian God," but also, by choosing either the Catholic or Protestant or Jewish formulation of the text, "tell[ing] the observer that the State supports this side of the doctrinal religious debate."[28] Whether they correctly understand the message sent by the Ten Commandments displays (which, of course, is disputed by other Justices in both cases), their interpretation makes easy work of distinguishing the displays from a Christmas crèche, a Hanukkah menorah, or even a legislative prayer.

Finally, the Justices must address how neutrality engages with the broader American history of church-state relationships, and also with the narrower history of governmental religious acknowledgments. This becomes the key ground for their disagreement with Scalia.[29] For both Souter and Stevens, the lessons history teaches about the scope of the Establishment Clause are sufficiently ambiguous that they must be pitched at a relatively high level of generality.[30] Neutrality

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[23] *McCreary County*, 545 U.S. at 877 n.24; *Van Orden*, 545 U.S. at 712 (Stevens, J., dissenting).

[24] *McCreary County*, 545 U.S. at 869; *Van Orden*, 545 U.S. at 718 (Stevens, J., dissenting).

[25] *McCreary County*, 545 U.S. at 877 n.24 (quoting *id.* at 905 (Scalia, J., dissenting)).

[26] *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring).

[27] *Id.* at 718 (Stevens, J., dissenting).

[28] *Id.* at 718 & nn.15–17. A comparison may clarify the Justices' understanding of the displays. In *Allegheny*, the crèche at issue included the familiar trope of the angel announcing "Glory to God in the Highest!" *See* County of Allegheny v. ACLU, 492 U.S. 579, 580 & n.5 (1989) (describing the crèche and origin of the angel's greeting in the Christian scriptures). Following their interpretation of the Ten Commandments displays, Souter and Stevens would understand in *Allegheny* that the government was itself announcing—through the voice of the angel, so to speak—"Glory to God in the Highest!" To be fair, this seems to approximate the interpretative stance the Court took in *Allegheny*. *See id.* at 598 ("'Glory to God in the Highest!' says the angel in the crèche—Glory to God because of the birth of Jesus. This praise to God in Christian terms is indisputably religious—indeed sectarian—just as it is when said in the Gospel or in a church service.").

[29] *See infra* notes 30–35 and accompanying text.

[30] *See, e.g.*, *McCreary County*, 545 U.S. at 875 (observing that "[t]here is no simple answer" to the meaning of the Establishment Clause and that "issues of interpreting inexact

emerges from a "sense of the past" as a necessary (but not always sufficient) guide to the Establishment Clause, since the Establishment Clause grew out of the desires "of the Framers and the citizens of their time" to avoid the kinds of religious conflicts they knew so well from English and continental history, and from their own colonial experiences.[31] The views of significant Framers, such as James Madison and Thomas Jefferson, provide general guideposts but are themselves ambiguous. Their private opinions cast confusing shadows over their official acts.[32] In Souter's and Stevens's understanding, our history of official religious acknowledgments is somehow both too inconclusive to furnish a reliable background, and too one-sidedly Christian to serve modern purposes.[33] The Justices manage to pick out of this historical miasma the overarching value of official "neutrality" to guide the application of the Establishment Clause to

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Establishment Clause language . . . arise from the tension of competing values"); *id.* ("[T]rade-offs [in interpreting the Clause] are inevitable, and an elegant interpretative rule to draw the line in all the multifarious situations is not to be had."); *Van Orden*, 545 U.S. at 731 (Stevens, J., dissenting) ("As the widely divergent views espoused by the leaders of our founding era plainly reveal, the historical record of the preincorporation Establishment Clause is too indeterminate to serve as an interpretive North Star."); *id.* (stating that, given the inconclusiveness of historical record, the Establishment Clause must be interpreted "not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the Clause's text and history the broad principles that remain valid today").

[31] *McCreary County*, 545 U.S. at 876 (reasoning from the framing generation's experience with religious divisiveness that "[a] sense of the past thus points to governmental neutrality" as an interpretive guide to the Establishment Clause, but that "given its generality as a principle, an appeal to neutrality alone cannot possibly lay every issue to rest"); *Van Orden*, 545 U.S. at 725–26 (Stevens, J., dissenting) (tracing origins of neutrality from "separationist impulses" gleaned from colonial experiences of religious oppression, such as the fact that "[n]ot insignificant numbers of colonists came to this country with memories of religious persecution by monarchs on the other side of the Atlantic").

[32] *See, e.g.*, *McCreary County*, 545 U.S. at 878 ("The historical record . . . is complicated beyond the dissent's account by the writings and practices of figures no less influential than Thomas Jefferson and James Madison."); *Van Orden*, 545 U.S. at 724 (Stevens, J., dissenting) (arguing that the majority opinion and Scalia's *McCreary County* dissent "disregard the substantial debates that took place regarding the constitutionality of the early proclamations and acts they cite").

[33] *See, e.g.*, *McCreary County*, 545 U.S. at 879–80 (claiming that the historical record supports the "fair inference . . . that there was no common understanding about the limits of the establishment prohibition," but also that "history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular"); *Van Orden*, 545 U.S. at 724, 726 (Stevens, J., dissenting) (claiming that it is "misleading" to present certain Framers' religious statements "as a unified historical narrative," but also that "many of the Framers understood the word 'religion' in the Establishment Clause to encompass only the various sects of Christianity").

problems such as the Ten Commandments displays.[34] Neutrality therefore emerges as both the principal original animating feature of the Establishment Clause, as well as the principle that the Court's case law has managed to tease out of a clause that was once significantly animated by a desire to prostrate every religion except Protestant Christianity.[35] This appears to be the historical metaphysics that informs Souter's and Stevens's opinions.

Scalia's dissent can be fairly analyzed only against these views. That is because Scalia is primarily concerned with contesting their understanding (which is now the Court's understanding) of how neutrality functions in the Court's Establishment Clause jurisprudence. Whereas Souter and Stevens distill neutrality as the organizing principle of the Establishment Clause, Scalia views it as one among other complimentary and sometimes competing principles. Whereas Souter and Stevens assess American historical practices through the lens of a univocal command of neutrality, Scalia discerns the contours of the Establishment Clause primarily through the lens of longstanding American practices of public religious acknowledgment. Whereas Souter and Stevens view the Establishment Clause as itself embodying an evolving, judicially applied tradition of neutrality, Scalia sees the Establishment Clause as a distinct limitation on government action whose contours emerge from both founding-era understandings and subsequent traditions reflected in laws and official practices. Between these approaches lies a gulf that cannot be explained merely by divergent interpretations of historical materials. Here instead are deep disagreements about how the Establishment Clause—and hence the courts—function in shaping the resolution of church-state issues. Admittedly, Scalia's dissent does represent a fundamentally different approach to interpreting the Establishment Clause. Nevertheless, to label that difference as simply Scalia's desire to write a preference for monotheism into the Establishment Clause is to caricature his dissent. Such a characterization also misses the real conversation that is taking place among the Justices.

What is Scalia's view on the place of neutrality within the Court's jurisprudence? Scalia regards as sheer *ipse dixit* the Court's enshrinement of neutrality as the Establishment Clause's master key—a key that falsifies both the Court's own jurisprudence and the larger history of American church-state

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[34] *See, e.g.*, *McCreary County*, 545 U.S. at 876 (finding support for the neutrality principle in the fact that "[t]he Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but [also] to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate" (citation omitted)); *id.* at 878 (finding support for the neutrality principle in deletion of the word "national" during the drafting of the Establishment Clause); *Van Orden*, 545 U.S. at 733–34 (Stevens, J., dissenting) (finding the neutrality principle "firmly rooted in our Nation's history and our Constitution's text," and explaining that "we are not bound by the Framers' expectations [but] . . . by the legal principles they enshrined in our Constitution").

[35] *See McCreary County*, 545 U.S. at 874 ("The importance of neutrality as an interpretative guide is no less true now than it was when the Court broached the principle in *Everson* . . . ." (citing Everson v. Bd. of Educ., 330 U.S. 1 (1947))).

relationships.[36] Scalia traces this defect to the cavalier approach to history taken in *Everson v. Board of Education*,[37] which inaugurated modern Establishment Clause jurisprudence.[38] *Everson*'s historiography, of course, has been criticized since virtually the day it appeared in the United States Reports.[39] Scalia's point is that the *McCreary County* Court has finally taken *Everson* at its word and enshrined as legal rule *Everson*'s absolutist rhetoric about the Establishment Clause's meaning. If the Establishment Clause means neutrality, and neutrality means not preferring religion to "nonreligion," then the state cannot use religious symbolism. In Scalia's view, this analysis is simplistic and wrong.[40]

The Court's own precedent should cast doubt on such an approach, and that is where Scalia focuses sharp attacks. He argues that the overall tenor of the Court's case law is incompatible with a one-size-fits-all principle of government "neutrality," understood as a rigorous evenhandedness between "religion and nonreligion."[41] Scalia points to the Court's approval of legislative accommodations for religious practices, tax exemptions for church property, and released-time programs for religious education.[42] Central to his attack is *Marsh*,[43] which upheld

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[36] *See, e.g., id.* at 889 (Scalia, J., dissenting) (arguing that the Court's broad invocations of neutrality are supported only by "the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no farther than the mid-20th century").

[37] 330 U.S. 1 (1947).

[38] *McCreary County*, 545 U.S. at 890 n.2 (observing that the "fountainhead of this jurisprudence, *Everson*" based its broad neutrality formulation "on a review of historical evidence that focused on the debate leading up to the passage of the Virginia Bill for Religious Liberty" (citing *Everson*, 330 U.S. at 11–13)). In that footnote, Scalia cites Edward S. Corwin's criticism that, in its *Everson* historiography, "it appeared the Court had been 'sold . . . a bill of goods.'" *Id.* (quoting Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 16 (1949)).

[39] For instance, one of *Everson*'s most notable early critics, the theologian and political theorist John Courtney Murray, wrote in 1949 that "the absolutism of the *Everson* and *McCollum* doctrine of separation of church and state is unsupported, and unsupportable, by valid evidence and reasoning—historical, political, or legal—or on any sound theory of values, religious or social." John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23, 40 (1949); *see also* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 1–13, 86–88, 91–92, 114–15 (1987); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE 8 (1982); DREISBACH, *supra* note 15, at 100–04; Corwin, *supra* note 38, at 16; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2107–09 (2003). *But cf.* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 207–08 (1986).

[40] *See McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).

[41] *Id.* at 889 (citation and internal quotation marks omitted).

[42] *See id.* at 891 (citing Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987); Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970); Zorach v. Clauson, 343 U.S. 306, 308 (1952)).

[43] Marsh v. Chambers, 463 U.S. 783 (1983).

Nebraska's practice of opening its legislative sessions with prayers as "a tolerable acknowledgment of beliefs widely held among people of this country."[44] Scalia holds up *Marsh* as exhibit A for the proposition that the Court has never really embraced the full implications of what it said about neutrality in *Everson*, particularly when it comes to symbolic government acknowledgments of widely shared religious sentiments.[45] In other words, incautious dicta in *Everson* cannot be elevated to the cardinal principle of the Establishment Clause without entirely falsifying the Court's approach to legislative prayer in *Marsh* and to religious symbolism in *Lynch* and *Allegheny*. Nor can *Marsh* be confined to its facts and quarantined from the rest of the Court's case law. Interestingly, given the importance of tradition to his jurisprudence, Scalia explicitly rejects "antiquity of the practice at issue" as a reason for upholding legislative prayer.[46] He explains the Court's unwillingness to cleave to neutrality as a form of institutional timidity, or as evidence that neutrality is not as deeply rooted in the Constitution as the Court now claims.[47]

However, Scalia does not stop there. He turns from the generalized neutrality as between religion and nonreligion, to the narrower neutrality as between one religion and another.[48] Here Scalia is at his most controversial level, but it is also here that the core of his rationale emerges. As the controlling ratio of his opinion, this helps contextualize the foray through the history of religious acknowledgments that begins his dissent. It also clarifies Scalia's disagreements with Souter's and Stevens's historical methodology. Therefore it is worth paying close attention to what Scalia says here—and what he does not say.

The nub of Scalia's dissent is that even the narrower form of neutrality between different religions must apply "in a more limited sense" to governmental "acknowledgment of the Creator."[49] A rigorous evenhandedness between one religion and another religion is indeed required—Scalia claims without explaining why—when the government gives financial assistance to religion or passes laws that affect religious practice.[50] Nevertheless, the same iron law cannot apply to government acknowledgments of religion for the simple reason that it would stamp

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[44] *McCreary County*, 545 U.S. at 892, 894 (Scalia, J., dissenting) (citing *Marsh*, 463 U.S. at 792).

[45] *See id.* at 892 ("Indeed, we have even approved (post-*Lemon*) government-led prayer to God.").

[46] *Id.* (reasoning that "antiquity of the practice at issue . . . is hardly a good reason for letting an unconstitutional practice continue" (citation omitted)).

[47] *See id.* ("What, then, could be the genuine 'good reason' for occasionally ignoring the neutrality principle? I suggest it is the instinct for self-preservation . . . .").

[48] *See id.* at 893 (observing that the Court's opinion additionally "suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another").

[49] *Id.*

[50] *Id.* (citing Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002); Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 532–33 (1993)); *see infra* notes 188–190 and accompanying text.

them out altogether.[51] He sets forth this reasoning in the most controversial passage from the dissent:

> If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God" or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.[52]

Scalia's jibe about "disregarding" polytheists, deists, and atheists[53] should not obscure his point, which he summarizes more placidly in the next paragraph: "Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion."[54]

Scalia rounds out this argument by explaining why government "acknowledgment of a single Creator" through a Ten Commandments display fits squarely within *Marsh*'s approval of "'a tolerable acknowledgment of beliefs widely held among the people of this country.'"[55] In supporting that position, Scalia asserts that the vast majority of religious believers in the United States—i.e., the 97.7% of whom are Christians, Jews, or Muslims—believe in "a single Creator" and recognize the Ten Commandments as a religious text reflective of that belief.[56]

Scalia's rhetorical flourishes aside, his main point here is narrow. He does not reject neutrality altogether but instead denies that it should rigorously apply to government religious acknowledgments. He discards neutrality in this area, not only in light of the Court's own precedents, but more fundamentally in light of a persistent tradition of public religious acknowledgment by American government. This requires Scalia to do two things that underscore the differences between his approach and that of Souter and Stevens. He must characterize the symbolic import of Ten Commandments displays at issue and then situate those displays within a tradition of historical practices that will help him assess whether the Establishment Clause permits them.

Scalia understands the messages of the Ten Commandments display in a way fundamentally different from Souter and Stevens. Whereas they see the displays as government-backed commands,[57] Scalia characterizes them as "a public

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[51] *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).
[52] *Id.*
[53] *See infra* notes 240–243 and accompanying text.
[54] *McCreary County*, 545 U.S. at 894 (Scalia, J., dissenting).
[55] *Id.* (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)).
[56] *Id.*
[57] *See supra* notes 23–28 and accompanying text.

acknowledgment of religious belief,"[58] "the acknowledgment of a single Creator,"[59] "public [or governmental] acknowledgment of God,"[60] "government invocation of monotheism,"[61] and "governmental affirmation of society's belief in God."[62] He analogizes the displays to public religious expressions such as the oath-taking formula "so help me God,"[63] the court-opening formula "God save . . . this honorable Court,"[64] our pledge-taking formula "a Nation under God,"[65] and our national motto, "In God We Trust."[66] Finally, he links the displays with public religious proclamations such as legislative prayers, officially designated "day[s] of thanksgiving and prayer,"[67] and explicit religious language in presidential addresses.[68] While Scalia agrees that the displays discriminate against non-monotheistic religions and atheism, he argues that this is a harm no different in kind and no greater in degree than other public expressions inflict when they "publicly honor[] God" (and refrain from honoring any particular god or gods, or affirming that there is no god).[69]

Scalia thus treats the Ten Commandments display as an integrated symbol. This sharply contrasts with Souter and Stevens, who view the Ten Commandments as ten government-backed prescriptions[70] (as if it were a sign outside a government building advising people to "Keep Off The Grass! Don't Feed the Pigeons!"). Scalia explicitly rejects that interpretation, retorting that "[t]he observer would no more think himself 'called upon to act' in conformance with the Commandments than he would think himself called upon to think and act like William Bradford because of the courthouse posting of the Mayflower Compact."[71] When called on to explain the symbolic meaning of the display, Scalia keeps to a high level of generality, suggesting that the displays "testif[y] to the popular understanding that the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government."[72]

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[58] *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).
[59] *Id.* at 894.
[60] *Id.* at 896.
[61] *Id.* at 897.
[62] *Id.* at 889.
[63] *Id.* at 886, 888.
[64] *Id.*
[65] *Id.* at 889.
[66] *Id.* at 888–89, 895 (emphasis omitted).
[67] *Id.* at 886.
[68] *Id.* at 886–88, 895.
[69] *Id.* at 893–94.
[70] *See* Van Orden v. Perry, 545 U.S. 677, 718 (2005) (Stevens, J., dissenting); *McCreary County*, 545 U.S. at 869.
[71] *McCreary County*, 545 U.S. at 905 n.10 (Scalia, J., dissenting).
[72] *Id.* at 907. Elsewhere, Scalia argues that the displays represent "[t]he acknowledgment of the contribution that religion in general, and the Ten Commandments in particular, have made to our Nation's legal and governmental heritage." *Id.* at 905. He also refers approvingly to the *Van Orden* plurality's interpretation that the display has

Scalia's reading of the Ten Commandments display as a unified symbol—and not as a government command to follow the individual commandments or to adopt their theological premises—enables him to place the displays within the holdings of *Marsh* and *Lynch*, and within the Court's general zone of tolerance for acknowledgments of broad-based religious sentiments.

We now have the framework for assessing the most controversial part of Scalia's argument: his use of history to interpret the Establishment Clause. Generally speaking, Scalia cannot intend his historical catalogue simply to demonstrate that similar religious invocations have a venerable pedigree and continue to season the nation's public rhetoric. After all, Scalia explicitly rejects "antiquity" as a reason for upholding unconstitutional practices.[73] While the Court has recognized widespread public religious sentiment and has even afforded it some constitutional significance,[74] Scalia's dissent transcends that approach to history. In *McCreary*, Scalia begins to construct a constitutional methodology for assessing American historical religious phenomena in the context of the Establishment Clause. Three passages from his dissent illustrate that method. First, following his historical catalogue, Scalia asks incredulously how the Court "can . . . *possibly* assert" that the Establishment Clause demands government neutrality towards religion as a general rule:

> Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. Surely not even the current sense of our society, recently reflected in an Act of Congress adopted *unanimously* by the Senate and with only five nays in the House of Representatives . . . criticizing a Court of Appeals opinion that had held "under God" in the Pledge of Allegiance unconstitutional.[75]

Second, in a passage already noted, Scalia summarizes his approach to assessing government religious acknowledgments under the Establishment Clause: "Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. The former is, as *Marsh v. Chambers* put it, 'a tolerable acknowledgment of beliefs widely held among the people of this country.'"[76]

"'undeniable historical meaning' as a symbol of the religious foundations of law." *Id.* at 905 n.10 (citing *Van Orden*, 545 U.S. at 690).

[73] *McCreary County*, 545 U.S. at 892.

[74] *See, e.g.*, Zorach v. Clauson, 343 U.S. 306, 313–14 (1952) (explaining that when legislatures act to accommodate religious belief or practice, they "follow[] the best of our traditions").

[75] *McCreary County*, 545 U.S. at 889 (Scalia, J., dissenting).

[76] *Id.* at 894 (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983) (Brennan, J., dissenting)).

Third, in response to Stevens's criticism of his use of history, Scalia clarifies his method with the following:

> But I have not relied upon (as [Justice Stevens] and the Court in this case do) mere "proclamations and statements" of the Founders. I have relied primarily upon official acts and official proclamations of the United States or of the component branches of its Government . . . . The only mere "proclamations and statements" of the Founders I have relied upon were statements of Founders who occupied federal office, and spoke in at least a quasi-official capacity . . . .
>
> It is no answer for Justice Stevens to say that the understanding that these official and quasi-official actions reflect was not "enshrined in the Constitution's text." The Establishment Clause, upon which Justice Stevens would rely, *was* enshrined in the Constitution's text, and these official actions show *what it meant.*[77]

From these passages emerges Scalia's methodology for using history to interpret and apply the Establishment Clause. Principally, Scalia relies on the overall sweep of certain historical practices as an interpretive grid against which to measure a textually inconclusive constitutional provision. He also attempts to pitch the relevant historical practices at a level of generality that can shed light on the particular issue involved. While one should place this method in the context of Scalia's jurisprudence,[78] some limited conclusions can be drawn about it from *McCreary County* itself.

First, because Scalia self-consciously confines his interpretive palette to official uses of religious language, Scalia is clearly not mounting an "original intent" argument. Instead, he takes official language itself as probative of a relevant historical practice against which to measure the Ten Commandments displays. Of course, relying on the language in which official pronouncements are formulated still requires some interpretation of text and context, but since we do not have here a strict "original intent" approach, Scalia would not need to delve into the theological intent or expectations of its authors (or ratifiers). To the contrary, Scalia is interested in the shared political significance of religious language rather than "which God" the authors had in mind (Deist? Christian? Judeo-Christian? All of them?) or "which religions" the ratifiers saw benefited by such pronouncements (Christianity? Protestant Christianity? "Judeo-Christianity"?). Interpreting the Establishment Clause thus is consistent with Scalia's general approach to constitutional interpretation, which is less a strict "original intent" than an "original meaning" approach informed by relevant traditional practices.[79]

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[77] *Id.* at 895–96 (quoting *Van Orden*, 545 U.S. at 724 (Stevens, J., dissenting)).

[78] *See infra* Part II.B.

[79] *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997) (rejecting "original intent" methodology, but explaining that he

Second, Scalia is not using historical materials to liquidate a "meaning" from the Establishment Clause. Souter and Stevens are doing just that, which explains why they find an impracticable level of ambiguity in the historical record and settle on "neutrality" as the generalized but indeterminate "meaning" of the Establishment Clause.[80] If one requires that historical materials furnish people's expectations about how open-textured constitutional language applies to a specific situation—i.e., a "what would James Madison do?" approach—this will lead one inevitably to conclude that the historical record is intolerably ambiguous. That may well be a compelling criticism of "original intent" methodology, but the important point is that Scalia explicitly denies he follows that approach.[81] Instead, he claims to be measuring ambiguous constitutional language against a set of historical practices that are—if appropriately defined and characterized—supposed to clarify the application of that language to the modern practice at issue.[82] Thus, it is an error to see Scalia's historical catalogue in the first part of his dissent as an (inevitably incomplete) thesis called "The Framers' Attitudes Toward Government Use of Religious Language," or as purporting to unravel all the ambiguities of that subject.[83] Scalia is using the historical materials for an altogether narrower and more modest purpose.

Third, Scalia's method leads him to characterize the historical materials in a particular way if they are to have any usefulness. As already discussed, Scalia understands the Ten Commandments displays as unified symbols whose message is pitched at a fairly high level of generality. In context, they are better understood as saying "Monotheistic religion has had an important impact on our public heritage of law and morality," rather than "You should become a Christian (or a

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consults Framers' writings "not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood"); *see also* Kannar, *supra* note 6, at 1306–07 (explaining that Scalia draws a sharp distinction between his original meaning approach and an original intent approach, and concluding that Scalia's method is "a profoundly positivist and textualist vision, inclined not only to minimize the role in constitutional interpretation of policy or the general contemplation of contemporary morals, but at times the Framers' actual intent, even when that intent is knowable"); David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1393 (1999) (explaining that "[w]hile Scalia's motives are similar to those of the proponents of 'original intent,' Scalia's focus on the Framers' end product rather than their pre- or post-drafting debates has significant implications for how he implements his originalism," and that "[u]nlike many versions of originalism, Scalia's approach does not use the statements and writings of individual drafters as authoritative sources for the meaning of the text"). On Scalia's supplementation of original meaning with tradition, see *infra* Part II.B.

[80] *See supra* note 30 and accompanying text.

[81] *See supra* note 79.

[82] *See infra* Part II.B.

[83] *See* McCreary County v. ACLU, 545 U.S. at 844, 885–89 (2005) (Scalia, J., dissenting).

Jew) and follow these rules."[84] Scalia may be wrong about that matter of interpretation, but the point is that Scalia must tease from the historical materials the relevant tradition against which to measure displays, understood as such. How he uses history for that purpose is analogous to how he treats the Court's symbolism precedents—i.e., finding that the displays' religious acknowledgment "is surely no more of a step toward establishment of religion than was the practice of legislative prayer we approved in *Marsh v. Chambers*, and it seems to be on par with the inclusion of a crèche or a menorah in a 'Holiday' display that incorporates other secular symbols."[85] Scalia is using historical materials in a similar way. He wants an analogue to the disputed government practice in order to have some intelligible standard against which to judge it.

The next Part discusses in more depth how Scalia's understanding of tradition informs this inquiry, but for now it is enough to point out that his method naturally leads him to be selective about the historical materials. Scalia understands the Ten Commandments displays as a symbolic affirmation, or acknowledgment, of the historical interrelationship among law, morality, and religion. The displays' religious content, in Scalia's view, is better described as a generalized monotheism rather than a specific adoption of the moral commands themselves or of any of the theological traditions that have embraced them. Scalia's characterization of the displays leads him to search the historical record for analogous governmental affirmations (and, as seen in the next section, for any traditions rejecting such affirmations). It will be no surprise to any student of American political and religious history that Scalia easily finds a rich vein of relevant materials in presidential inaugural addresses, in thanksgiving proclamations, and in a variety of national symbols. Such materials are particularly helpful to Scalia's argument because, not only do they demonstrate a persistent tradition of government religious language, but they also lack any consistent counter-tradition in which laws or other official practices have explicitly rejected using such language on constitutional grounds. The exceptional nature of Jefferson's refusal (at least at the federal level; Jefferson was willing to deploy religious language at the state level) simply proves the point.[86]

Nevertheless, does Scalia ignore or minimize the explicitly Christian content of the historical materials in order to make his case for monotheism look better than it does? This is a central feature in the case against Scalia—charging that he manufactures a historical record to avoid concluding that our traditions of religious symbolism are not broadly "monotheistic" but narrowly Christian. Properly evaluating these claims requires a more complete development of the role tradition plays in Scalia's jurisprudence,[87] but a basic point can be noted here. Given

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[84] *See supra* notes 57–69 and accompanying text.

[85] *McCreary County*, 545 U.S. at 905 (Scalia, J., dissenting) (citations omitted).

[86] *See, e.g.*, DREISBACH, *supra* note 15, at 27, 59, 63–64 (attributing Jefferson's aversion to designating days of thanksgiving and fasting, in part, to his understanding of the First Amendment constraints peculiar to the federal government, and noting that, while governor of Virginia in 1779, Jefferson proclaimed days of thanksgiving and prayer).

[87] *See infra* Part II.B.

Scalia's historical method, it is not clear why a tradition of Christian religious acknowledgment is relevant to his inquiry. After all, Scalia has identified the symbolic import of the Ten Commandments displays, rightly or wrongly, with a generalized monotheism and not with a particular theological tradition, whether Jewish or Christian or Protestant Christian. If, hypothetically, there were a tradition of Christian religious acknowledgments alongside, or intertwined with, a tradition of generalized monotheistic acknowledgment, it is not clear why that would hurt Scalia's case. If all Scalia is doing is measuring a "monotheistic" religious display against our traditions of religious acknowledgments, he should be able to claim plausibly that the display fits within at least one, or part of one, of our traditions.

But is that all Scalia is doing? In a later passage, Scalia responds to Stevens's criticism that some Founders thought the Establishment Clause protected only Christianity:

> I am at a loss to see how this helps [Justice Stevens's] case, except by providing a cloud of obfuscating smoke. (Since most thought the Clause permitted government invocation of monotheism, and some others thought it permitted government invocation of Christianity, [Stevens] proposes that it be construed not to permit any government invocation of religion at all.)[88]

Scalia might have stopped here, content to show that Stevens's narrower reading of tradition, even if correct, would not necessarily invalidate a Ten Commandments display. Nevertheless, Scalia goes on to remark that, "[a]t any rate, those narrower views of the Establishment Clause were *as clearly rejected* as the more expansive ones."[89] In support of that claim, Scalia remarks that the vast majority of the materials he relied on "have invoked God, but not Jesus Christ."[90]

What should one make of these comments by Scalia? Up to that point in his dissent, he seems content to have identified a tradition of generalized monotheism in our historical practices—one more than sufficient, in his view, to validate the Ten Commandments displays. Then, in response to Stevens's criticism that he has resisted following tradition where it actually leads (that is, to a tradition of "exclusively Christian" government acknowledgements), Scalia says that any tradition of "Christian acknowledgments" has been "clearly rejected." Does Scalia mean that, if government today wanted symbolically to acknowledge Christianity, then Scalia would strike down that practice simply based on his view of the content of our traditions? Or is Scalia saying something far more modest about the role of our traditions in interpreting the Establishment Clause? Answering these questions requires a look at the broader approach Scalia takes to using tradition in constitutional interpretation.

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[88] *McCreary County*, 545 U.S. at 897 (Scalia, J., dissenting).
[89] *Id.* (emphasis added).
[90] *Id.*

B. The Role of Tradition in Scalia's Constitutional Jurisprudence

Traditions reflected in longstanding and persisting government practice generally tell Scalia what a constitutional provision was not originally designed to do. The function of a constitutional limitation, in Scalia's view, is to place a supermajority restraint on what ensuing "transient majorities" can accomplish by ordinary political processes.[91] In that scheme, tradition provides a relatively objective historical standard by which a court can flesh out the boundaries of a constitutional limitation on government power. Tradition for Scalia thus acts as an adjunct to original meaning. The history of particular governmental practices provides an amplified commentary on a common original understanding of constitutional guarantees. This section of the Article explicates this understanding of tradition in Scalia's jurisprudence. It does not comprehensively assess Scalia's traditionalism;[92] nor does it join the extensive academic commentary on traditionalism as a form of constitutional interpretation.[93] Instead, it takes the measure of Scalia's use of tradition in order to gauge, in the final section, the precise question about tradition posed by his *McCreary County* dissent: is Scalia using tradition to embed in the Establishment Clause an exclusive preference for monotheism in government religious acknowledgments?[94]

Scalia's use of tradition must be understood in connection with his view of the function of constitutional limitations on governmental power. Such limitations are generally not intended to embed in the Constitution a guarantee that laws will reflect current societal (or, *a fortiori*, judicial) preferences. For Scalia, ordinary political processes ensure that laws reflect current values. However, constitutional guarantees, including those securing individual rights, serve the opposite function of "prevent[ing] the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable."[95] That

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[91] A.C. Pritchard & Todd Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 418–29 (1999).

[92] *See, e.g.*, J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution*, 103 W. VA. L. REV. 19, 38–67 (2000) (discussing Justice Scalia's jurisprudence of tradition by contrasting original meaning—which Justice Scalia supports—with search for intent, which he considers futile); Pritchard & Zywicki, *supra* note 91, at 418–29 (presenting "Justice Scalia's Majoritarian Theory of Tradition" as squaring tradition with democracy).

[93] *See generally* J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613 (1990); Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665; Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991).

[94] *See infra* Part III.

[95] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989). In that passage, Scalia does recognize the possibility of amending the Constitution to

understanding informs Scalia's most expansive discussion, in *Rutan v. Republican Party of Illinois*, of the relationship between the Bill of Rights and "tradition":

> The provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of *other* practices are to be figured out. When it appears that the latest "rule," or "three-part test," or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens.[96]

This passage sheds considerable light on Scalia's use of tradition. First, tradition helps Scalia interpret constitutional guarantees when the text is not determinative. As Scalia explains in his dissent in *McIntyre v. Ohio Elections Commission*, "[w]here the meaning of a constitutional text (such as the 'freedom of speech') is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine."[97] Second, tradition subsequent to adoption of a constitutional provision does not create a "meaning" independent of the constitutional limitation itself. Instead, tradition has merely a "validating" or "clarifying"[98] function with regard

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"update" its guarantees, but asserts that constitutional limitations also serve to "require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside." *Id.*

[96] 497 U.S. 62, 95–96 (1990) (Scalia, J., dissenting) (footnote omitted); *see also* SCALIA, *supra* note 79, at 40 (explaining that the "whole purpose [of a constitution] is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away").

[97] 514 U.S. 334, 378 (1995) (Scalia, J., dissenting); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring and dissenting) (complaining that the Court "ignore[s] a long and clear tradition clarifying an ambiguous text," as it did with respect to the Establishment Clause in *Lee v. Weisman*, 505 U.S. 577 (1972)).

[98] *See Casey*, 505 U.S. at 980 n.1, 1000 (Scalia, J., concurring and dissenting).

to the text, and thus "cannot alter the core meaning of a constitutional guarantee."[99] Third, as the concrete expression of "tradition," Scalia has in mind longstanding practices recognized chiefly in state or federal laws, and also in court decisions or in analogous official practices.[100] As Professors Pritchard and Zywicki explain in their assessment of Scalia's traditionalism, "[l]egislative tradition is paramount in Scalia's hierarchy of sources of tradition."[101] Scalia views such products of representative political processes as concretely reflecting the people's ongoing resolution of "'the basic policy decisions governing society.'"[102] A longstanding and consistent pattern of such resolutions thus gives Scalia an objective benchmark against which to discern a common understanding of the limits imposed by the Constitution on political processes. In a sense, Scalia's hermeneutic of tradition projects the original understanding of a constitutional provision across time, amplifying it by reading consistent and widely accepted governmental practices as a sort of running commentary on citizens' understanding of the Constitution.[103]

The key aspect of Scalia's *Rutan* discussion is that it highlights the largely negative and restraining character tradition plays in constitutional interpretation.[104] With some additional nuances discussed below, tradition's core function is to map out areas in which constitutional limitations were not designed to restrain the policy preferences of majorities. This idea is implicit in the relationship between tradition and constitutional guarantees. To one side are the "long-recognized personal liberties" that a supermajority removes from a future majority's reach by protecting them in constitutional guarantees.[105] To the other side are the "accepted political norms" that are excluded from the Constitution's purview and left to

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[99] *McIntyre*, 514 U.S. at 378 (Scalia, J., dissenting).

[100] *See, e.g.*, Pritchard & Zywicki, *supra* note 91, at 420 ("'[T]radition' for Scalia is more accurately characterized simply as 'history': a collection of facts regarding past patterns of legislative regulation, rather than an ongoing source of wisdom and contextual understanding.").

[101] *Id.* at 421; *see also id.* at 424 ("Legislative tradition is seen as the *best* evidence of political consensus.").

[102] *Id.* at 419 (quoting Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting)).

[103] For instance, Scalia observes that, in the face of a thin or ambiguous record of original understanding, a "most weighty" indication of constitutional meaning appears in:

> the widespread and longstanding traditions of our people. Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness. A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality.

McIntyre, 514 U.S. at 375 (Scalia, J., dissenting).

[104] *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 95–96 (1990) (Scalia, J., dissenting).

[105] *Id.* at 95.

ordinary political processes.[106] For Scalia, tradition helps discern those "accepted political norms" that lie outside constitutional limitations and thus outside the judiciary's reach.[107] For example, in *McIntyre*, Scalia used a "universal and long-established American legislative practice" of election disclosure requirements to discern the kind of practices the First Amendment did not reach and thus left to ordinary legislation.[108] In *Michael H. v. Gerald D.*, Scalia relied on a longstanding legislative tradition—one curtailing an adulterous biological father's ability to establish parental rights in opposition to the husband and wife—to find that the Due Process Clause did not overturn California's traditional policy.[109] Tradition thus places an outer limit on the constitutional limitations themselves and, by necessary implication, on the judiciary's power to strike down laws on the basis of those limitations.

Tradition and judicial restraint are closely linked for Scalia. His explanation of how tradition functions in constitutional interpretation presupposes that broad constitutional theories cannot override a persistent line of policy resolutions by representative bodies. This comes through plainly in *Rutan*, where Scalia explains that "traditions are themselves the stuff out of which the Court's principles are to be formed," and that, therefore, any constitutional "test" devised by the Court must be "recalculated" if it will disrupt a "landmark practice."[110] His dissent in *United States v. Virginia* similarly reaffirms that "whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts."[111] The other side of this coin is Scalia's readiness to defer to the resolutions reached by the political process. For instance, again in *Rutan*, Scalia's deference to a tradition of governmental political patronage goes hand-in-hand with his deference to "the choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political contexts."[112] Additionally, in *Cruzan v. Director, Missouri Department of Health*, Scalia affirms that "reasonable and humane limits . . . [on] requiring an individual to preserve his own life" are ensured, not by the judicially derived substance of the Due Process Clause, but rather by the political safeguards inherent in the Equal Protection Clause, "which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me."[113]

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[106] *Id.* at 95–96.

[107] *Id.* at 85–95.

[108] *McIntyre*, 514 U.S. at 375–77 (Scalia, J., dissenting).

[109] 491 U.S. 110, 121–30 (1989).

[110] 497 U.S. at 96 (Scalia, J., dissenting). Scalia further explains in that opinion that "[t]he order of precedence is that a constitutional theory must be wrong if its application contradicts a clear constitutional tradition; not that a clear constitutional tradition must be wrong if it does not conform to the current constitutional theory." *Id.* at 97 n.2.

[111] 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

[112] 497 U.S. at 94 (Scalia, J., dissenting).

[113] 497 U.S. 261, 300 (1989) (Scalia, J., concurring). Elsewhere in *Cruzan*, Scalia explains that "even when it *is* demonstrated by clear and convincing evidence that a patient

Professors Pritchard and Zywicki highlight this restraining role of tradition, observing that "tradition aids [Scalia's] constitutional theory by restraining judges from substituting their own policy preferences for those of democratically elected legislatures."[114] Indeed, "[w]hen neither text nor tradition recognizes a claimed right, Scalia defers to the decisions reached by legislative majorities."[115]

Scalia's use of tradition seems calibrated to uphold long-recognized practices (and their modern analogues), at least where constitutional text does not unambiguously invalidate them. Tradition would establish an objective baseline of constitutionality against which to measure future practices. Reinforcing this view is Scalia's understanding of the Court's institutional role. In his *Virginia* dissent, for instance, he asserts that "the function of this Court is to *preserve* our society's values . . . not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed on democratic government, not to prescribe, on our own authority, progressively higher degrees."[116] This view does not exclude the possibility that tradition could positively inform the substance of a constitutional guarantee, thus empowering judges to invalidate counter-traditional practices. Tradition might justify striking down laws, and would not always simply justify refraining from striking them down. This possibility most clearly appears in Scalia's *McIntyre* dissent, where he discusses an "easy" case for the originalist.[117] Strictly speaking, Scalia's discussion concerns practices contemporaneous with the framing to discern original meaning, but his reasoning applies with equal force to tradition proper (that is, to a *post*-adoption tradition of government practices).

In *McIntyre*, Scalia identifies the "easy" originalist case for upholding a practice as one where "government conduct that is claimed to violate the Bill of Rights or the Fourteenth Amendment is shown, upon investigation, to have been engaged in without objection at the very time the Bill of Rights or the Fourteenth Amendment was adopted."[118] For Scalia, this explains why laws against obscenity and libel are untouched by the First Amendment—"they existed and were universally approved in 1791."[119] At the opposite extreme lies the case "where the government conduct at issue was *not* engaged in at the time of adoption, and there is ample evidence that the *reason* it was not engaged in is that it was thought to violate the right embodied in the constitutional guarantee."[120] Scalia would thus invalidate modern use of "[r]acks and thumbscrews," since, although well-known at the founding, they "were not in use because they were regarded as cruel

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no longer wishes certain measures to be taken to preserve his or her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored." *Id.* at 293.

[114] Pritchard & Zywicki, *supra* note 91, at 420 (citing Scalia, *supra* note 95, at 863).

[115] *Id.* at 421.

[116] 518 U.S. at 568 (Scalia, J., dissenting).

[117] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 379–81, 385 (1995) (Scalia, J., dissenting).

[118] *Id.* at 372.

[119] *Id.*

[120] *Id.*

punishments."[121] The difficult originalist case, Scalia explains, lies between these extremes: where founding-era evidence discloses neither a shared constitutional approval nor disapproval of a particular practice.[122] Such a case demands, over and above historical analysis, a delicate judgment "as to whether the government action under challenge is consonant with the concept of the protected freedom . . . that existed when the constitutional protection was accorded."[123]

In these difficult cases, post-adoption tradition can help clarify original meaning.[124] For Scalia, using post-adoption tradition to interpret an indeterminate text is no different from using contemporaneous practice to determine original meaning. After all, as already noted, Scalia treats tradition as simply an adjunct to original meaning.[125] Theoretically this means tradition can project meaning into the Constitution and justify striking down a counter-traditional law. Admittedly, in *McIntyre*, a post-adoption tradition leads Scalia not to invalidate the law under the First Amendment.[126] Nevertheless, his reasoning is premised on the idea that he would have invalidated that same law, if he had located a tradition showing the First Amendment *protected* the kind of expression at issue.[127]

Thus, Scalia's traditionalism could result in either upholding or invalidating a law under the Constitution. Said another way, tradition potentially has both a negative function (simply saying what a constitutional limitation was not designed to do) and a positive function (saying affirmatively what kind of protection the provision was supposed to afford). While the negative function is congenial to Scalia's overall philosophy of judicial restraint, the positive function is theoretically compatible with his use of tradition. Indeed, as discussed below, in some cases Scalia explicitly foresees the possibility of striking down laws on the basis of tradition. However, this is theory and not practice. A closer look at the practical implications of Scalia's traditionalism reveals that the negative role of tradition is far more prominent a feature of his jurisprudence.

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[121] *Id.*

[122] *Id.* at 375 (identifying "[t]he most difficult case for determining the meaning of the Constitution" as one where "[n]o accepted existence of governmental restrictions of the sort at issue here demonstrates their constitutionality, but neither can their nonexistence clearly be attributed to constitutional objections").

[123] *Id.*; *see also* SCALIA, *supra* note 79, at 45 (explaining that in difficult cases, where original meaning is either ambiguous or must be applied to "new and unforeseen phenomena," "the Court must follow the trajectory of the [constitutional guarantee at issue], so to speak, to determine what it requires—and assuredly that enterprise is not entirely cut-and-dried but requires the exercise of judgment").

[124] *McIntyre*, 514 U.S. at 375 (Scalia, J., dissenting); *see also supra* note 98 and accompanying text.

[125] *See supra* notes 96–103 and accompanying text.

[126] *See McIntyre*, 514 U.S. at 375–76 (Scalia, J., dissenting). The tradition Scalia identifies in *McIntyre* as providing a reason for upholding Ohio's election disclosure requirement was one approving such requirements, dating only from the late-nineteenth century but since adopted virtually unanimously by the states. *Id.*

[127] *Id.* at 379.

The positive aspect of Scalia's traditionalism seems very difficult to activate, particularly when relying on the fact that particular practices were not historically engaged in. The absence of a particular governmental practice, either in the founding era or extending beyond it, is simply not enough. Instead, the "nonexistence" of a practice must "clearly be attributed to constitutional objections" in order to flower into an affirmative constitutional prohibition.[128] As Scalia explains in *McIntyre* with regard to more modern restrictions on anonymous electioneering, "[q]uite obviously, not every restriction upon expression that did not exist in 1791 or in 1868 is *ipso facto* unconstitutional."[129] Scalia thus raises a high barrier against the Court inferring, from government non-engagement in a practice, a common understanding of a constitutional prohibition on that practice. In *McIntyre*, Scalia might have been willing to infer such a prohibition from the prevalence of anonymous pamphleting in founding-era politics,[130] but his identification of a widespread post-adoption tradition of election disclosure requirements resolved the ambiguity of original meaning the other way. The implicit obstacles in Scalia's method against using tradition to invest positive meaning in the Constitution lead Professors Pritchard and Zywicki to remark that "Scalia's argument is a one-way ratchet: A practice of regulation proves the constitutional power to regulate, but an absence of regulation is ambiguous because it provides no evidence as to whether the government has the (previously unexercised) *power* to regulate."[131]

That is somewhat overstated because Scalia recognizes that the nonexistence of a practice (whether at the founding or, by extension, in post-adoption tradition) could imply a common understanding of a constitutional limitation on government power.[132] Nevertheless, the point is practically sound and is illuminated by examining Scalia's use of tradition in interpreting the Due Process Clause. In that area, the constitutional text invests tradition with a plainly normative power—for Scalia, traditional practices are, by definition, "due" process.[133] But even here, Scalia rejects using tradition to freeze constitutional provisions around the kernel of tradition. Instead, tradition only provides a constitutional baseline against which practices diverging from tradition can be measured.

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[128] *Id.* at 375.

[129] *Id.* at 373.

[130] *See id.* at 375. More precisely, Scalia would have required "further evidence of common practice in 1868, since I doubt that the Fourteenth Amendment time-warped the post-Civil War States back to the Revolution." *Id.*

[131] Pritchard & Zywicki, *supra* note 91, at 424–25; *see also* Broughton, *supra* note 92, at 58 ("Justice Scalia's use of tradition as the 'primary determinant of what the Constitution means' tends to produce two practical results: it tends to favor republican (though Scalia most often refers to them as 'democratic') outcomes adopted in the political branches, and it tends to circumscribe judicial review." (citation omitted)).

[132] *See McIntyre*, 514 U.S. at 378 (Scalia, J., dissenting) ("[P]ost-adoption tradition cannot alter the core meaning of a constitutional guarantee.").

[133] Schad v. Arizona, 501 U.S. 624, 650 (1991) (Scalia, J., dissenting).

Scalia's opinions suggest that tradition plays a consistent interpretative role across the entire Bill of Rights.[134] However, tradition's impact will vary, implicitly, since tradition supplements textual meaning and the definiteness of different constitutional texts obviously varies. The Due Process Clause is where tradition would have greatest impact on determining original meaning, since for Scalia, "[i]t is precisely the historical practices that *define* what is 'due.'"[135] In Scalia's jurisprudence, this holds for both procedural and substantive due process.[136] Because Scalia equates "due process" with the "law of the land" contemporaneous with adoption of the Due Process Clause, the guarantees of the Due Process Clause are anchored to settled historical practices.[137] For instance, personal service on a defendant physically present in the forum is, by definition, process "due" under the Due Process Clause because such process is part of settled historical usage against which any modern development must be measured.[138] Or, again, a state's refusal to afford an adulterous biological father the right to obtain parental rights in opposition to the husband and wife cannot, by definition, violate substantive due process, given "a societal tradition of enacting laws *denying* the [biological father's] interest."[139]

Tradition in Scalia's due process jurisprudence is not simply an adjunct to original meaning—it is the substance of original meaning itself. Consequently, tradition would here seem best positioned to give Scalia a reason to strike down a counter-traditional law. Furthermore, if one wanted to catch Scalia shaping a constitutional guarantee around tradition—freezing the Constitution in the past, so to speak, and leaving no room for development—it would logically be here, where tradition and original meaning coalesce. But that is not what one finds. As Scalia's due process opinions tell us explicitly, traditional practices merely serve as an objective benchmark against which to measure the constitutionality of modern practices. Therefore, traditional practices would obviously validate similar modern practices (particularly if the traditional practices had persistent post-adoption

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[134] *See, e.g.*, case cited *supra* note 96 and accompanying text.

[135] *Schad*, 501 U.S. at 650 (Scalia, J., dissenting).

[136] *See, e.g.*, Burnham v. Superior Court of Cal., 495 U.S. 604, 619 (1990) (Scalia, J., plurality) ("The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"); Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (Scalia, J., plurality) ("In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.").

[137] *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 28–31 (1991) (Scalia, J., concurring) (explaining the original meaning of "due process").

[138] *See Burnham*, 495 U.S. at 610–16, 619 (holding that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice'").

[139] *Michael H.*, 491 U.S. at 122 n.2.

usage), but they would not automatically invalidate every departure from tradition. They would simply provide an objective standard for comparison. Indeed, as will be seen, Scalia even allows that a settled modern consensus might justify the invalidation of traditional practices.

In his *Pacific Mutual Life Insurance Co. v. Haslip* concurrence, Scalia lays out his view of "the proper role of history in a due process analysis":

> If the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it does not necessarily *deny* due process. The remaining business, of course, was to develop a test for determining *when* a departure from historical practice denies due process.[140]

Scalia draws this framework from the Court's 1884 decision in *Hurtado v. California*.[141] In two opinions, Scalia has quoted the following language from *Hurtado* approvingly:[142]

> [A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; *but it by no means follows, that nothing else can be due process of law*. . . . [T]o hold that such a characteristic [i.e., that a particular process has been "immemorially the actual law of the land"] is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians.[143]

In *Haslip*, Scalia criticizes the Court for departing from this historically grounded due process standard and substituting a malleable "fundamental fairness" standard that has become progressively decoupled from historical practices.[144] He emphasizes that his own approach is not the Court's, but instead the one, stemming from *Hurtado* and reaffirmed by Justice Cardozo in *Snyder v. Massachusetts*,[145] that "no procedure firmly rooted in the practices of our people can be so

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[140] 499 U.S. at 31–32 (Scalia, J., concurring).

[141] 110 U.S. 516, 527–29 (1884).

[142] *See Haslip*, 499 U.S. at 31 (Scalia, J., concurring); *Burnham*, 495 U.S. at 619 (Scalia, J., plurality).

[143] *Hurtado*, 110 U.S. at 528–29 (emphasis added). In *Haslip*, following the quoted language, Scalia explained that "*Hurtado*, then, clarified the proper role of history in a due process analysis." 499 U.S. at 31 (Scalia, J., concurring).

[144] *Haslip*, 499 U.S. at 31–36 (Scalia, J., concurring).

[145] 291 U.S. 97 (1934).

'fundamentally unfair' as to deny due process of law."[146] Scalia qualifies even that last statement by explaining that "firmly rooted practices" can nonetheless be invalidated by other constitutional provisions that, unlike the Due Process Clause, "might be thought to have some counter-historical content."[147] Finally, Scalia ends his concurrence with the striking concession that an evolving consensus of legislative or judicial practice could "purge[] a historically approved practice from our national life," thereby "permit[ting] this Court to announce [under the Due Process Clause] that it is no longer in accord with the law of the land."[148]

Thus, even in the area where tradition most decisively impacts original meaning—due process—tradition for Scalia does not freeze the content of the constitutional guarantee. As Judge Michael McConnell observes with respect to Scalia's traditionalism, "[a] jurisprudence grounded in text and tradition is not hostile to social change, but it assigns the responsibility to determine the pace and direction of change to representative bodies."[149] To be sure, tradition furnishes an important benchmark against which to assess the constitutionality of modern practices (in this case, whether they provide "due process of law"). Modern practices identical, or closely analogous, to settled historical practices will be upheld, but, importantly, modern practices that diverge from settled historical usage will not be automatically invalidated on that basis alone. The language from *Hurtado* that Scalia is fond of quoting harshly dismisses such an approach as "stamp[ing] upon our jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians."[150] Historical practices instead provide the raw materials for evaluating the divergent practices—a practice which Scalia admits is fraught with difficult judgments, but which plainly does not amount to automatic invalidation. In fact, Scalia is even willing to posit some evolutionary content to the Due Process Clause, should a definitive national consensus develop rejecting settled historical practice.[151]

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[146] *Haslip*, 499 U.S. at 38 (Scalia, J., concurring) (citing *Snyder*, 291 U.S. at 105). For a good discussion of the evolution of the historical due process standard, see McConnell, *supra* note 93, at 694–95.

[147] *Haslip*, 499 U.S. at 38 (Scalia, J., concurring). Scalia offers the Equal Protection Clause as an example of a provision that "might be thought to have some counter-historical content." *Id.*

[148] *Id.* at 39. Scalia did not need to take such a step in *Haslip*, since the practice at issue there—common-law assessments of punitive damages—was "far from a fossil, or even an endangered species. They are (regrettably to many) vigorously alive." *Id.*

[149] McConnell, *supra* note 93, at 686 (citing Burnham v. Superior Court of Cal., 495 U.S. 604, 627 (1990)).

[150] *Haslip*, 499 U.S. at 31 (Scalia, J., concurring) (quoting Hurtado v. California, 110 U.S. 516, 529 (1884)).

[151] *Cf.* McConnell, *supra* note 93, at 671 (observing, with reference to the similar due process approach in *Washington v. Glucksberg*, that the Court "implied that even a traditional norm could come to violate substantive due process if it is subsequently abandoned or rejected by a new stable consensus" (citing Washington v. Glucksberg, 521 U.S. 702, 714–18 (1997))).

Furthermore, there is every reason to think that this is Scalia's approach in the area of substantive due process. In *Michael H.*, for instance, although Scalia rejects recognition of the biological father's counter-traditional claim under the substantive component of due process, he explicitly says he would defer to a counter-traditional legislative policy.[152] "It is," as Scalia says, "a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted."[153] In *Cruzan*, despite finding determinative for due process purposes the longstanding tradition of anti-suicide laws, Scalia would defer to ordinary political process for resolving increasingly complex end-of-life issues.[154] Implicitly affirming that there exist "reasonable and humane limits that ought not to be exceeded in requiring an individual to preserve his own life," Scalia entrusts the setting of such limits to democratic majorities constrained "to accept for themselves and their loved ones what they impose on you and me."[155] Finally, in *Lawrence v. Texas*, Scalia's dissent would have rejected finding a right to homosexual sodomy rooted in substantive due process, but at the same time would have raised no constitutional opposition to counter-traditional legislation through ordinary political processes.[156] Since "[s]ocial perceptions of sexual and other morality change over time, and [since] every group has the right to persuade its fellow citizens that its view of such matters is the best," Scalia explains that he "would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than [he] would *forbid* it to do so."[157]

As with procedural due process, then, so with substantive. Tradition acts as a constitutional benchmark for evaluating modern practices, but does not commit the judiciary to striking down laws simply because they diverge from historical practices. Judge McConnell explains that the effect of this historical use of tradition in the substantive due process area

> is to allow the democratic, decentralized institutions of the country to continue to ponder the issue, and to adapt to changing mores and national experience. The Court's [substantive due process] approach thus leaves

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[152] *See* Michael H. v. Gerald D., 491 U.S. 110, 129–30 (1989).

[153] *Id.*

[154] Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 293 (Scalia, J., concurring).

[155] *Id.* at 300; *see also id.* at 292–93 (explaining that "the States have begun to grapple" with "the difficult, indeed agonizing, questions that are presented by the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it," and professing concern that the Court is "poised to confuse that enterprise" by "requiring [the legislative debate] to be conducted against a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term").

[156] *See* 539 U.S. 558, 603–04 (2003) (Scalia, J., dissenting).

[157] *Id.* at 603.

> social change and experimentation to the political branches, and reserves to the courts the task of enforcing traditional and enduring principles of justice.[158]

Scalia's approach thus casts the Due Process Clause—as the prime exemplar of tradition at work in constitutional interpretation—in a primarily negative role. "'Its function,'" as Scalia explains in *Haslip*, "'is negative, not affirmative, and it carries no mandate for particular measures of reform.'"[159]

It should be noted that tradition will have a less dramatic impact on other constitutional guarantees than on the Due Process Clause. For Scalia, historical practices themselves are the yardstick for due process.[160] The text of the Due Process Clause itself points to tradition and, logically, there can be for Scalia no original meaning of "due process" separable from historically settled usage. By contrast, other constitutional guarantees are not simply empty vessels for tradition. For example, Scalia sees the Equal Protection Clause as having "counter-historical" content—that is, as designed to invalidate certain historical practices that might otherwise claim the status of tradition.[161] Other constitutional guarantees likewise have their own normative content that would trump incompatible subsequent practices.[162] This is how Scalia views the First Amendment. As already seen, Scalia developed his theory of tradition largely in *Rutan* and *McIntyre*, both cases dealing with the impact of the Free Speech Clause on governmental practices restricting expression. In those opinions, Scalia cast "freedom of speech" as an

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[158] McConnell, *supra* note 93, at 672. Judge McConnell is there addressing the Court's substantive due process approach in *Washington v. Glucksberg*, 521 U.S. 702, 716–36 (1997), but he closely associates that approach with Scalia's own historical method, *see, e.g.*, McConnell, *supra* note 93, at 671 n.47 (observing that "one of the most important aspects of the *Glucksberg* decision" is the majority's acceptance of Scalia's methodology in *Michael H.* (citing *Michael H.*, 491 U.S. at 121–24)).

[159] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 39 (1991) (Scalia, J., concurring) (quoting Ownbey v. Morgan, 256 U.S. 94, 112 (1921)).

[160] Scalia uses historical practices to measure due process without exhausting the content of the Due Process Clause by limiting "due process" to those historical practices only. *See supra* note 138 and accompanying text.

[161] *See Haslip*, 499 U.S. at 38 (Scalia, J., concurring) ("The Equal Protection Clause and other provisions of the Constitution, unlike the Due Process Clause, are not an explicit invocation of the 'law of the land,' and might be thought to have some counter-historical content."). Of course, Scalia's insistence that the Equal Protection Clause has an unambiguous textual meaning that clearly invalidates both affirmative action and racial segregation is a controversial point. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520–28 (1989) (Scalia, J., dissenting). That controversy is not over Scalia's traditionalism per se, but over how he applies his traditionalism in the Equal Protection Clause context and is therefore beyond the scope of this Article.

[162] *See, e.g.*, *Haslip*, 499 U.S. at 38 (Scalia, J., concurring) (explaining further that "the principle I apply today does not reject our cases holding that procedures demanded by the Bill of Rights—which extends against the States only *through* the Due Process Clause—must be provided despite historical practices to the contrary").

ambiguous concept whose original meaning needs clarification from either contemporaneous practices or post-adoption tradition, but, unlike "due process," "freedom of speech" is not reducible to historical practices. For example, in *McIntyre*, Scalia explained that a "postadoption tradition" of anti-flag-desecration laws "cannot alter the core meaning" of the Free Speech Clause—i.e., that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[163]

With a guarantee like the Free Speech Clause, then, tradition will emphatically play a "clarifying" or "validating" role.[164] Whether we are dealing with contemporaneous or post-adoption practices, tradition glosses original meaning. Contrast this with the Due Process Clause, where contemporaneous understandings of "historical practices" or "the law of the land" determine the content of due process (with, presumably, a post-adoption continuation of such practices confirming that original content). With due process, traditional practices straightforwardly project meaning into the Constitution, providing a stand-alone reason for invalidating a counter-traditional law.[165] By contrast, with freedom of speech, traditional practices shed light on original meaning, but do not determine it.[166] There is, by definition, a core of original meaning that tradition could not contradict. This is not to say that traditional practices could not, under the Free Speech Clause, provide an independent reason for invalidating a law. Scalia never denies that, and the possibility is implicit in *McIntyre*. But, in practice, Scalia would be less likely to use tradition in this way under the Free Speech Clause than he would under the Due Process Clause.[167] Scalia's *McIntyre* dissent in particular reveals the implicit obstacles to using tradition as its own justification for invalidating a law.[168] There, tradition appears better adapted to mapping out areas committed to resolution by ordinary political processes than to projecting judicially enforceable content into the Constitution. This aspect of Scalia's traditionalism will be crucial when considering his use of tradition to interpret another textually ambiguous clause in the First Amendment—the Establishment Clause. It will also answer whether Scalia's critics have fairly censured him for projecting an exclusive preference for monotheism into the Establishment Clause.

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[163] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 377–78 (1995) (Scalia, J., dissenting) (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

[164] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 898, 1000 (1992) (Scalia, J., concurring and dissenting); *see also supra* note 98 and accompanying text.

[165] Schad v. Arizona, 501 U.S. 624, 650 (1991) (Scalia, J., dissenting).

[166] *McIntyre*, 514 U.S. at 378 (Scalia, J., dissenting).

[167] Moreover, as noted, even in the due process area, divergence from historical practices does not result in automatic invalidation. *See supra* notes 140–159 and accompanying text.

[168] *See McIntyre*, 514 U.S. at 371–78; *see also supra* notes 147–148 and accompanying text.

III. THE DISSENT AND THE CRITICS: IS SCALIA A MONOTHEISTIC ACTIVIST?

Having placed Scalia's dissent in its larger jurisprudential context, we can now ask whether his critics hit home. Criticisms of his dissent come from Souter's and Stevens's direct replies to Scalia in *McCreary County*[169] and *Van Orden*,[170] and also from legal scholars.[171] To judge from the critics' tone, something more is at stake than the resolution of a doctrinal issue. Souter's majority opinion in *McCreary County* deems Scalia's dissent "a surprise," delivering the "remarkable view" that "government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should certainly trouble anyone who prizes religious liberty."[172] Souter invokes the "St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts" as specters of religious violence counseling modern respect for the principle of neutrality.[173] Stevens's *Van Orden* dissent accuses Scalia of "marginalizing the belief systems of more than 7 million Americans by deeming them unworthy of the special protections he offers monotheists under the Establishment Clause."[174] Among academic commentators, the most prominent rejoinders to Scalia thus far up the ante. Professor Jack Balkin characterizes Scalia's Establishment Clause as only "requir[ing] neutrality among *monotheistic religions that believe in a personal God who cares about and who intervenes in the affairs of humankind*, and in particular, among Christianity (and its various sects), Judaism, and Islam."[175] Professor Thomas Colby believes that Scalia's dissent may portend "a wholesale rethinking of the constitutional relationship between church and state,"[176] and that it launches "an all-out assault on the venerable principle of neutrality, the constitutional foundation upon which both liberals and conservatives alike had stood steadfast for generations."[177] Colby goes further, warning that Scalia's approach would "represent the single greatest sea change in the history of the Establishment Clause,"[178] and even that it "would represent a complete rethinking of the very nature of our country—of the role that religion plays in government, and of the rights of religious minorities."[179] Are these criticisms overstated? Are they wrong? This Part addresses those questions. As will be explained, such criticisms boil down to the notion that Scalia would violently overturn the bedrock principle of neutrality in Establishment Clause

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[169] McCreary County v. ACLU, 545 U.S. 844, at 850–81 (2005).

[170] Van Orden v. Perry, 545 U.S. 677, 707–36 (2005) (Stevens, J., dissenting).

[171] *See, e.g.*, *infra* notes 175–179 and accompanying text.

[172] *McCreary County*, 545 U.S. at 879–80.

[173] *Id.* at 881.

[174] *Van Orden*, 545 U.S. at 719 n.18 (Stevens, J., dissenting).

[175] *See* Posting of Jack Balkin to Balkinization Blog, Justice Scalia Puts His Cards on the Table, http://balkin.blogspot.com/2005/06/justice-scalia-puts-his-cards-on-table.html (June 27, 2005, 12:53 EST).

[176] Colby, *supra* note 4, at 1098.

[177] *Id.* at 1105.

[178] *Id.* at 1113.

[179] *Id.* at 1121.

jurisprudence, and replace it with a principle that exclusively favors monotheistic religions. The particular instrument Scalia would use to inaugurate this revolution is tradition. Having explored Scalia's use of tradition in the previous section, this Part can now ask whether that is in fact what Scalia is attempting to do.

There are two interlocking parts to the overall criticism of Scalia's dissent. First is his "rejection" of a broad neutrality principle and his substitution (at least in the area of government religious acknowledgments) of a preference for monotheistic religions. The second part is more important, but a word needs to be said about the first. It is simply overstated to say that Establishment Clause jurisprudence has always operated under a consistent, overarching principle of neutrality, and that Scalia "would cast that decades-old cardinal understanding aside in one fell swoop."[180] It is more accurate to say that the Court has consistently paid lip-service to various formulations of neutrality, but has had to constantly adjust, refine, or even jettison the principle in certain areas of its Establishment Clause jurisprudence.[181] The inherent difficulties in the concept of neutrality have led Professor Frank Ravitch, a noted Religion Clause scholar, to conclude that "neutrality, whether formal or substantive, does not exist."[182] Nowhere is the gulf between neutrality and actual practice more palpable than with

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[180] *Id.* at 1113.

[181] On neutrality and its variations in Religion Clause jurisprudence, see Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 8–24 (2000) (describing development of the neutrality doctrine); Carl H. Esbeck, *A Constitutional Case for Government Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 20–39 (1997) (same); Patrick M. Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 3–15 (2005) (same); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 46–73 (1997) (describing the "no-aid" and "nondiscrimination" versions of neutrality, but arguing that the essential goal of both separation and neutrality is the "goal of minimizing government influence on religious choices"); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 65–72 (2002) (describing development of the neutrality doctrine); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 237–46 (1994) (describing abandonment of strict separationism for "some version of religious neutrality, or equal religious liberty").

[182] Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 492 (2004). Professor Ravitch reasons that "[c]laims of neutrality cannot be proven" because "[t]here is no independent neutral truth or baseline to which they can be tethered." *Id.* at 493. Therefore, "any baseline to which we attach neutrality is not neutral; claims of neutrality built on these baselines are by their nature not neutral." *Id.* Ravitch echoes Professor Steven Smith's provocative thesis that "the quest for neutrality . . . is an attempt to grasp at an illusion." STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 96 (2005); *see also* STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 103–15 (2001) (critiquing the neutrality principle).

government religious symbolism.[183] Professor Ira Lupu correctly observes that "government-sponsored religious messages can never achieve the status of neutrality among religions,"[184] presumably meaning that all religious symbols are unconstitutional and rigorous adherence to neutrality would make religious symbolism cases easy. However, the "endorsement" test the Court has settled on for these cases is, far from being a neutrality-based standard, one that is inherently non-neutral in that it focuses on the perceptions of exclusion felt by religious "outsiders."[185] As Judge McConnell observes, "there is no 'neutral' position, outside the culture, from which to make this assessment."[186] The sheer existence of the endorsement test in religious symbolism cases—one that appears to be

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[183] On the relationship of the Court's approach to government religious symbolism and the neutrality principle, see generally Robin Charlow, *The Elusive Meaning of Religious Equality*, 83 WASH. U. L.Q. 1529, 1561 & n.130 (2005) (suggesting that the Court simply avoids applying the neutrality principle in religious symbolism cases); Steven G. Gey, *"Under God," the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1880–84 (2003) (arguing that the inclusion of the phrase "under God" in the Pledge is not trivial and therefore unconstitutional); Kenneth Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 55 SUP. CT. REV. 357, 376–402 (2003) (equating Justice O'Connor's concern with exclusion felt from government religious symbols with a concern for racial equality); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 177 (2004) ("[T]he right to religious liberty is a right to government neutrality. That is why litigants can object to government-sponsored religious symbols even though plaintiffs in such cases are not 'unduly burdened.'"); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1049–51 (1986) (arguing that government neutrality toward religion can be achieved through application of Justice O'Connor's "advance or inhibit" test); Ira C. Lupu, *Government Messages and Government Money:* Santa Fe, Mitchell v. Helms, *and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 816 (2001) ("[G]overnment-sponsored religious messages can never achieve the status of neutrality among religions."); Toni M. Massaro, *Religious Freedom and "Accommodationist Neutrality": A Non-Neutral Critique*, 84 OR. L. REV. 935, 949–63 (2005) (discussing incompatibility between neutrality and government use of religious symbols); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 147–57, 148 (1992) (criticizing the "endorsement test" used for religious symbolism cases and remarking that "[w]hether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no 'neutral' position, outside the culture, from which to make this assessment"); Gabriel A. Moens, *The Menace of Neutrality in Religion*, 2004 BYU L. REV. 535, 574 (arguing that the neutrality principle should be rejected because it "fails to achieve true nutrality and often trivializes religion's role in public life"); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1844–48 (2004) (advocating a decentralized approach to the Religion clauses).

[184] Lupu, *supra* note 183, at 816.

[185] *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 598–602 (1989); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

[186] McConnell, *supra* note 183, at 148.

bleeding into other areas[187]—is itself a refutation of the claim that the Establishment Clause lives under an all-encompassing regime of neutrality. Of course, these dissonances were present at the inception of the Court's modern jurisprudence. In *Everson*, the Court invoked a sweeping formulation of neutrality,[188] but then immediately pared it back to resolve a parochial school funding issue without falling into complete contradiction.[189] The *Everson* majority's refusal to extend absolute neutrality to its logical separationist end-point provoked the dissent to accuse it of subverting neutrality altogether.[190] This was the thrust of Justice Jackson's famous quip that the Court, like Lord Byron's Julia, "whispering 'I will ne'er consent,'—consented."[191]

It is, in short, untenable to claim that "[b]efore Justice Scalia's opinion, virtually everyone was operating within the neutrality paradigm,"[192] without dropping a telling footnote that describes the deep academic and judicial disagreements about the utility of neutrality—in other words, to what extent neutrality is "inadequate, manipulable, incapable of deciding hard cases, or even incoherent."[193] This explains why the Court itself has had to soften neutrality with

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[187] *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 860 (2005) (reasoning that "[b]y showing a purpose to favor religion, the government 'sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members'" (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) (internal quotation marks omitted))).

[188] *See* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (reasoning that the Establishment Clause means, inter alia, that "[n]either [state nor federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another," and that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions").

[189] *See id.* at 17 ("[W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools."). As Professor Keith Werhan observes, "*Everson*'s easy statement of the neutrality principle disguised its enduring difficulty, for the principle has proven far easier to state than to apply in contested cases. *Everson* itself serves as an example." Keith Werhan, *Navigating the New Neutrality: School Vouchers, the Pledge, and the Limits of a Purposive Establishment Clause*, 41 BRANDEIS L.J. 603, 604 (2003).

[190] *See* 330 U.S. at 58–59 (Rutledge, J., dissenting) (arguing that the policy excluding children in religious schools from participation in transportation reimbursements "entails hardship . . . [b]ut it does not make the state *unneutral* to withhold what the Constitution forbids it to give. On the contrary it is only by observing the prohibition rigidly that the state can maintain its *neutrality* and avoid partisanship in the dissensions inevitable when sect opposes sect over demands for public moneys to further religious education, teaching or training in any form or degree, directly or indirectly." (emphases added)).

[191] *Id.* at 19 (Jackson, J., dissenting).

[192] Colby, *supra* note 4, at 1113.

[193] *Id.* at 1113 & n.54 (noting "that the neutrality paradigm is, of course, no panacea" and that "neutrality means different things to different people, and there has been a great

formulations such as "benevolent neutrality,"[194] which critics quickly labeled a counterfeit of genuine neutrality. This also explains why prominent Religion Clause scholars, such as Professors Douglas Laycock and Frank Ravitch, have felt impelled to construct refinements such as "substantive neutrality" or "facilitation" tests.[195] Perhaps most tellingly, this is why the opposing sides in the most prominent anti-establishment case in a decade—the school voucher case, *Zelman v. Swimmon-Harris*—were worlds apart on the outcome, while both claiming the mantle of neutrality.[196] No one will likely say it better than Professor Laycock: "Those who think neutrality is meaningless have a point. We can agree on the principle of neutrality without having agreed on anything at all."[197]

What Scalia is proposing to do with neutrality is entirely predictable. There is nothing revolutionary about it. Scalia is simply unwilling to allow abstract jurisprudential guideposts to override long-established public practices, especially where constitutional text or precedent does not clearly invalidate them. As he explained in *Rutan*, "a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic . . . is not to be laid on the

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deal of discussion among academics and judges about the extent to which it is inadequate, manipulable, incapable of deciding hard cases, or even incoherent").

[194] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (observing that "[t]he course of constitutional neutrality in this area cannot be an absolutely straight line" and that "[s]hort of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference"); *id.* at 711 (Douglas, J., dissenting) ("The [property tax] exemptions provided here insofar as welfare projects are concerned may have the ring of neutrality. But subsidies either through direct grant or tax exemption for sectarian causes, whether carried on by church *qua* church or by church *qua* welfare agency, must be treated differently, lest we in time allow the church *qua* church to be on the public payroll, which, I fear, is imminent.").

[195] *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990) (proposing as "substantive neutrality" the principle that "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance"). *See generally* Ravitch, *supra* note 182, at 504–06, 544–49 (critiquing Laycock's formulation of neutrality as valuable but non-neutral and proposing a related "facilitation test").

[196] *Compare* 536 U.S. 639, 653 (2002) (approving the Ohio voucher program because it is "neutral in all respects toward religion"), *with id.* at 688, 696–98 (Souter, J., dissenting) (arguing that the majority has "ignor[ed] the meaning of neutrality and private choice themselves" in order to validate the voucher scheme, and describing his understanding of neutrality). *See also* Ravitch, *supra* note 182, at 506–07, 513–23 (describing the difficulty with applying neutrality in *Zelman*). Tellingly, Justice Souter begins his dissent in *Zelman* by quoting the absolutist "no tax" language in *Everson*, claiming that "[t]he Court has never in so many words repudiated this statement," and concluding that "[i]t is only by ignoring *Everson* that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law." *Zelman*, 536 U.S. at 686–88 (Souter, J., dissenting).

[197] Laycock, *supra* note 195, at 994.

examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court."[198] To the contrary, the order of priority is the reverse: public practices reflecting a persistent, widespread common understanding of constitutional guarantees are themselves the raw material for the Court's principles of adjudication—the "very points of reference by which the legitimacy or illegitimacy of *other* practices are to be figured out."[199] Judge McConnell captures this distinction when he explains that the "moral philosophic approach" to constitutional interpretation of a jurist like Souter "is deductive and theoretical, deriving specific prescriptions from more general theoretical propositions," whereas the "traditionalist approach" of a jurist like Scalia "is inductive and experiential . . . , reason[ing] up from concrete cases and circumstances."[200] Thus, Scalia's core disagreement with his critics is not primarily over the relative importance of neutrality as an Establishment Clause principle, but really over the function of any such overarching principle in constitutional methodology. Scalia reads such abstract principles against the available background of relevant tradition, and not (as Souter and Stevens do) the other way around.

This different interpretative methodology explains another aspect of Scalia's dissent that has drawn sharp criticism. In his dissent, Scalia admits that some form of neutrality is "indeed a valid principle where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue."[201] Critics have asked why Scalia accepts neutrality as valid in these areas, but would discard it in the area of governmental religious symbolism. Indeed, why not jettison neutrality across the board, ask the critics, and allow government to channel funds selectively to favored monotheistic religions?[202] This criticism confuses Scalia's approach with Souter's and Stevens's, which read neutrality as an overarching theoretical command of the Establishment Clause. Scalia, by contrast, shapes the principles of Establishment Clause adjudication around the intelligible contours of long-accepted public practices. Scalia does not elaborate in *McCreary County* why this approach might lead to accepting neutrality in one area and not in another, but it is not difficult to imagine why. As to public funding of religion, our nation's common understanding of the evils of religious establishments was shaped significantly by eighteenth-century controversies over compelled funding of

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[198] Rutan v. Republican Party of Ill., 497 U.S. 62, 95–96 (1990) (Scalia, J., dissenting); *see also* United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) ("[W]hatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts.").

[199] *Rutan*, 497 U.S. at 96 (Scalia, J., dissenting); *see supra* note 96 and accompanying text.

[200] McConnell, *supra* note 93, at 672.

[201] McCreary County v. ACLU, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) (citing *Zelman*, 536 U.S. at 652; *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532–33 (1993); *id.* at 557–58 (Scalia, J., concurring)).

[202] *See, e.g.*, Colby, *supra* note 4, at 1112.

churches and nineteenth-century controversies over funding of religious schools.[203] Whether we have drawn the correct constitutional lessons from these controversies is open to serious question, but it is evident why the historical record might lead a traditionalist like Scalia to infer some principle of evenhandedness for religious funding issues. The same can be said, even more forcefully, for free exercise principles and neutrality. The historical record shows that the Free Exercise Clause was understood, at the very least, to ban laws that were explicitly non-neutral with regard to religious belief and practice.[204] The only controversy in that area is whether free exercise also impacts laws that simply have a disparate impact on religion.[205] One can choose to explain Scalia's differing approach to these discrete areas as mere hypocrisy. A fairer explanation—fairer because it takes into account Scalia's overall methodology—is that Scalia draws a different lesson from our public traditions of religious acknowledgement. Because the neutrality principle falsifies those traditions, it cannot override them.

The core of the case against Scalia concerns how he would allegedly use traditions of religious acknowledgment. Scalia, it is said, would not merely deploy those traditions negatively but positively.[206] He would embed in the Establishment Clause a preference for religious acknowledgments of a certain theological stripe, thereby excluding recognition of other forms of religion. According to the critics, Scalia would derive the theological content of this tradition from Framers' expectations about what "religion" they meant to enshrine in the Establishment

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[203] *See, e.g.*, Laycock, *supra* note 181, at 48–50 (observing that "[f]inancing of churches was the central church-state issue of the 1780s, and was the immediate background to the adoption of the Establishment Clause in 1791," and that "[t]he other great controversy that gave prominence to the no-funding principle was the nineteenth century dispute over common schools").

[204] *See, e.g.*, Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1108, 1114 (1994) (explaining that the original Free Exercise Clause "[a]t most . . . prevented the federal government from passing laws targeting religion *qua* religion" and that "even if the [Clause] could be read as an expression of individual rights, it would prohibit only those laws that directly targeted religion"); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1418 (1990) (explaining that one view of the Free Exercise Clause, at its core, forbids laws that directly target religious conduct for unfavorable treatment).

[205] *Compare* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1137–41 (1990) ("[W] hen . . . regulations [and laws] . . . *do* have a substantial impact on the press or on religion, they raise a serious claim for exemption."), *with* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 917–47 (1992) ("Americans did not, however, authorize or acknowledge a general constitutional right of religious exemption from civil laws.").

[206] *See supra* notes 104–09, 128–33 and accompanying text (distinguishing negative and positive uses of tradition in Scalia's jurisprudence).

Clause.[207] For instance, on Souter's reading, "[Scalia's] dissent says that the deity the Framers had in mind was the God of monotheism."[208] Stevens agrees, but adds that Scalia has misconstrued the historical record. The material Scalia reads as giving "specially preferred constitutional status to all monotheistic religions" would "just as strongly support[] a preference for Christianity."[209] Stevens claims that "many of the Framers understood the word 'religion' in the Establishment Clause to encompass only the various sects of Christianity."[210] Professor Colby advances this case even more forcefully: Scalia's Establishment Clause would "permit[] the government . . . , in the context of governmental religious expression, to favor Judeo-Christian monotheism over all other religions (but not vice versa)."[211] Scalia's mishandling of tradition would mean, he claims, that "biblical monotheism is now, has always been, and will always be, the favored religion of the United States Constitution."[212]

These criticisms were not snatched from thin air. There are a few passages in Scalia's dissent that, if read out of context and divorced from Scalia's interpretative methodology and overall jurisprudence, might support the critics' reading.[213] But properly assessing the tail requires taking account of the dog. Scalia's general approach to using tradition in constitutional interpretation, as described above, is incompatible with the view that, in *McCreary*, he would use tradition to embed a particular and exclusive theological content in the Establishment Clause. Scalia's traditionalism is far better adapted to negative uses—ruling that constitutional guarantees do not extend to certain practices—than to the positive use of providing independent reasons for finding practices unconstitutional. Tradition is for Scalia a backstop, not a plan for action. Indeed, the typical criticisms of Scalia's traditionalism lament that he defers too much to majorities and refuses to deploy tradition as an evolving standard for ongoing judicial enforcement.[214] There is, in short, a critical difference in Scalia's

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[207] *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 877 (2005); Van Orden v. Perry, 545 U.S. 677, 728–29 (2005) (Stevens, J., dissenting).

[208] *McCreary County*, 545 U.S. at 879.

[209] *Van Orden*, 545 U.S. at 729 (Stevens, J., dissenting).

[210] *Id.* at 726.

[211] Colby, *supra* note 4, at 1098.

[212] *Id.*

[213] *See infra* notes 58–69 and accompanying text.

[214] *See, e.g.*, Balkin, *supra* note 93, at 1620 (claiming that through his use of tradition in *Michael H.*, "Justice Scalia tried to write 1950's white middle class theories of the family into the Constitution—thus establishing the hegemony of Ozzie and Harriet, if you will"); Brown, *supra* note 93, at 202 (characterizing Scalia's use of tradition as "a thinly-veiled effort to cut off all possibility of progressive interpretation of the past"); Strauss, *supra* note 93, at 1708 (observing that "Justice Scalia's traditionalism . . . is highly majoritarian" and consequently, "[u]nless the Constitution is clear, a majority can make any practice constitutional just by sustaining it for a time"); Zlotnick, *supra* note 79, at 1394 ("[L]ike his semantic textualism, Scalia's 'historical practices' approach more often results in no protection for a modern practice, either because that practice was condemned under the religious or moral precepts of that earlier time, or because the modern situation

methodology between saying, "tradition means the government may elect to do, or not do, this," and saying, "tradition alone means the government may never do this." The critics of Scalia's Ten Commandments dissent have cast him as a jurist looking to tradition for the power to strike down laws, but the role sits uncomfortably on his shoulders.[215]

Due process is where tradition is best situated to provide Scalia a stand-alone reason for finding a current practice unconstitutional.[216] Settled historical usages define what process is "due," and thus a modern practice, opposed to historical practices, cries out for invalidation. Even here, Scalia would not use tradition automatically to invalidate every practice that diverges from the traditional baseline. Recall Scalia's own formulation of his due process analysis: "If the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it does not necessarily *deny* due process."[217]

What if this paradigm were applied to Scalia's use of tradition to interpret the Establishment Clause? This would require an assumption contrary to the fact that the Establishment Clause interacts with traditional practices exactly as the Due Process Clause does—in other words, that historically settled usage alone *defines* the content of the Establishment Clause. But, for purposes of argument, transposing Scalia's due process traditionalism would result in this analysis of a religious symbolism case under the Establishment Clause: "If the government chooses to *follow* a historically approved [practice of religious acknowledgment], it necessarily [acts in conformity with the Establishment Clause], but if it chooses to *depart* from historical practice, it does not necessarily [violate the Establishment Clause.]"[218]

So, even supposing that the Establishment Clause is the empty vessel for tradition that the Due Process Clause is, Scalia would still refrain from using tradition to capture and freeze the meaning of the Establishment Clause. "Historically approved practices"—in this case a particular tradition of government religious acknowledgments—would provide a backdrop for the reach of the Establishment Clause, but the character of historical acknowledgments would not capture the Establishment Clause in its entirety. Any divergence from our traditions of religious acknowledgement would not mean automatic invalidation. Nor would Scalia's use of tradition necessarily prohibit today's majorities from

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was unknown to the Framers." (footnotes omitted)); *id.* at 1397 ("Scalia's threshold for departing from originalism is so high that, while theoretically possible, its conditions rarely, if ever, will occur."); *cf.* McConnell, *supra* note 93, at 672 (describing a traditionalism like Scalia's as "allow[ing] the democratic, decentralized institutions of the country to continue to ponder the issue, and to adapt to changing mores and national experience," and as "leav[ing] social change and experimentation to the political branches").

[215] *See supra* notes 175-79 and accompanying text.

[216] *See supra* notes 132–133 and accompanying text.

[217] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 31–32 (1991) (Scalia, J., concurring).

[218] *Id.*

altering our practices of government religious acknowledgment. As Judge McConnell explained, such a traditionalism would, to the contrary, "allow the democratic, decentralized institutions of the country to continue to ponder the issue, and to adapt to changing mores and national experience," and would "leave[] social change and experimentation to the political branches."[219]

It is true that, on this view, historical practices alone could theoretically justify striking down a contrary modern practice or religious acknowledgments. If historical practices set a baseline, it follows that some modern practices might fall below it. But how likely is it that Scalia's traditionalism will result in striking down a modern practice? After all, even in due process, Scalia adopts the view that, simply because a current practice lacks "the sanction of settled usage[,] . . . it by no means follows that nothing else can be due process of law."[220] Thus, while departing from historical practices could deny due process, "by no means" does every departure *automatically* deny it.[221] The likelihood that tradition alone will invalidate a law becomes clearer when we consider Scalia's use of tradition outside the context of due process.

Scalia treats the Establishment Clause like the Free Speech Clause, as a constitutional provision that, while not reducible to historical practices, nonetheless benefits from historical clarification.[222] The upshot is that First Amendment traditions are even less likely than due process traditions to justify, on their own strength, striking down laws. Religious and speech traditions are better adapted to negative and restraining uses, merely clarifying the limits of constitutional guarantees.[223] This becomes evident, as already seen, in Scalia's *McIntyre* dissent.[224] There, to justify invalidating modern election disclosure requirements based on tradition alone, Scalia would have required far more than the mere absence of similar laws during the founding era, and even more than the founding-era prevalence of ostensibly contrary practices (such as anonymous

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[219] McConnell, *supra* note 93, at 672.

[220] *Haslip*, 499 U.S. at 31 (Scalia, J., concurring) (quoting Hurtado v. California, 110 U.S. 516, 528 (1884)).

[221] *Id.* at 31–32.

[222] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 632–33 (1991) (Scalia, J., dissenting) (stating that history illuminates how the Framers thought the Establishment Clause should apply to contemporaneous practices and that a practice existing at that time should be viewed with importance in interpreting the Establishment Clause (citing Marsh v. Chambers, 463 U.S. 783, 790 (1983); Walz v. Tax Comm'n, 397 U.S. 664, 681 (1970) (Brennan, J., concurring))).

[223] *See, e.g.*, Zlotnick, *supra* note 79, at 1394 (observing that while "Scalia's originalism sometimes defends a historic practice now under attack," his approach "more often results in no protection for a modern practice"). Of course, by "no protection for a modern practice," Professor Zlotnick could have just as easily said "a limitation on a constitutional guarantee that shows the Constitution neither forbids nor denies the modern practice." Whatever the verbal formulation, the bottom line is that Scalia's traditionalism is better adapted to saying what practices the Constitution defers to representative bodies, than to saying what practices the Constitution categorically forbids (or requires).

[224] *See supra* notes 98–99 and accompanying text.

electioneering).[225] Instead, Scalia would have demanded that the "nonexistence [of election disclosure laws] clearly be attributed to constitutional objections."[226] This erects a high barrier against using tradition alone to invalidate laws under the Free Speech Clause. The historical absence of a governmental practice—or the existence of different practices—does not imply, in and of itself, that the Constitution was understood to forbid the practice.[227] Rather, Scalia would require evidence clearly showing a practice was not engaged in because of a common understanding that it was unconstitutional.[228] Not engaging in the practice—or, again, engaging in different practices—because of political calculus, personal preferences, or because the kinds of lawmaking at issue had not occurred to anyone at the time,[229] would not merit the inference of a constitutional understanding about the practice. This leads Professors Pritchard and Zywicki to deem Scalia's traditionalism a "one-way ratchet"—that is, a method that tends to use tradition negatively (to say what practices ambiguous constitutional guarantees do not restrain) and not positively (to say what practices ambiguous constitutional guarantees forbid).[230]

Can one understand Scalia's use of tradition in *McCreary County* as an application of these general principles? There is a strong case for answering yes. First, notice how Scalia frames the basic legal issue when he concludes that "[h]istorical practices . . . demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion."[231] This narrow formulation suggests a correspondingly narrow (and negative) use of

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[225] *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 374 (1995) (Scalia, J., dissenting) (arguing that Justice Thomas's concurrence "recounts other pre- and post-Revolution examples of defense of anonymity in the name of 'freedom of the press,' but not a single one involves the context of restrictions imposed in connection with a free, democratic election, which is all that is at issue here"); *id.* (characterizing "the sum total of the historical evidence marshaled by the concurrence for the principle of *constitutional entitlement* to anonymous electioneering" as "partisan claims in the debate on ratification (which was *almost* like an election) that a viewpoint-based restriction on anonymity by newspaper editors violates freedom of speech").

[226] *Id.* at 375.

[227] *Id.* at 374.

[228] *See id.* at 375 (noting that the nonexistence of a tradition of government prohibition of anonymous electioneering could not be "clearly attributed to constitutional objections").

[229] *See id.* at 374 (observing that "[t]he issue of a governmental prohibition upon anonymous electioneering in particular . . . simply never arose," given that "[t]he idea of close government regulation of the electoral process is a more modern phenomenon, arriving in this country in the late 1800's").

[230] *See* Pritchard & Zywicki, *supra* note 91, at 424–25.

[231] McCreary County v. ACLU, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting). Later, Scalia restates this point as "[i]nvocation of God despite [non-monotheistic Americans'] beliefs is permitted not because nonmonotheistic religions cease to be recognized by the religion clauses of the First Amendment, but because governmental invocation of God is not an establishment." *Id.* at 899–900.

tradition. Saying that "the acknowledgment of a single Creator"[232] or "governmental invocation of God"[233] is "not an establishment"[234] (or "distant" from an establishment) confines Scalia's conclusion to the case at hand. It suggests he is deploying "historical practices" merely as a baseline for comparison with the Ten Commandments displays, and not as a vehicle to define the Establishment Clause exhaustively. Scalia constructs a public record of monotheistic religious acknowledgments as a reference point for evaluating monotheistic displays.[235] Nevertheless, saying that these displays fall within our settled public practices of religious acknowledgments is a far cry from saying that those settled public practices exhaustively define and prospectively delimit all that the Establishment Clause would ever allow. To do so, as Scalia has remarked in the due process context, would "stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians."[236]

Second, Scalia's treatment of neutrality sheds light on what he is doing with tradition. In the Religion Clauses as elsewhere, Scalia subordinates constitutional theory to settled usages that reflect a common understanding of constitutional guarantees.[237] Scalia thus refuses to deploy "neutrality" to strike down governmental religious symbolism that falls within tradition. This is why Scalia reasons that neutrality between religions must "necessarily appl[y] in a more limited sense to public acknowledgment of the Creator."[238] Scalia has identified a settled public practice of acknowledging God, and he does not accept that a "neutrality" principle latent in the Establishment Clause must now scour that practice from public life.[239] Scalia recognizes that even the blandest invocation of "God" or "the Almighty" necessarily violates neutrality with respect to atheists or polytheists, but this supports rather than undermines his resolve not to use neutrality in a blunt fashion.[240] Importantly, he speaks of "monotheists" versus "atheists and polytheists" simply because he has already characterized the Ten Commandments display as plainly monotheistic.[241] It is only in that sense that

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[232] *Id.* at 894.

[233] *Id.* at 900.

[234] *Id.*

[235] *See id.* at 894 ("Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God.").

[236] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 31 (1991) (Scalia, J., concurring) (quoting Hurtado v. California, 110 U.S. 516, 528 (1884)); *see supra* notes 140–148 and accompanying text.

[237] *See supra* notes 73–77 and accompanying text. As Scalia remarks in his *Lee v. Weisman* dissent, "[o]ur Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions." 505 U.S. 577, 644 (1991) (Scalia, J., dissenting).

[238] *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).

[239] *Id.*

[240] *Id.*

[241] *See supra* notes 52–56 and accompanying text.

Scalia then claims that "the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."[242] However, Scalia speaks only in terms of what the Establishment Clause permits, and not in terms of what it commands. His rhetoric is equally compatible with the conclusion that, in a case concerning different religious symbolism, the Establishment Clause would also "permit" the "disregard" of devout monotheists in favor of polytheists or atheists. It does not follow from Scalia's statements that he is projecting an exclusively monotheistic tradition into the Establishment Clause. Taking Scalia's tart rhetoric out of context makes for effective sound-bites, but it does not do justice to what Scalia is saying.[243]

Third, Scalia's characterization of the Ten Commandments displays as simply "acknowledg[ing] a single Creator"[244] clarifies his focus on monotheism. Monotheism turns out to be crucial to Scalia's dissent, but not for the reasons his critics believe. Of course, Scalia's understanding of the display as a "monotheistic acknowledgment" usefully allows him to place it within *Marsh*'s "tolerable acknowledgment of beliefs widely held among the people of this country."[245] However, that characterization also has implications for tradition. For if the question is whether a monotheistic acknowledgement violates our traditions, then

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[242] *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).

[243] It does even less justice to Scalia's point to change the quotation from "the Establishment Clause permits *this* disregard of polytheists, [etc.]," *id.* at 893 (emphasis added), to "the Establishment Clause permits *th[e]* disregard of polytheists," Colby, *supra* note 4, at 1109 (emphases added) (alteration in original). The two statements have strikingly different implications. The actual quotation suggests that the Establishment Clause permits a limited form of "disregard" for non-monotheistic sensibilities, while recognizing an entire panoply of constitutional "regard" for non-monotheists in other contexts. The altered quote suggests that Scalia thinks the Establishment Clause permits majorities to ride roughshod over non-monotheists' rights in any context. Because Scalia's "choice of words here (and throughout his dissent) is important," Colby, *supra* note 4, at 1109, it bears noting that, later in his dissent, Scalia explicitly *rejects* the notion that "non-monotheistic religions cease to be religions recognized by the religion clauses of the First Amendment," *McCreary County*, 545 U.S. at 899–900 (Scalia, J., dissenting).

[244] *McCreary County*, 545 U.S. at 894 (Scalia, J., dissenting).

[245] *Id.* at 892, 894 (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)). Incidentally, Scalia's statements that "[t]he three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic" and also "believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life," *id.* at 894, are made with direct reference to the quoted statement in *Marsh*. In other words, Scalia uses statistics to locate the displays within *Marsh*'s "tolerable acknowledgement of beliefs widely held among the people of this country." *Id.* at 892, 894. Scalia is simply not making an argument, as critics claim, that grounds the displays' constitutionality on some vague standard of "inclusiveness," and it consequently falls flat to level the accusation that "[i]n claiming inclusiveness, Justice Scalia is simply glossing over [atheists or Buddhists or Wiccans], as if they do not exist at all," Colby, *supra* note 4, at 1118.

it makes sense to compare apples to apples and ask whether we have in fact historically engaged in analogously monotheistic public utterances. To answer yes, based on evidence such as presidential inaugural addresses and public mottoes, is not the same thing as saying: "A theology of monotheism is written into the Establishment Clause." It is also different from saying, "Religious acknowledgments that deviate from a generalized monotheism automatically violate the Establishment Clause." Admittedly, Scalia never spells any of this out, but he does drop a footnote giving a specific example of how a Ten Commandments display would violate the Establishment Clause.[246] Scalia explains that the Establishment Clause "would prohibit . . . governmental endorsement of a particular version of the Decalogue as authoritative."[247] It is telling that, when pressed to identify an actual constitutional violation, Scalia does not alter the theological content of the religious display (saying, for instance, "If the government displayed the Sermon on the Mount or a passage from the Qur'an, *that* would violate the Clause"), but instead changes the use the government makes of the display. The Establishment Clause is violated, not by one theological content over another, but by a governmental deployment of text that ventures into the core of historical religious establishments: official promulgation of doctrine.[248]

Fourth, and most importantly, Scalia's approach to tradition explains how he treats the historical record of public religious acknowledgments. Tradition for Scalia, it must be recalled, is an adjunct to original meaning. Scalia, of course, rejects using original intent in both constitutional and statutory interpretation. He refuses to plumb the private motives or expectations of Framers, and instead seeks the public, commonly held understanding of constitutional guarantees contemporaneous with their drafting, promulgation, and ratification.[249] Historical practices, whether contemporaneous or post-adoption, aid Scalia only insofar as they clarify that original, public understanding of the constitutional guarantee. Consequently, when using tradition to interpret the Constitution, Scalia tries to reconstruct a record of public practices from which to infer a common understanding about the reach of constitutional guarantees. The important axiom is that Scalia is not using tradition to discern the Framers' original intent behind the Establishment Clause, whether that intent is characterized as what "religion" the Framers "had in mind" when drafting the Religion Clauses, what forms of Christianity the Framers adhered to or hoped to benefit through the Religion Clauses, or what Framers privately thought about government use of religious language.

Scalia's critics have failed to make this critical distinction between original meaning and original intent. For instance, Souter and Stevens criticize Scalia for a

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[246] *See McCreary County*, 545 U.S. at 894 n.4 (Scalia, J., dissenting).

[247] *Id.*

[248] *See, e.g.*, McConnell, *supra* note 39, at 2131–36 (describing as a central element of the founding-era understanding of an establishment of religion the government's "control over doctrine and liturgy").

[249] *See supra* notes 96–103 and accompanying text.

treatment of the historical record selectively privileging monotheistic utterances and ignoring the Framers' tacit preferences for either Christianity or Deism.[250] Professor Colby likewise accuses Scalia of making a "hash" of history by "selectively drawing upon the historical record to give the appearance of a historical consensus that did not exist"—specifically, by ignoring certain Framers' reservations about government religious language and glossing over explicitly Christian content in some founding-era practices.[251] These criticisms simply fail to address what Scalia, according to his own methodology, is doing with the historical record. Because Scalia is not using tradition to discover original intent, it is irrelevant whether Framers like Madison or Jefferson had private or idiosyncratic reservations about using public religious language. From the viewpoint of original meaning, the important point is that critics can point to precious little public disagreement about the common official deployment of religious utterances.[252]

It is one thing to claim there was "a dispute and outcry among the framing generation" about government religious language, but it is another thing to support that claim with public evidence.[253] The kind of "dispute and outcry" that would

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[250] *See, e.g.*, *McCreary County*, 545 U.S. at 876–81; Van Orden v. Perry, 545 U.S. 677, 724–29 (2005) (Stevens, J., dissenting).

[251] Colby, *supra* note 4, at 1127 & n.120.

[252] *Id.* at 1128. For instance, it is telling that in the 1822 letter of Madison to Edward Livingston—often cited to show a divergence of founding-era opinion on the constitutionality of executive thanksgiving proclamations—Madison admits that "[w]hilst I was honored with the Executive Trust I found it necessary on more than one occasion to follow the example of predecessors" in making such proclamations. *Id.* at 1128 & n.123 (citing Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 105, 105 (Philip B. Kurland & Ralph Lerner eds., 1987)). Madison adds, in his own defense, that he "was always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory." *Id.* In other words, the very evidence showing Madison's private opinion about his actions as President demonstrates, given Madison's inconsistent public actions, a very different common understanding about the limits of the Establishment Clause. Why, in short, would Madison have found it "necessary on more than one occasion" to issue such proclamations, unless the common understanding was that the Establishment Clause did not bar them (indeed, so much so, that Madison felt political pressure to issue them)? The only public dissent from this view that Scalia's critics point to is evidence such as Jefferson's decision not to issue thanksgiving proclamations, and the vote of one representative against a congressional resolution urging Washington to issue a thanksgiving proclamation. *See, e.g.*, *id.* at 1128 nn.125 & 126. This is flimsy material upon which to base a claim that the original public understanding substantially diverged about whether the Establishment Clause permitted executive thanksgiving proclamations. It rather confirms the opposite: the widely held understanding was that the proclamations presented no constitutional question.

[253] *See, e.g.*, *id.* at 1127–28 & nn.123–25, 1134 n.146 (citing JAMES MADISON, DETACHED MEMORANDA 558 (Elizabeth Fleet ed., 1946); Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 252, at 98, 98–99; Letter from James Madison, *supra* note 252, at 105). Justice Souter relies on similar materials in his *McCreary County* majority opinion to support the

count in Scalia's traditionalism is one that impacted the pattern of public religious language, or, better yet, one that coalesced into a tangible counter-tradition of laws and practices. Private reservations or official inaction derived from personal interpretation or political scruples scarcely reflect a commonly held public understanding of constitutional meaning. To the contrary, virtually every indication of founding-era practices points to a common understanding that public religious acknowledgments did not present a question of constitutional magnitude.[254] Moreover, there appears to be no evidence whatsoever reflecting a public understanding going the other way—i.e., that government religious utterances were avoided because they were commonly thought to violate the Establishment Clause.[255] Historian and Religion Clause scholar Thomas Curry notes there was substantial agreement in the founding generation—even between Baptists and Congregationalists, who disagreed violently about tax-supported churches—regarding the propriety of "Sabbath laws, appointment of chaplains, and designation of days of prayer."[256] Curry remarks that, in 1789, such religious acknowledgments "caused no conflict at either the state or federal level."[257] As for

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conclusion that "there was no common understanding about the limits of the establishment prohibition." 545 U.S. at 879. In the letter to Reverend Miller cited above, Jefferson himself makes the point quite nicely about the difference between private and public actions. *See* Letter from Thomas Jefferson, *supra*, at 99. At the end of the letter, Jefferson "express[es] . . . satisfaction that you have been so good as to give me an opportunity of explaining myself in a *private letter*, in which I could give my reasons more in detail than might have been done in a *public answer*." *Id.* (emphasis added).

[254] *See, e.g.*, Lupu, *supra* note 183, at 775–79; *see also* CURRY, *supra* note 39, at 218 (describing the first Congress's "many involvements with religion" and remarking that "[c]ustoms like days of prayer and thanksgiving appeared not so much matters of religion as part of the common coin of civilized living"); *id.* at 218–19 ("Even Baptists and Congregationalists, so sharply at odds with each other on tax support for churches, shared many common attitudes about such non-disputed Church-State matters as Sabbath laws, appointment of chaplains, and designation of days of prayer. Eventually, these would become subjects of controversy. In 1798, however, they caused no conflict at all at either the state or federal level."); JOHN WITTE, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 76 (2000) (observing that "it is rather clear that the First Session of Congress had little compunction about confirming and continuing the Continental Congress's tradition of supporting chaplains, prayers, Thanksgiving Day proclamations, and religious education, . . . [as well as its] practice of including religion clauses in its treaties, condoning the American edition of the Bible, funding chaplains in the military, and celebrating religious services officiated by religious chaplains," and suggesting that "[t]he ease with which Congress passed such laws does give some guidance on what forms of religious support the First Congress might have condoned").

[255] *Cf.* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting) (requiring that the "nonexistence [of election disclosure laws] clearly be attributed to constitutional objections" in order to infer a constitutional prohibition); *see also supra* note 108 and accompanying text.

[256] CURRY, *supra* note 39, at 218–19.

[257] *Id.* at 219.

Madison and Jefferson, each held idiosyncratic opinions about church-state relationships that were out-of-step with commonly held views.[258] Evidence of what they thought privately about religious invocations actually supports the existence of a common understanding that contradicted their views. Moreover, when drafting and debating the Religion Clauses, Madison willingly suspended his private views of church-state relationships in favor of more politically expedient measures that would command broader support.[259] As Professor Gerard Bradley explains, "[t]he

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[258] *See, e.g.*, *id.* at 205 (observing that, while Madison would have supported more far-reaching alterations in church-state relationships, "[r]epeatedly, in his correspondence, as well as in his speeches, [Madison] asserted that he sought achievable amendments that would eschew controversy and gain ratification"); DREISBACH, *supra* note 15, at 27 ("Critics had castigated Jefferson for departing from the practice of his presidential predecessors and virtually all state chief executives, who routinely designated days for prayer, fasting, and thanksgiving."); 2 JAMES HITCHCOCK, THE SUPREME COURT AND RELIGION IN AMERICAN LIFE: FROM "HIGHER LAW" TO "SECTARIAN SCRUPLES" 22–30 (2004) (generally describing Madison's and Jefferson's views on church-state relations, and arguing that Madison's "separationist position, like Jefferson's, was not shared widely enough to make it politically safe to adhere to in all its fullness"); *id.* (observing that "Jefferson's and Madison's separationism was a relatively new development, emerging from the Enlightenment of the eighteenth century," and that "Jefferson's and Madison's positions did not command a consensus in their own day"); WITTE, *supra* note 254, at 48, 68–70, 74, 77 (explaining that Madison unsuccessfully pressed the minority position that protection of religious liberties should be guaranteed in the Constitution against the states themselves). Professor Gerard Bradley discusses a particularly instructive letter from Madison to Jefferson on October 17, 1788, in which Madison explained to Jefferson that, to be effective, rights secured in the Bill of Rights must hew closely to the public's general sentiments. *See* BRADLEY, *supra* note 39, at 72. Madison wrote that he was opposed to "absolute restrictions" being placed in the Bill of Rights "in cases that are doubtful, or where emergencies may overrule them," since such restrictions, "however strongly marked on paper will never be regarded when opposed to the decided sense of the public, and after repeated violations in extraordinary cases they will lose even their ordinary efficacy." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 271, 274 (Gaillard Hunt ed., 1904). Since, as Professor Bradley explains, "Madison divorced a federal bill of rights from his own latitudinal views" of church-state relationships, such a letter confirms the view that Madison did not even attempt to lodge his own views in the Religion Clauses. BRADLEY, *supra* note 39, at 72 (citation omitted); *see* Letter from James Madison, *supra*.

[259] *See, e.g.*, BRADLEY, *supra* note 39, at 72 (characterizing Madison's church-state opinions as "quite alien to the sense of the community," and explaining that, consequently, "Madison divorced a federal bill of rights from his own latitudinal views"); CURRY, *supra* note 39, at 205 (stating Madison "sought achievable amendments that would eschew controversy and gain ratification of three-fourths of the states"). Professor Bradley goes on to explain that "the distance between the First Amendment and Madison's personal philosophy is not hard to locate. His was a highly specific political enterprise with no room for unorthodox views—his own or anyone else's." BRADLEY, *supra* note 39, at 88.

truth is that Madison's personal philosophy, whatever it may have been, has nothing to do with the meaning of the Establishment Clause."[260]

Much the same can be said for the notions that certain Framers had Christianity "in mind" when they approved the Religion Clauses, or that, because many Framers held deistic ideas, they could not have meant to privilege the Judeo-Christian monotheism reflected in a Ten Commandments display.[261] These two arguments are often made against government religious acknowledgments, but they are, of course, incompatible with each other. A coterie of deist Framers would not have imposed through the Constitution an exclusivist Christianity that would have been politically and theologically unpalatable to any respectable deist.[262] In any event, Scalia's interpretative approach would see these claims as irrelevant. As already noted, Scalia is not using tradition to plumb the personal theological convictions of Madison, Jefferson, Washington, Story,[263] or anyone else, whether

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[260] BRADLEY, *supra* note 39, at 87; *see also id.* at 86 (arguing that "[t]he historical fallacy with the most severe consequences is the implication that to the extent Madison 'authored' or 'sponsored' the Establishment Clause, it represents what Madison personally believed was the proper alignment of church and state").

[261] *See supra* notes 207–212 and accompanying text; *see also* Colby, *supra* note 4, at 1126–29.

[262] On the multifaceted deism of prominent Framers, see generally DAVID L. HOLMES, THE FAITHS OF THE FOUNDING FATHERS 49–108 (2006); Avery Cardinal Dulles, *The Deist Minimum*, 149 FIRST THINGS 25, 26–27 (2005). While one should speak of a spectrum of deist beliefs, and while not every deist in the founding era was hostile to orthodox Christianity, deism in any form differed fundamentally from the tenets of traditional Christianity. As David Holmes explains, even so-called "Christian" deists "replaced the Judeo-Christian explanation of existence with a religion far more oriented to reason and nature than to the Hebrew Bible, Christian Testament, and Christian creeds." HOLMES, *supra*, at 44. *See generally id.* at 39–48.

[263] A passage from Justice Story's *Commentaries on the Constitution of the United States* is typically held up to show that the common understanding of the founding era extended constitutional protections only to Christian sects. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 727 (2005) (Stevens, J., dissenting). Story did indeed write that the "real object" of the Establishment Clause was "not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 991, at 700 (Ronald D. Rotunda & John E. Nowak eds., 1987). However, he wrote that sentence to reject what he considered the false claim that the First Amendment was "[a]n attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference." *Id.* § 988, at 700. He also admitted that, while Christians would naturally want the government "to foster, and encourage [Christianity]," the "real difficulty lies in ascertaining the limits, to which government may rightfully go in fostering and encouraging religion." *Id.* §§ 986–87, at 699. Furthermore, Story recognized that "the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men, or to punish them for worshipping God in the manner, which, they believe, their accountability to him requires." *Id.* § 990, at 700–01. For the inviolability of the conscience, and for the proposition that "[t]he rights of conscience are, indeed, beyond the just reach of any human power," Story cited none other

deist or Christian.[264] Rather, Scalia takes the language of public religious utterances as itself relevant to how people commonly understood the Establishment Clause.[265] He is constructing a public record, not a Founders' biography. The conclusion he draws from the general range of such utterances is unremarkable: that the common understanding must have been, at the very least, that generalized monotheistic language (such as "God" or "Providence" or "Almighty Being") did not present a constitutional problem when deployed officially by the federal government.[266] Again, Scalia uses that conclusion merely as a baseline for determining the constitutionality of a Ten Commandments display. It is, of course, evident that Scalia's construal of the display is strikingly different from Souter's and Stevens's.[267] But the point is not whether Scalia is correct about that, but rather about his use of tradition to reach that conclusion. His method here is perfectly consistent with his negative use of tradition in other areas, deploying historical practices to demarcate the current practices the Establishment Clause does not reach.

A special word needs to be said about the claim that Scalia glosses over the Christian character of certain founding-era practices (such as Christian language in certain presidential addresses or Christian worship services conducted by

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than Madison and Locke. *Id.* § 990, at 701. Story's chain of reasoning led him to conclude that, in the Religion Clauses, "it was deemed advisable to exclude from the national government all power to act upon the subject" and that "[t]he only security was in extirpating the power [to create a religious establishment]." *Id.* § 992, at 702. Story's conclusion to this part of his *Commentaries* deserves quotation in full:

> Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.

Id. § 992, at 702–03. While this Article is not the place for a complete exposition of Justice Story's understanding of the Religion Clauses, simply reading his comments in context reveals his thought to be far from the "Christian nation" stereotype with which he is often labeled. *See also id.* § 213, at 161 (explaining that the Establishment Clause "seems to prohibit any laws, which shall recognize, found, confirm, or patronize any particular religion, or form of religion, whether permanent or temporary, whether already existing, or to arise in the future").

[264] *See, e.g.*, SCALIA, *supra* note 79, at 38 (explaining that Scalia consults Framers' writings "not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood"); *see also supra* note 79 and accompanying text.

[265] *See* McCreary County v. ACLU, 545 U.S. 844, 897 (2005) (Scalia, J., dissenting).

[266] *See, e.g.*, CURRY, *supra* note 39, at 218 (remarking that "[c]ustoms like days of prayer and thanksgiving appeared not so much matters of religion as part of the common coin of civilized living").

[267] *See supra* notes 23–28 and accompanying text.

congressional chaplains). The notion is that Scalia conveniently ignores where the real originalist evidence would lead—to an exclusive constitutional preference not for "monotheism" but for Christianity.[268] This again shows a failure to understand Scalia's method. Such criticisms would have much greater force if Scalia understood himself to be constructing the definitive theological history of founding-era religious invocations. However, Scalia does not understand himself as a historian, but as a judge tasked with interpreting the reach of constitutional language.[269] Thus, his treatment of the historical material goes only so far as to answer the question before the Court. Having located a sizeable deposit of religious language of a "generally monotheistic" character, Scalia's interpretative method does not require him to scavenge the rest of the historical record for evidence of more particularized theologies. What Scalia documents is more than enough to allow him to dispose of the case. If it is true that Scalia has overlooked or minimized certain instances of Christian utterances, he would likely be the first to admit that, as a non-historian, he may have oversimplified the monotheistic character of our traditions.[270] Nevertheless, that would not change the fact that, for Scalia, our traditions are nonetheless capacious enough to validate the generalized acknowledgment of "a single Creator" he detects in the Ten Commandments display.[271]

In assessing Scalia's treatment of the distinctively "Christian" historical elements, one must also take into account the level of generality at which Scalia pitches tradition. Much has been written about this aspect of Scalia's traditionalism, but suffice it here to say that the interpretative use Scalia makes of historical practices leads him to define them at a level of abstraction as close as possible to the law or practice at issue.[272] The most controversial and well-known example of this is Scalia's definition of the relevant tradition in *Michael H.* California law presumptively barred a biological father's parental visitation rights, where his child was born into another existing marriage.[273] To measure this law

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[268] *See, e.g.*, *Van Orden*, 545 U.S. at 729 (Stevens, J., dissenting); Colby, *supra* note 4, at 1135–37.

[269] *See, e.g.*, Scalia, *supra* note 95, at 857 (admitting that the originalist judge's task is one "sometimes better suited to the historian than the lawyer").

[270] *See, e.g.*, *id.* at 856 (recognizing that "it is often exceedingly difficult to plumb the original understanding of an ancient text," since "[p]roperly done, the task requires the consideration of an enormous mass of material . . . an evaluation of the reliability of that material . . . [a]nd further still, it requires immersing oneself in the political and intellectual atmosphere of the time").

[271] McCreary County v. ACLU, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting).

[272] The paradigm instance of this appears in the infamous "footnote 6" of Scalia's opinion in *Michael H. See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989); *see also* Balkin, *supra* note 93, at 1615–17 (criticizing Scalia's specificity in defining relevant tradition in *Michael H.*); McConnell, *supra* note 93, at 671 & n.47 (describing *Glucksberg*'s adoption of Scalia's substantive due process methodology from *Michael H.* (citing Washington v. Glucksberg, 521 U.S. 702, 721–22 (1997))).

[273] 491 U.S. at 115.

against due process, Scalia sought a tradition in positive law either recognizing or curtailing a biological father's parental rights in that specific situation.[274] He rejected Justice Brennan's alternate method of asking, at a much higher level of generality, whether our traditions recognize "parenthood."[275] For Scalia, the proper level of generality was one that allowed him to compare California's specific policy choice with the most closely analogous policy choices made throughout our history.[276] Commenting on this kind of historical methodology, Judge McConnell explains that "[a]iry generalities like 'the right to be left alone,' or to make choices 'central to personal dignity and autonomy, . . . are too imprecise to support legal analysis" and hence to "determine whether any such traditions exist, or if they exist, what might be included within them."[277]

Scalia's concern for exactness in calibrating the generality of tradition clarifies how he treats the historical record in *McCreary County*. Having defined the Ten Commandments display as akin to "acknowledging a single Creator," Scalia then constructs a public record of religious acknowledgments calculated to give him a precise standard for comparison.[278] In other words, Scalia wants to compare apples to apples—governmental policy choices that correspond as precisely as the historical record allows to the policy choice made in erecting a Ten Commandments display. Scalia, then, would presumably pass over instances of more theologically specific religious language—such as explicitly Christian references—than the usual references to "the Supreme Being" or "Divine Providence." This explains Scalia's almost casual rejoinder to Stevens that "[s]ince most thought the Clause permitted government invocation of monotheism, and some others thought it permitted government invocation of Christianity, [Justice Stevens] proposes that it be construed not to permit any government invocation at all."[279] Indeed, this *a fortiori* argument is Scalia's basic response to the charge of minimizing the Christian character of the historical materials: if there were, so to speak, intertwining traditions of both Christian and monotheistic acknowledgments, then how could an acknowledgment like the Ten Commandments displays—which falls within the broader of those traditions—possibly violate the Establishment Clause?

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[274] *See id.* at 123.

[275] *See id.* at 130.

[276] *Compare id.* at 127 & n.6 (Scalia, J., plurality) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."), *with id.* at 137 (Brennan, J., dissenting) (focusing on the definition of "parenthood").

[277] McConnell, *supra* note 93, at 671. Judge McConnell argues that the Court's "[a]cceptance" of Scalia's method of specificity in substantive due process "is one of the most important aspects of the *Glucksberg* decision." *Id.* at 671 n.47; *see Glucksberg*, 521 U.S. at 721 (insisting that the Court's historical inquiry be based on "a 'careful description' of the asserted fundamental liberty interest" (citations omitted)).

[278] McCreary County v. ACLU, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting).

[279] *Id.* at 897.

Having situated Scalia's dissent within his traditionalism, we can now assess those "difficult" passages where Scalia has been understood as saying that the Establishment Clause permits nothing other than acknowledgments of generalized monotheism. On this view, specific acknowledgments of Christianity, Judaism, or Islam—and, by extension, any non-monotheistic religion—would violate the Establishment Clause, precisely because of their theological content.[280] Scalia's critics have seized on these passages and read his entire dissent in light of them.[281] Concentrated in fewer than three pages, these passages respond to Stevens's claim that a truly principled originalism would recognize the inconvenient truth that

> many of the Founders who are often cited as authoritative expositors of the Constitution's original meaning understood the Establishment Clause to stand for a *narrower* proposition than the plurality, for whatever reason, is willing to accept. Namely, many of the Framers understood the word "religion" in the Establishment Clause to encompass only the various sects of Christianity.[282]

Stevens later reiterates this point in direct reply to Scalia's dissent, asserting that "[t]he original understanding of the type of 'religion' that qualified for constitutional protection under the Establishment Clause likely did not include those followers of Judaism and Islam who are among the preferred 'monotheistic' religions Justice Scalia has embraced in his *McCreary County* opinion."[283] Stevens flatly claims that evidence for the Establishment Clause's original meaning "just as strongly supports a preference for Christianity as it does a preference for monotheism."[284] Finally, Stevens derides the founding generation *in toto* as "men who championed our 'Christian nation' [and] men who had no cause to view anti-Semitism or contempt for atheists as problems worthy of civic concern."[285] Since Stevens does not cite a single source for these sweeping claims, they are perhaps better understood as rhetoric, buttressing the argument that Scalia has culled from the historical materials only what is most palatable to (some) modern sensibilities.

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[280] *See supra* notes 11–15 and accompanying text (discussing the use of neutrality in Justices Souter's and Stevens's opinions).

[281] *See, e.g.*, Colby, *supra* note 4, *passim*; Balkin, *supra* note 93, *passim*.

[282] Van Orden v. Perry, 545 U.S. 677, 726 (2005) (Stevens, J., dissenting).

[283] *Id.*

[284] *Id.* at 728.

[285] *Id.* Again, one wonders how these universalist claims are consistent with the widely accepted historical view that many prominent founders held, to some degree, deistic views of Christianity. Those founders, including Jefferson, Madison, Franklin, Adams, Monroe, and perhaps even Washington, would have been perplexed by the very notion of a "Christian nation," not to mention horrified by the accusation that they had somehow tried to embed that idea, by invisible ink as it were, in the Constitution's Religion Clauses. *See* HOLMES, *supra* note 262, at 40–49.

In any event, the controversial passages in Scalia's dissent are a direct[286] response to Stevens's philippic, and should be read as such.

The most problematic of Scalia's responses is his claim that "those narrower views of the Establishment Clause were as clearly rejected as the more expansive ones."[287] The key term here is "rejected." Does Scalia mean that the common understanding of the Establishment Clause "rejected" the notion that government could acknowledge any but the generalized monotheism uttered by prominent founders? Scalia's comments immediately following might support that reading, since he emphasizes the fact that every example of Framers' religious language "invoked God, but not Jesus Christ."[288] Scalia then cites George Washington's letter to the Hebrew Congregation of Newport, Rhode Island, in which Washington clearly contemplates that our "'liberty of conscience and immunities of citizenship'" extend to non-Christians.[289] That evidence appears to stand for the uncontroversial proposition that the protections offered by the Religion Clauses were not limited to Christians.[290] So, what is Scalia getting at in his response to Stevens, and, specifically, what does he mean that our common understanding "rejected" both the "narrower" and "more expansive" views of the Establishment Clause that Stevens articulates? Again, two things help clarify Scalia's sometimes unwieldly rhetoric: the particular context of his comments, and his overall approach to using tradition in constitutional interpretation.

First, context indicates that Scalia is saying only that our traditions have "rejected" Stevens's "broader" and "narrower" views of the Establishment Clause. The "broader" view, held for instance by Thomas Jefferson, was that the Establishment Clause categorically forbids government religious language.[291] In response, Scalia argues that Jefferson's idiosyncratic view was "plainly rejected"

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[286] *See, e.g.*, McCreary County v. UCLA, 545 U.S. 844, 897 (2005) (Scalia, J., dissenting) (responding directly to Stevens's claim that "some in the founding generation thought that the Religion Clauses of the First Amendment should have a *narrower* meaning, protecting only the Christian religion or perhaps only Protestantism").

[287] *Id.*

[288] *Id.*

[289] *Id.* (quoting Letter from George Washington to the Hebrew Congregation of Newport, R.I. (Aug. 18, 1790), *reprinted in* 6 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 284, 285 (Dorothy Twohig et al. eds., 1996)).

[290] *Cf.* STORY, *supra* note 263, § 992, at 702–03 (affirming that, under the Religion Clauses, "the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship").

[291] *See* Van Orden v. Perry, 545 U.S. 677, 724 (2005) (Stevens, J., dissenting) ("Notably absent from [the plurality's] historical snapshot is the fact that Thomas Jefferson refused to issue the Thanksgiving proclamations that Washington had so readily embraced based on the argument that to do so would violate the Establishment Clause." (citations omitted)).

in common public understanding of the time.[292] By the same token, the "narrower" view described by Stevens is that "the word 'religion' in the Establishment Clause . . . encompass[ed] only the various sects of Christianity," and that, consequently, the original Establishment Clause offered "protection" only to Christians and not to "followers of Judaism and Islam."[293] Scalia responds directly to that claim by arguing that "*those* narrower views . . . were as clearly rejected as the more expansive ones."[294] Thus, Scalia is saying that tradition has "clearly rejected" the narrower view that the Establishment Clause protects only Christian sects.[295] This makes sense of the examples Scalia includes to support that statement. Washington's letter to the Newport Hebrew Congregation confirms that Washington understood the Religion Clauses as offering protection to non-Christians.[296] Additionally, the examples of public religious language demonstrate that common understanding permitted recognition of religious belief more broadly than Christianity proper. Notice what Scalia does not say. He does not say that, simply because our tradition rejected the "narrower" view of the Establishment Clause, the Clause therefore mandates a particular theology of government religious pronouncements. Careful attention to context shows that Scalia is responding to the stark polarities in Stevens's opinion and is not positing a specific theological content for the Establishment Clause itself.

Nevertheless, it is true that Scalia's statements are not as transparent as they ought to be. Only by considering his broader traditionalism does Scalia's meaning become clear. How does Scalia's general approach to tradition help interpret these passages? The answer is fairly straightforward. If Scalia is doing what the critics claim—embedding a preference for generic monotheism in the Establishment Clause—then he is going beyond using tradition negatively and is proposing to use it positively. In other words, Scalia would allegedly use a record of historical practices (monotheistic acknowledgements) and the non-existence or rarity of other practices (explicitly Christian acknowledgments) to infer a constitutional prohibition on religious acknowledgments that diverge from the historical norm. However, we have already seen what high barriers Scalia's own jurisprudence raises against this positive use of tradition in the First Amendment context.[297] As explained in *McIntyre*, what Scalia would need to demonstrate is not merely the non-existence of Christian acknowledgments, but instead, that the non-existence or

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[292] *McCreary County*, 545 U.S. at 896 (Scalia, J., dissenting) ("There were doubtless some who thought [the Clause] should have a broader meaning, but those views were plainly rejected.").

[293] *Van Orden*, 545 U.S. at 726, 728 (Stevens, J., dissenting).

[294] *McCreary County*, 545 U.S. at 897 (Scalia, J., dissenting) (emphasis added). The antecedent of "those" is the statement, earlier in the paragraph, that "some in the founding generation thought that the Religion Clauses . . . should have a *narrower* meaning, protecting only the Christian religion or perhaps only Protestantism." *Id.*

[295] *See id.*

[296] *Id.* at 898 (citing Letter from George Washington, *supra* note 289, at 285).

[297] *See supra* notes 128–131 and accompanying text.

rarity of Christian acknowledgments clearly implies a common understanding that such acknowledgments were constitutionally forbidden.[298]

Scalia does not even attempt to make such a case in his *McCreary County* dissent. By comparison to the careful sifting of historical evidence in *McIntyre*, Scalia's treatment of the historical record in *McCreary County* is almost cursory.[299] Why? Because *McCreary County* is an easy case for Scalia.[300] His parsing of the historical record easily reveals a tradition of religious acknowledgments wide enough to contain the Ten Commandments display. Scalia's handling of the distinctively Christian elements in that record seems more like a counter-argument than an independent historical inquiry. That is, Scalia's remarks about the relative absence of Christian language (compared to the more prevalent monotheistic language)[301] seem calculated merely to dismiss Stevens's arguments about originalism. Scalia is not constructing a record dense enough to prove that Christian language would necessarily violate the Establishment Clause. Nor would Scalia's methodology be satisfied merely by pointing to the historical prevalence of generically monotheistic language. One would still need to draw the negative inference from such evidence that Christian language was commonly understood to be constitutionally outlawed. Just as Scalia recognized in the Free Speech context that "[q]uite obviously, not every restriction upon expression that did not exist in 1791 or in 1868 is *ipso facto* unconstitutional,"[302] it is equally true that not every form of government religious expression that was not commonplace in 1791 or 1868 is *ipso facto* unconstitutional. Scalia's conclusions about Christian language are, in a word, tentative, because Scalia is merely rebutting the claim that an original understanding of the Establishment Clause necessarily privileges Christianity (or Protestant Christianity) and prostrates all other religions. That, too, for Scalia is a claim easily dismissed. The limited effort he gives to dealing with the Christian evidence is enough for that purpose. But Scalia makes scarcely a start on the harder task of inferring a tradition constitutionally forbidding Christian acknowledgments, and that is a good reason for concluding that Scalia's dissent does nothing of the kind.[303]

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[298] *See supra* notes 128–131 and accompanying text; *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting).

[299] *See McCreary County*, 545 U.S. at 886–89 (Scalia, J., dissenting).

[300] *See supra* notes 117–118 and accompanying text.

[301] *See supra* notes 268–271 and accompanying text.

[302] *McIntyre*, 514 U.S. at 373 (Scalia, J., dissenting).

[303] Much the same can be said for Scalia's comments about tradition in his *Lee v. Weisman* dissent. *See* 505 U.S. 577, 641 (1991) (Scalia, J., dissenting). There Scalia "concedes" that "our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington . . . down to the present day, has, with a few aberrations . . . ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *Id.* These comments sound, more than anything in *McCreary County*, like a statement about the positive content of religious

It should be said that the critics' case against Scalia goes further than this. Not only is he supposed to be using tradition to embed monotheism in the Establishment Clause, but he is also supposed to be limiting any further development of the Establishment Clause (what this Article has referred to as "freezing" the Establishment Clause around monotheism). If it is unlikely Scalia is doing the first, it is straining credibility to the breaking point to believe he is doing the second. Even in the due process area, Scalia does not do this with tradition. As explained in *Haslip*, Scalia would not regard every divergence from historical practices as an automatic violation of due process.[304] Rather, he would simply use those historical practices as a touchstone for measuring the constitutionality of divergent modern practices.[305] Thus, even if Scalia in *McCreary County* is at his most aggressive in deploying tradition, even then he would not be poised to do what the critics claim.[306] At most, Scalia would be saying that religious acknowledgments that diverge from historical standards (for instance, a Christian symbol, or Islamic language, or a Buddhist text) would not be the easy Establishment Clause cases that a generic monotheism presents. What "test" Scalia might devise to assess these harder cases he does not say, and it is beyond the scope of this Article to devise one.[307] Nevertheless, the point is that even a more stringent analysis would not equal automatic invalidation. More fundamentally, a different analysis would not be the fruit of some blind, ahistorical, or politically motivated preference for "generic monotheism."[308] Instead, it would stem from the same methodological exigencies that inform all of Scalia's traditionalism. This does not make Scalia a religious bigot. It makes him a principled jurist.

In sum, a careful reading of Scalia's dissent, in light of his overall traditionalism, indicates that Scalia uses tradition in *McCreary County* just as he typically does elsewhere: negatively. Traditional practices serve as an objective baseline for measuring the constitutionality of modern practices, and not as a

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tradition. The problem is that, in *Lee*, Scalia appears to be granting these premises merely for the sake of argument, much as, earlier in the same paragraph, he had "acknowledge[d] for the sake of argument" the claims of "some scholars" that by 1790 the term "establishment" had acquired a broader meaning. *Id.* Regardless, *Lee* was just as easy a case for Scalia as *McCreary County*, and he comes nowhere close in either opinion to marshalling the historical evidence to support a positive inference from tradition that any religious acknowledgment, other than generalized monotheism, is unconstitutional. It thus makes little sense to read either opinion as flying in the face of a historical methodology that Scalia has worked out carefully elsewhere.

[304] *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 38 (1991) (Scalia, J., concurring); *see also supra* notes 134–159 and accompanying text.

[305] *See id.*; *see also supra* notes 95–103 and accompanying text.

[306] *See, e.g.*, Colby, *supra* note 4, at 1098.

[307] *Cf. Haslip*, 499 U.S. at 33–34 (Scalia, J., concurring) (discussing the Court's difficulties in formulating and applying a "fundamental fairness" standard to assess departures from historical practices under the Due Process Clause).

[308] *See, e.g.*, Colby, *supra* note 4, at 1139 (speculating that Scalia's "preference" for a generic monotheism arises out of a political desire to support the Bush administration's "war on terror").

pretext to project substantive outcomes into the Constitution. Scalia is no more using tradition to embed monotheism in the Establishment Clause than he was using tradition in *Michael H.* to embed the "nuclear family" in the Due Process Clause,[309] and no more than he was using tradition in *Rutan* to embed the patronage system in the Free Speech Clause.[310] Scalia uses tradition in these cases not to confine the law's development behind a wall of traditionalism, but instead to restrain the judiciary from embedding its own evolutionary charter in the Constitution. Scalia's traditionalism defers that development to representative government. If tradition confines anyone in this process, it is Scalia himself. To paraphrase Jaroslav Pelikan, Scalia's tradition is the living constitutionalism of the dead, not the dead constitutionalism of the living.[311]

IV. CONCLUSION

Scalia's dissent in *McCreary County* may well turn out to be important and controversial, but not for the reasons that legal scholars have so far identified. A close reading of the dissent—in light of Scalia's overall approach to using tradition in constitutional interpretation—shows that Scalia is not using tradition to propose an Establishment Clause hardwired by the founders for monotheistic religions. Tradition does not typically serve that kind of positive function in Scalia's jurisprudence, and it does not do so in *McCreary County*. Instead, tradition serves as a tool of judicial restraint, precisely to avoid imprinting the judiciary's own views indelibly onto constitutional guarantees. Moreover, traditional practices for Scalia merely provide a historical baseline for understanding constitutional provisions—they do not freeze the Constitution in place around those traditions.

Far from stifling the ongoing development of our traditions of religious symbolism, Scalia's traditionalism simply defers from courts to representative bodies the mechanism for developing tradition. Seen that way, his approach to religious symbolism in *McCreary County* meshes with his approach to free exercise accommodations in his equally controversial opinion in *Employment Division, Department of Human Resources v. Smith*, the Oregon peyote case.[312] Scalia's *McCreary County* dissent thus fills out his general approach to the Religion Clauses. He searches for relatively clear judicial rules, while seeking to withdraw courts from the business of assessing different forms of religious expression or of weighing the relative merits of religious and secular interests. In *McCreary County*, tradition is the tool Scalia uses for those purposes.

The debate in *McCreary County* among Scalia, Souter, and Stevens fundamentally concerns the proper use of history to interpret the Establishment

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[309] *See supra* note 139 and accompanying text. *But see supra* note 214.

[310] *See supra* note 112 and accompanying text.

[311] *See* Jaroslav Pelikan, THE VINDICATION OF TRADITION 65 (1984) ("Tradition is the living faith of the dead; traditionalism is the dead faith of the living.").

[312] *See* 494 U.S. 872, 874–90 (1990); *see also* sources cited *supra* note 205 and accompanying text.

Clause. At bottom, Scalia's traditionalism may represent his attempt to inject a measure of historical restraint into the Establishment Clause's interpretation. Ever since beginning its Establishment Clause project in 1947, the Court has not only been plagued with bad historical research but, more fundamentally, it has been deeply confused over precisely what questions history was supposed to answer about the Establishment Clause. Scalia's traditionalism in *McCreary County* proposes a historical orientation to the Establishment Clause strikingly different from the usual one. The Establishment Clause would not serve, as it does for Souter and Stevens, as an invitation for the Court to superintend the ongoing development of our traditions of church and state according to the Justices' best lights. Rather, in Scalia's view, the Establishment Clause places an intelligible historical backdrop, grounded in actual practices, against which to assess the modern development of church-state relationships. Regardless of whether Scalia's assessment of our traditions is compelling in this particular case, the view he seems to take of the relationship between history and the Establishment Clause could reorient and clarify the way history is used to interpret the Establishment Clause. Therefore, quite apart from its problematic interpretation by legal scholars, Scalia's Ten Commandments dissent is worth understanding on its own merits. However, doing that requires clearing away misinterpretations of Scalia's approach. This Article has attempted both tasks, simultaneously.

It will not suffice to read the entirety of Scalia's dissent through the prism of a few passages that are both ambiguous and contentious. However, read in light of his traditionalism, it becomes evident that Scalia proposes an essentially restrained approach to using history to interpret the Establishment Clause. Not only does this approach have the merit of inviting judges to formulate clearer standards for establishment issues, but it also acts to confine the discretion of judges according to the intelligible pattern of our historical practices. Those would be no small benefits in an area of jurisprudence as plagued with confusion and incoherence from its modern rebirth as the Establishment Clause.

SUBSIDIARITY AND RELIGIOUS ESTABLISHMENTS IN THE UNITED STATES CONSTITUTION

KYLE DUNCAN*

I. INTRODUCTION

SUBSIDIARITY is a theory about the relationship among social structures, the common good and human dignity with a venerable pedigree in European political thought. It concerns how persons become genuinely free by associating with others and what those associations, or "mediating structures," imply about state authority. Paradoxically, subsidiarity both empowers and limits the state—empowering it to remedy the incapacities of social groups, but limiting its intervention by reference to the integrity of those groups.[1] The term comes from the Latin *subsidium*, meaning "help" or "reserve forces," and this etymology underscores the calibrated scope of state action.[2] The state *helps* but does not *absorb* inter-

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1. *See generally* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 332-44 (1994) (noting paradoxical nature of subsidiarity); Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 40-46 (2003) ("Subsidiarity is therefore a somewhat paradoxical principle."); Ken Endo, *The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors*, 44 HOKKAIDO L. REV. 652, 642-10 (1994); Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 108-21 (2001) [hereinafter Vischer, *Beyond Devolution*].

2. *See, e.g.*, Carozza, *supra* note 1, at 42 n.16, 44; Endo, *supra* note 1, at 642-40; Vischer, *Beyond Devolution*, *supra* note 1, at 118-20.

mediate associations. In that way, it is thought, the people within these associations will flourish most fully in their humanity, in their communities and in their relationships to the state.[3]

Subsidiarity has two major aspects. Substantively, it functions as a principle ordering the relationships among state authority and social groups. Structurally, it describes the distribution of competences when higher and lower public entities interact in a single system.[4] Thus, subsidiarity may apply substantively to the interactions between the state and labor unions, and it may apply structurally to the interactions between a central government and its constituent governmental entities.[5] The structural aspect of subsidiarity is closely connected to federalism.[6] Indeed, it is as a seed-bed for federalist ideas that subsidiarity has gained recent prominence in the European Community.[7] Though intertwined, the substantive and structural aspects of subsidiarity must be carefully distinguished.

This Article will use subsidiarity to illuminate a strategy for dealing with religious establishments found in the United States Constitution, particularly in its Establishment Clause. Subsidiarity has been applied to many fields, from public international law, to environmental policy, to commerce, to corporate governance and even to human rights.[8] Its appli-

3. *See, e.g.*, Carozza, *supra* note 1, at 45 (explaining that subsidiarity's "end product" is "'greater flexibility and adaptability' in the social order," resulting in "'a genuinely pluralistic society, . . . which is a union of lesser societies each of which maintains its own identity, function, and end'") (quoting Clifford Kossel, *Global Community and Subsidiarity*, 8 COMMUNIO: INT'L CATH. REV. 37, 46-48 (1981)).

4. *See, e.g.*, Endo, *supra* note 1, at 640-38 (explaining distinction between "non-territorial" subsidiarity, which "initially represented the delimitation of spheres between the private sectors and the public," and "territorial" subsidiarity, which focuses instead on "the division of powers among several levels such as the EC, the State, the Region, and the Local Authority").

5. *See, e.g.*, Carozza, *supra* note 1, at 41 (describing application of subsidiarity to labor relations in Leo XIII's 1891 papal encyclical, *Rerum Novarum*); *see also* Bermann, *supra* note 1, at 342-43 (describing "respect for internal divisions of component states" as aspect of subsidiarity).

6. *See* Bermann, *supra* note 1, at 343 (observing "special relationship that exists between subsidiarity and federalism"); Vischer, *Beyond Devolution*, *supra* note 1, at 122-26 (discussing relationship of subsidiarity to American federalism). For a discussion of subsidiarity's relation to federalism, see *infra* notes 195-202 and accompanying text.

7. *See* Bermann, *supra* note 1, at 344-402 (discussing comprehensively prominence of Federalist ideas within European culture); Endo, *supra* note 1, at 609-569; *see also* Carozza, *supra* note 1, at 50-52.

8. *See, e.g.*, ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 239-41 (1999) (discussing relationship of subsidiarity to international law); Bermann, *supra* note 1, at 344-48 (discussing European Community Treaties); *id.* at 346 & nn.42-47 (noting subsidiarity provisions in 1992 Maastrict Treaty concerning education, vocational training, culture, health, consumer protection and industrial competitiveness); Carozza, *supra* note 1, at 56-79 (discussing international human rights law); *id.* at 41 (discussing labor unions); John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law? Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55, 119-23 (2003) [hereinafter Czarnetzky & Rychlak, *Empire of Law*] (discussing International Criminal Court in terms of subsidiarity); Ronald J. Rychlak & John

cation to religious establishments, as yet untried, is quite natural. Religious associations—regardless of whether they figure in religious establishments—are social structures through which persons find meaning, form communities, relate to others and interact with the state. Thus, as a substantive norm, subsidiarity allows one to assess the role of religious associations within a pluralistic society, and it consequently furnishes an illuminating way of understanding the problem of religious establishments as such. As a structural norm, subsidiarity helps place the Establishment Clause within the federal framework of the United States Constitution. It invites us to view the Clause as a structural strategy for dealing with the problem of religious establishments as faced by the authors and ratifiers of the United States Constitution.

Part II of this Article summarizes the general principles of subsidiarity and places them within a theoretical and historical framework. Subsidiarity emerges from this discussion as a theoretical tool particularly well adapted to our modern, pluralistic society. It promotes a robust vision of human freedom that transcends the isolated and individualistic liberty of classical liberalism. Persons find this fuller notion of freedom—including freedom of conscience—in communities that are supported and invigorated, but not supplanted, by a state with powerful but limited competences.

Part III addresses subsidiarity's relationship to constitutional rules and to federalism. In terms of a constitution, subsidiarity appears less as a rule embedded in a constitution—one that can be liquidated and applied by courts—than as a principle guiding the creation of a federal structure and the distribution of governmental competences in that structure.

After this lengthy preparation, Part IV turns to the heart of the matter: how subsidiarity can help us understand both the problem of religious establishments and how that problem is addressed by the Establishment Clause of the United States Constitution. First, as for religious establishments proper, subsidiarity suggests a useful way of understanding the kinds of problems posed by the interaction of religious associations and government. Such problems are less a question of violating indeterminate background principles—such as "neutrality" or "separation of church and state"—than a question of the state absorbing the functions of a religious association in a way that degrades the mediating character of the association and compromises the state's ability to pursue society's common good. At the same time, subsidiarity indicates that such problems are better han-

M. Czarnetzky, *The International Criminal Court and the Question of Subsidiarity*, 2000-2003 THIRD WORLD LEGAL STUD. 115, 119, 121 (2003) (same); Vischer, *Beyond Devolution*, *supra* note 1, at 104-05 (listing applications, including legislative initiatives on poverty, environmental law, campaign finance reform, land use regulations and radio broadcast licenses, as well as interpretations of Supreme Court jurisprudence on parental authority and Commerce Clause). *See generally* Symposium, 2 J. CATH. SOC. THOUGHT (2005) (discussing application of subsidiarity to faith-based charitable organizations, school finance, bureaucracy, corporate governance, federalism and federal prosecution).

dled prudentially through political management than through rule-based judicial resolution. Second, these insights suggest how the Establishment Clause itself functions within the federalist structure of the United States Constitution. The Clause emerges as a structural strategy for partitioning the federal government from a volatile area of social policy—one described by the First Amendment's rubric of "laws respecting an establishment of religion"—to an area thought by the framing generation to be more securely managed by individual states. Both of the conclusions suggested by a subsidiary analysis conflict with our modern understandings of religious establishments and the Establishment Clause. But this vexed area of jurisprudence and scholarship needs provocation to shake off unhelpful theoretical baggage and to find promising ways forward.

Subsidiarity suggests several paths, developed in Part IV. As to the modern problem of church-state interaction, subsidiarity proposes that it is far more complex than slogans such as "separation of church and state" and "neutrality" have led us to believe. Conversely, as to the Establishment Clause itself, subsidiarity proposes that the Clause is far more modest than two generations of Supreme Court jurisprudence have led us to believe. A subsidiary Establishment Clause is, first and foremost, one integrated intelligibly into the overall structure of the Constitution. From that point of view, the Clause addresses structures, institutions and jurisdiction more than it promotes church-state theories or particular substantive outcomes. A subsidiary Clause may not hold the answers to many of the problems we currently associate with the Clause—for instance, the "correct" answers to religious participation in voucher programs, or to the presence of religious symbolism in government buildings—but it promises to be a Clause that courts can use consistently and coherently. Furthermore, a subsidiary Clause may promote a more genuine and stable form of "religious freedom" by situating people's religious beliefs and activities within communities that are both empowered and circumscribed by state and society. This is an appealing alternative to the stark polarities offered by much of the Supreme Court's religion clause jurisprudence—a choice between the beliefs of the isolated individual and the interests of a powerful, unified state.

This Article is only a preliminary sketch of how subsidiarity interacts with religious establishments and the Establishment Clause. It leaves many areas unexplored, such as how a subsidiary Establishment Clause jurisprudence might appear, and how a subsidiary Clause might protect liberty of conscience. It deliberately postpones the question of incorporation of the Establishment Clause until the end, for good reason. For the question of how the Clause applies to the states is parasitic on the questions of what the Clause means and how it relates to federalism. A subsidiary view of the Clause does not roll back incorporation, but it does force provocative questions about how incorporation of the Clause should be carried out. These are questions that Establishment Clause scholars have been asking recently with more and more insistence. A discussion of subsidiarity provides a good point of entry into that debate. In fact, sub-

sidiarity should be a major part of the incorporation discussion—a discussion about the dynamics of a massive shift in the federal structure of our government—precisely because subsidiarity provides crucial insight into the inner-workings of federalism itself.

One final caveat: this Article does not propose to recast every conundrum of Establishment Clause jurisprudence within the matrix of subsidiarity. Nor does it promote subsidiarity as a new-and-improved "test" for applying the Clause. What the article does is argue that subsidiarity is a powerful tool for explaining the function of the Clause in our constitutional structure. That alone is reason to consider what subsidiarity has to say about religious establishments and the United States Constitution.

II. THE THEORY OF SUBSIDIARITY

A. *General Themes*

Subsidiarity begins and ends with the person. It assumes that the basic aim of societal structures, private and public, is to promote human dignity and, hence, genuine freedom. It views human persons not as instruments, but as ends in and of themselves. At the same time, persons are irreducibly social and realize their most authentic humanity only in community with others.[9] Consequently, the notion of "freedom" at stake in subsidiarity is not purely individual autonomy without restraint or interference. Rather, the freedom subsidiarity seeks to foster "means freedom to *act* in such a way as to participate fully in the goods of an authentically human life."[10]

Subsidiarity builds upward from this basic focus on the person. Human personhood requires a kaleidoscope of associations for its full expression. For instance, individuals need family associations to nurture their basic affective, material, educational and spiritual needs.[11] In the economic sphere, individuals need to form associations for furthering production, exchange and conditions of labor and pay in any free market system. Such groups cannot function in isolation but must interact with other groups to serve their members fully.[12] What results is an organically intermeshed civil society, "understood as the sum of the relationships be-

9. *See, e.g.*, Carozza, *supra* note 1, at 42-43 (explaining that "subsidiarity presupposes that the human person toward whose flourishing the application of the principle is aimed is naturally social") (citing Kossel, *supra* note 3, at 46).

10. *See* Carozza, *supra* note 1, at 43 & n.27 (citing JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 147 (1980)). Finnis explains that:

> Human good requires not only that one *receive* and *experience* benefits or desirable states; it requires that one *do* certain things, that one should *act*, with integrity and authenticity . . . . Only in action (in the broad sense that includes the investigation and contemplation of truth) does one fully participate in human goods.

FINNIS, *supra*.

11. *See, e.g.*, FINNIS, *supra* note 10, at 144-47 (discussing function of family in subsidiarity).

12. *See* Carozza, *supra* note 1, at 43. Carozza explains that:

tween individual and intermediate social groupings, which are the first relationships to arise and which come about thanks to 'the creative subjectivity of the citizen.'"[13]

Subsidiarity seeks to nourish these intermediate social groups, whether by protecting them from government interference, empowering them through limited but effective government intervention, or coordinating their various pursuits. The term "mediating structures" captures their basic function.[14] A mediating structure could refer to any voluntary association—a family, a neighborhood, a church, a civic club—that "stand[s] between the individual in his private life and the large institutions of public life."[15] Mediating structures "tend[ ] to facilitate self-empowerment and [to] foster a sense of belonging and civic purpose[,]" while at the same time channeling "meaning and value" to larger societal structures, including the state.[16] A legal policy or social structure resonates with subsidiarity if it furthers this basic principle of facilitating, through mediating

> [S]ubsidiarity envisions that just as the individual realizes his fulfillment in community with others, so do smaller communities realize their purpose in interactions with other groups—a group of families as part of an educational community, for instance, or a group of workers as part of an economy of production and exchange.

Id.

13. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH para. 185 (2004) [hereinafter COMPENDIUM] (quoting JOHN PAUL II, ENCYCLICAL SOLLICITUDO REI SOCIALIS para. 15 (1987)). The Catholic Church has made subsidiarity a foundation of its social teaching since the nineteenth century. For a discussion of the Catholic Church's incorporation of subsidiarity, see *infra* notes 25-27, 83-87 and accompanying text. *See generally* Vischer, *Beyond Devolution*, *supra* note 1, at 108-10. As Robert Vischer correctly notes, "[t]o invoke subsidiarity in public policy debates without acknowledging and exploring its Catholic roots is to cut off the principle from the particular priorities it reflects and the broader values it embodies." *Id.* at 109. As with its teaching on natural law, the Church's teaching on subsidiarity is not grounded in theological sources and is thus, in principle, accessible to anyone regardless of religious presuppositions. *See id.* at 108; *see also* GEORGE, *supra* note 8, at 229 (discussing reasons for referring to Church's natural law teaching); POPE BENEDICT XVI, ENCYCLICAL DEUS CARITAS EST para. 28a (2005) (explaining that Catholic Church's social teaching, which was presented "on the basis of reason and natural law," does not attempt to impose religious faith on state or non-Catholics).

14. *See generally* Vischer, *Beyond Devolution*, *supra* note 1, at 116-21 & n.63 (noting role of mediating structures in subsidiarity). Vischer relies primarily on the seminal works by Richard John Neuhaus & Peter Berger. *See* Peter L. Berger & Richard John Neuhaus, *Peter Berger and Richard John Neuhaus Respond*, *in* TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY (Michael Novak ed., 2d ed. 1996); Richard John Neuhaus & Peter Berger, *To Empower People: The Role of Mediating Structures in Public Policy*, *in* THE ESSENTIAL NEOCONSERVATIVE READER (Mark Gerson ed., 1996) [hereinafter Neuhaus & Berger, *Mediating Structures*].

15. Vischer, *Beyond Devolution*, *supra* note 1, at 116 (quoting Neuhaus & Berger, *Mediating Structures*, *supra* note 14, at 213-14).

16. Vischer, *Beyond Devolution*, *supra* note 1, at 117. Vischer notes that:

> Neuhaus and Berger's call for mediating structures—a call that has since been echoed by many scholars—focused on neighborhoods, families, churches, and voluntary associations. When properly functioning, these institutions connect individuals to the wider society in ways that heighten

structures, both the flourishing of persons and the greater justice and responsiveness of state authority.

Subsidiarity recognizes that the state has an obligation to intervene in aid of lower societal structures in appropriate and well-defined ways, but that the intervention must be of a limited, incremental, temporary and remedial nature. Theorists of subsidiarity thus speak of its *positive* and *negative* aspects.[17] Positively, the state (or any higher societal association) offers help to subordinate associations to the extent they cannot accomplish their own ends. But negatively, there is a strong presumption against extensive state intervention into lower associations. Subsidiarity thus exhibits a "principled tendency toward solving problems at the local level and empowering individuals, families and voluntary associations to act more efficaciously in their own lives."[18] These inseparable aspects of subsidiarity attempt to reconcile the apparent antithesis of diversity and community.[19] The ultimate goal, built upon the uniqueness of every human person, is to realize a "genuinely pluralistic society."[20]

The character of the help offered to lower associations is discerned at the crossroads of positive and negative subsidiarity. The image of "absorption" offers some signposts. No association nourishes its members' dignity by dissolving their individuality into a homogenized mass. This is true by definition, given the purpose of an association is to nourish individual development. Just so, higher associations must not absorb the unique qualities and functions of lower associations. Interventions by higher associations are necessitated and limited by the same problem—i.e., that the lower organization requires some aid because it, for whatever reason, cannot achieve its goals. But to preserve those lower associations as genuine associations, the nature of the intervention must be partial and incremental—"subsidiary" to the function and character of the association aided. One certainly does not invigorate mediating structures by destroying them. Subsidiarity further cautions that one also fails to do so by providing a kind of intervention that robs them of their essential identity as mediators.[21]

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their social awareness and maximize the impact of their actions, yet preserve their own unique sphere of operation and identity.

Id. at 117 n.68; *see also id.* at 117 n.69 (citing Neuhaus & Berger, *Mediating Structures*, *supra* note 14, at 215).

17. *See generally* Carozza, *supra* note 1, at 44; Vischer, *Beyond Devolution*, *supra* note 1, at 118-21. As Fred Crosson writes, "[t]he responsibility of the state . . . is to assist the subsidiary groups in achieving their proper ends, and to implement those ends itself only temporarily in circumstances where the subsidiary group is, perhaps because of particular socio-economic conditions, incapable of functioning normally." Vischer, *Beyond Devolution*, *supra* note 1, at 119 (quoting Fred Crosson, *Catholic Social Teaching and American Society*, *in* PRINCIPLES OF CATHOLIC SOCIAL TEACHING 170-71 (David A. Boileau ed., 1998)).

18. Vischer, *Beyond Devolution*, *supra* note 1, at 116.

19. *See* Carozza, *supra* note 1, at 44 (discussing duality of subsidiarity).

20. *Id.* at 45 (quoting Kossel, *supra* note 3, at 46).

21. John Finnis reasons that:

Subsidiarity's guiding principle is that intervention should "assist but not usurp" mediating structures.[22] Various formulae may attempt to capture that idea—for instance, whether a higher association can "more effectively or efficiently" attain a specified objective than the lower association, or whether a particular problem presents "cross-boundary dimension or effects."[23] But verbal formulae are just that—shorthand labels which conceal numerous policy choices and open-ended questions demanding complex argumentation. Also, each presupposes some basic agreement on, or way of determining, the specific objectives to be met, or the particular contours of a problem to be remedied.[24] No formula or test mechanically substitutes for the basic goal of subsidiarity—i.e., fostering the vitality of mediating structures in the service of human dignity and the common good.

The Roman Catholic Church's formulations of the principle of subsidiarity—contained principally in late nineteenth and early twentieth century papal encyclicals on labor relations—are the most carefully elaborated modern statements of the principle and have consequently become benchmarks for its development.[25] They are worth quoting at length:

> [T]he State must not absorb the individual or the family; both should be allowed free and untrammeled action so far as is consistent with the common good and the interest of others . . . . Whenever the general interest or any particular class suffers, or is threatened with harm, which can in no other way be met or prevented, the public authority must step in to deal with it . . . . The limits [of intervention] must be determined by the nature of the occasion which calls for the law's interference—the principle be-

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> [J]ust as the dissolution of family and property would water down human friendship, so the complete absorption by the family of its members would radically emaciate their personal freedom and authenticity . . . . To say this is to formulate, in relation to the family, a principle which in fact holds good for all other forms of human community (though only in a modified form for full friendship itself). Some recent political thinkers have given this principle the name 'subsidiarity,' and this name will be convenient provided we note that it signifies not secondariness or subordination, but assistance . . . . [T]he principle is one of justice.

FINNIS, *supra* note 10, at 146.

22. Carozza, *supra* note 1, at 66.

23. *See generally* Endo, *supra* note 1, at 638-33 (discussing various criteria for justifying governmental interventions under principle of subsidiarity). "Cross-boundary effects" ask whether a problem is serious enough, or whether its effects are so diffuse and difficult to contain that the lower association cannot cope with the problem. Endo cites as one example "the measures to prevent acid rain, since this issue in nature can rarely be solved by the efforts of a country or a region alone." *Id.* at 635.

24. *See generally* Bermann, *supra* note 1, at 378-90 (discussing implementation of subsidiarity as legislative precept).

25. *See generally* Carozza, *supra* note 1, at 41-42; Endo, *supra* note 1, at 627-21; Vischer, *supra* note 1, at 108-15.

> ing that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief . . . . Rights must be religiously respected wherever they exist, and it is the duty of the public authority to prevent and to punish injury, and to protect every one in the possession of his own. Still, when there is question of defending the rights of individuals, the poor and badly off have a claim to especial consideration . . . . The State should watch over these societies of citizens banded together in accordance with their rights, but it should not thrust itself into their peculiar concerns and their organization[.][26]

> Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them. The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of "subsidiary function," the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.[27]

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26. POPE LEO XIII, ENCYCLICAL RERUM NOVARUM para. 35-37, 55 (1891).

27. POPE PIUS XI, ENCYCLICAL QUADRAGESIMO ANNO para. 79, 80 (1931); *see also* POPE JOHN PAUL II, ENCYCLICAL CENTESIMUS ANNUS para. 48 (1991) (discussing application of subsidiarity to government social assistance). The recently published COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH gathers together all the relevant Church texts on subsidiarity. *See* COMPENDIUM, *supra* note 13, at para. 185-88. In his first encyclical letter, *Deus Caritas Est*, Pope Benedict XVI reaffirmed the centrality of subsidiarity to the Church's social teaching:

> The State which would provide everything, absorbing everything into itself, would ultimately become a mere bureaucracy incapable of guaranteeing the very thing which the suffering person—every person—needs: namely, loving personal concern. We do not need a State which regulates and controls everything, but a State which, in accordance with the principle of subsidiarity, generously acknowledges and supports initiatives arising from the different social forces and combines spontaneity with closeness to those in need.

DEUS CARITAS EST, *supra* note 13, at para. 28b.

B. *Society, Associations and the State*

Subsidiarity, as Paolo Carozza writes, "has an intellectual history as old as European political thought."[28] The following sections will attempt to trace some of that history. This will deepen our understanding of subsidiarity generally, but more specifically it will clarify how subsidiarity can apply to the complex of issues posed by the interrelationship of religious associations and the state in a pluralistic society, by the special problem of religious establishments, and finally by the remedy to these various problems offered by the Establishment Clause of the United States Constitution.[29]

Subsidiarity begins with the Aristotelian view that society is a web of associations, each performing specific tasks and providing for its own needs. Aquinas would develop this view by conceiving society as an organism, to which individuals are ordered prior to being ordered to themselves.[30] Far from obliterating the individual, these conceptions recognize the natural links between persons and the inescapable fact that people cannot live outside of a society and a culture.[31] Accordingly, the seventeenth century political theorist Johannes Althusius reasoned that society precedes the state, not historically but ontologically. As the first to systematically describe a subsidiary society, Althusius imagined it as a multitude

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28. Carozza, *supra* note 1, at 40.

29. My discussion draws heavily from the leading modern work on subsidiarity, Chantal Millon-Delsol's THE SUBSIDIARY STATE. *See* CHANTAL MILLON-DELSOL, L'ETAT SUBSIDIAIRE: INGÉRENCE ET NON-INGÉRENCE DE L'ETAT: LE PRINCIPE DE SUBSIDIARITÉ AUX FONDEMENTS DE L'HISTOIRE EUROPÉENNE (1992); *see also, e.g.*, Carozza, *supra* note 1, at 40 (describing Millon-Delsol's book as "one of the most comprehensive available and one of the first standard sources for any study of the concept"); Endo, *supra* note 1, at 646 (depicting it as "the most detailed study [of subsidiarity] so far"). I am working from the Italian translation of Millon-Delsol's book. *See* CHANTAL MILLON-DELSOL, LO STATO DELLA SUSSIDIARIETÀ (Rosario Sapienza trans., 1995).

30. *See generally* MILLON-DELSOL, *supra* note 29, at 18-30, 37-47 (discussing roots of subsidiarity in Aristotle's *Politics* and Aquinas' *Summa Theologica, Summa Contra Gentiles* and *De Regno*); *see also* FINNIS, *supra* note 10, at 159 (noting that subsidiarity "is one important development of the Aristotelian political science"); Czarnetzky & Rychlak, *Empire of Law, supra* note 8, at 121 (observing that "[s]ubsidiarity is closely related to Aristotle's concept of justice as friendship"). For a detailed explication of Aquinas's development of Aristotle on the subject of subsidiarity, see Nicholas Aroney, *Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire*, 25 L. & PHIL. (forthcoming 2006), *available at* http://www.ssrn.com/abstract=890811 (last visited Oct. 21, 2006).

31. *See* MILLON-DELSOL, *supra* note 29, at 40. As Millon-Delsol explains, Aquinas's vision "does not mean that man is a simple means of which the community makes use, but that man cannot reach his ends if not in terms of a broader community. Individually, he possesses the capacity to forge his own destiny, but through the means of a society." *Id.* (author's trans.); *see also* ST. THOMAS AQUINAS, DE REGNO, *reprinted in* ST THOMAS AQUINAS: POLITICAL WRITINGS 5-8 (R.W. Dyson ed. & trans., 2002) (explaining why "[i]t is . . . necessary for man to live in a community," and "necessary for there to be some means whereby such a community of men may be ruled").

of interlocking but distinct social groups, like "Russian dolls that nest one within the other."[32]

The social groups composing civil society, like the individuals within them, can effectively seek their own ends. They possess an intrinsic capacity that a leading modern theorist of subsidiarity, Chantal Millon-Delsol, terms "human capability."[33] This describes neither superhuman power nor unlimited enlightenment, but rather a "concrete capability, an intrinsic knowledge of one's own proximate needs, the ability to manage quotidian details, an everyday know-how."[34] All groups and individuals, however, have natural incapacities and thus must rely on assistance from higher groups, including the state, to realize their own ends.

This insight points us to the justification for political power: neither force nor divine right, but rather the basic need for authority to support human endeavors.[35] This justification intrinsically limits the exercise of political power. As with any higher social entity, the interventions of the governing authority extend only to areas where lower groups fall short.[36] This includes state intervention that helps groups maximize their own capacities by coordinating them for the collective good of society.[37] Govern-

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32. MILLON-DELSOL, *supra* note 29, at 50 (author's trans.); *see also id.* at 48-61 (discussing contribution of Althusius's *Politics* to theory of subsidiarity). Millon-Delsol identifies Althusius as "the first author of federalism . . . and at the same time the first to describe a subsidiary society." *Id.* at 39 (author's trans.); *see also* Endo, *supra* note 1, at 631-30 & n.5 (placing Althusius's contribution in historical context).

33. Millon-Delsol locates the concept of human capability primarily in the works of Montesquieu and de Tocqueville. *See generally* MILLON-DELSOL, *supra* note 29, at 62-82 (discussing contribution of Tocqueville and Montesquieu to theory of subsidiarity); *see also, e.g.*, 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 381 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (discussing popular sovereignty in terms of individual capabilities); MONTESQUIEU, SPIRIT OF THE LAWS VIII, VI (Thomas Nugent ed., Colonial Press 1899) (1748).

34. MILLON-DELSOL, *supra* note 29, at 66-67 (author's trans.).

35. *See* AQUINAS, *supra* note 31, at 7 (explaining that authority is necessary because "if many men were to live together with each providing only what is convenient for himself, the community would break up into its various parts unless one of them had responsibility for the good of the community as a whole").

36. *See* MILLON-DELSOL, *supra* note 29, at 26-28. Millon-Delsol observes, in turn, that social groups' spheres of competence are limited, flexibly, by the capacity of their various actors—tasks that go beyond that capacity should be confided elsewhere. *See id.* The problem of "local despotism" from the social groups themselves, is remedied by applying the "same law of distribution of competences" to those groups. *See id.* at 99-118 (author's trans.).

37. *See id.* at 18-19. Millon-Delsol draws this reflection from the Aristotelian idea that the aim of the city was not merely to survive, but to "live well." *See id.* at 19 (author's trans.) (citing ARISTOTLE, POLITICS I, 2, 1252 b29). The "supplemental" or "subsidiary" aid provided by the city "helps beings to develop themselves, rather than merely to make up for their own deficiencies." *Id.* at 19-20 (author's trans.).

ment intervention is thus necessarily partial, incremental and supplemental.[38] The theory of subsidiarity finds its roots in these ideas.

In stark contrast to the subsidiary state is the despot. The despot intrudes excessively into the competences of lower groups, in effect "transpos[ing] domestic governance into political governance," and thus treating people as incapable of managing their own interests.[39] Especially in Tocqueville and Montesquieu, the despot becomes not the arbitrary tyrant, but rather the ruler who absorbs his subjects' initiatives.[40] By contrast, the subsidiary political power, subordinated both to persons and society, does not mediate "between society and its own good (as in despotism), but rather mediates between social ends and their realization."[41]

Social groups interact with the state through a complex web of political contracts.[42] These political contracts are not the social compacts of John Locke.[43] For theorists of subsidiarity, the notion of social compact is meaningless, since "society, in the sense of ties and relationships among individuals, exists by nature."[44] Against this background of a naturally occurring civil society, political contracts crucially limit the power of the state according to the rights of groups and the persons within them to act within their own spheres of action. Social groups may therefore integrate themselves within "more powerful communities to develop their own well-being," without surrendering their integrity.[45]

Concrete freedom thus demands the existence of free, intermediate bodies within society. They manage the tensions between the socially

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38. Any intervention, governmental or not, should also be proximate, that is, applied wherever possible "between close-knit groups," since social groups nearest to people's needs are usually best adapted to meet them. *Id.* at 113 (author's trans.). Millon-Delsol explains the concept of proximity with a memorable illustration: "A giant cannot provide for all the needs of a Lilliputian: if the giant does not annihilate him, he will carry him, but he is in any event incapable of participating in his minuscule concerns." *Id.* at 47 (author's trans.).

39. *Id.* at 20 (author's trans.).

40. *See id.* at 64-66. As Millon-Delsol explains, these theorists dispel the historical reflex that used good and bad princes as the fundamental criteria in distinguishing political regimes, replacing it with a tendency to "categorize regimes according to the extension of governmental activity." *Id.* at 64-65 (author's trans.); *see also* MONTESQUIEU, *supra* note 33, at III; 1 TOCQUEVILLE, *supra* note 33, at 82-93, 250-51, 661-65 (discussing various aspects of despotism).

41. MILLON-DELSOL, *supra* note 29, at 43 (author's trans.).

42. *See generally id.* at 48-61 (discussing notion of "multiplicity of contracts" in work of Althusius).

43. *See generally* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. VIII *reprinted in* JOHN LOCKE: TWO TREATISES OF GOVERNMENT 330-49 (Peter Laslett ed., Student ed. 1988) [hereinafter LOCKE, SECOND TREATISE OF GOVERNMENT] (describing beginning of political societies); *see also generally* Robert A. Goldwin, *John Locke, in* HISTORY OF POLITICAL PHILOSOPHY 476, 496-97 (Leo Strauss & Joseph Cropsey eds., 3d ed., Univ. of Chi. Press 1987) (1963).

44. MILLON-DELSOL, *supra* note 29, at 52 (author's trans.).

45. *Id.* at 53, 56-59 (author's trans.).

grounded autonomy of individuals and the interventions of the state.[46] Societal aid, flowing from many decentralized sources, is thus assured of being partial and calibrated to meet particular needs.[47] This further illustrates why subsidiarity avoids Lockean social contract theory: isolated individuals would inevitably strike bargains with political authority grossly favoring the state. Only persons grounded in preexisting social groups—individuals "rich with activities"—could negotiate genuine liberty with the state.[48] Consequently, the remedy for political authoritarianism is not the liberty of isolated individuals but rather the mediating activity of free, intermediate associations.[49]

This subsidiary strategy for securing freedom through mediating groups necessarily implies structural limitations on government power. Again, drawing on Tocqueville and Montesquieu, Millon-Delsol traces a connection between the ability of free associations to flourish and the architecture of a limited government. It is well known, of course, that Tocqueville championed voluntary associations as crucial to individual development and to checking tyranny.[50] Millon-Delsol points out further that Tocqueville specifically identified American federalism as "one of the most powerful combinations in favor of human prosperity and freedom."[51] In praising the American federal structure, Tocqueville contrasted the limited competences of the "immense, distant" federal sovereignty with the more responsive sovereignty of states that "envelops each citizen, and takes him over daily in detail."[52] For Tocqueville, then,

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46. Robert Vischer ably explains this mediating aspect of associations:

> The value of associations derives, in significant part, from the extent to which associations stand in tension with the individual on one side and the state on the other. In other words, associations are important relationally, as their relationship with the individual and the state equips them to fulfill a mediating role. This role allows associations to serve as bridges between the individual and the surrounding, impersonal society, but it also injects tension into the association's relationships with the individual and the state.

Robert K. Vischer, *The Good, the Bad, and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 951-52 (2004) [hereinafter Vischer, *Associations*] (citations omitted).

47. *See* MILLON-DELSOL, *supra* note 29, at 74-76, 100-07 (discussing societal aid).

48. *Id.* at 100-18 (author's trans.).

49. *See id.* at 107-10.

50. *See, e.g.*, 1 TOCQUEVILLE, *supra* note 33, at 180-86 ("On political association in the United States."); Vischer, *Associations*, *supra* note 46, at 961 (commenting on Tocqueville's view that "American reliance on associations . . . [were] a bulwark against tyranny and . . . an essential inculcator of democratic values").

51. MILLON-DELSOL, *supra* note 29, at 74 (explaining that "beginning with a description of America, and not from an imagined ideal, Tocqueville paints the proper role of the State") (author's trans.); *id.* at 76 (describing that, for Tocqueville, in American federalism, "clearly appear the paradox and the realized unity of liberty and self-sufficiency") (author's trans.).

52. 1 TOCQUEVILLE, *supra* note 33, at 158; *see also id.* at 57-65 (discussing advantages of localized governance in New England Township). As Harvey Mansfield

American federalism provided the matrix within which associational freedom could operate.[53]

C. *Managing the Common Good*

The subsidiary state pursues a substantive vision of the common good, but in a manner subordinate to the efforts of social groups.[54] While oriented to the common good, a just government's power is limited to constructing an ordered framework that oversees the diverse projects of individuals and social groups. Political power is not the author of diversity, but only "produce[s] the unity necessary for the development of diversity."[55] Thus the state safeguards and promotes the common good, rather than defining it, in the sense of making up for the natural incapacities of social groups—social groups whose own efforts contribute to the

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and Delba Winthrop explain, "Tocqueville elaborates several of the institutional means Americans employ to temper majority tyranny[,]" including "'decentralized administration' in federalism[.]" He also "specifies the means necessary to avert mild despotism: associations—among which he includes local government, a free press, an independent judiciary, respect for forms and formalities generally and for individual rights in particular." *Id.* at lxxi.

53. For a discussion of the relationship between subsidiarity and federalism, see *infra* notes 118-38 and accompanying text. In the same vein, Montesquieu's theories of governmental structure grew out of the subsidiary vision that the state is secondary and supplemental to society. He rejected as impossible and dangerous the idea of eliminating all injustice, opting instead to devise the best scheme for controlling and prohibiting it. This naturally leads to the subsidiary state, because, as Millon-Delsol explains, "[t]he more the activities left to the state increase, the wider becomes the field of injustices that cannot be punished." MILLON-DELSOL, *supra* note 29, at 72 (author's trans.). Only when reasonably detached from society, can the state hope to govern it. Montesquieu's famous theory of separation of powers within government emerges as a logical sequel, allowing control of government itself by limiting its component parts. *See id.* at 71-74; *see also* MONTESQUIEU, *supra* note 33, Books V, VI, VIII, XI, XV, XIX, XX, XXIII, XXVI, XXIX.

54. *See generally* Patrick Brennan, *Jacques Maritain: (1882-1973), in* 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS AND HUMAN NATURE 75, 94-95 (J. Witte, Jr. and F. Alexander eds., 2006) (discussing idea of common good, especially in work of Jacques Maritain). In Catholic social thought, the common good is conceived as "the sum total of all those conditions of social life which enable individuals, families, and organizations to achieve complete and efficacious fulfillment." *Id.* at 96 (quoting *Gaudium et Spes, in* VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 59, 74 (Austin Flannery ed., 1975)). Robert Vischer explains that:

> Catholic social theory developed its theses [regarding the role of government intervention] in response to the liberalism of John Locke, by which society is understood as a collection of individuals who have come together to promote and protect their private rights and interests. Catholic social theory, by contrast, emphasizes the good of the community, not just the rights of individuals.

Vischer, *Beyond Devolution*, *supra* note 1, at 113-14 (internal quotations and citation omitted).

55. MILLON-DELSOL, *supra* note 29, at 38-40, 44-46 (author's trans.); *see also* AQUINAS, DE REGNO, *supra* note 31, at I, ch. III, XV.

common good.[56] Russell Hittinger identifies this principle as central to subsidiarity, as he explains: "[S]ubsidiarity presupposes that there are plural authorities and agents having their 'proper' (not necessarily, lowest) duties and rights with regard to the common good."[57] The state both supervises and coordinates the various activities of social groups, while, in exceptional circumstances, "bringing to a particular entity concrete goods that it would not have been able to produce on its own."[58]

This subsidiary view of the relationship between state power and the common good, particularly as it appears in Catholic social theory, is antiperfectionistic. It recognizes that limited human beings and their institutions will never ideally realize human dignity, as Millon-Delsol describes:

> To social problems, one cannot simply find a solution in the sense of a definitive systematization. There are means, imperfect and tentative, for managing this critical condition permanently in the equilibrium of the possible . . . . It is because the value of dignity is plural, that is paradoxical, that [Catholic] social doctrine seeks a compromise between the duty of non-interference and the duty of interference. In this area, the principle of subsidiarity acquires its definitive dimension.[59]

Consequently, subsidiarity does not furnish *a priori* criteria for state intervention. In contrast with classical liberalism on the one hand (which allows minimal intervention only for basic security) and with socialism on the other (which allows comprehensive state intervention), subsidiarity promotes equilibrium and not rigid solutions. As John Czarnetzky and Ronald Rychlak explain, because subsidiarity focuses on the common good, applying it requires judgments that are "nuanced, comprehensive, and *political*" judgments, consequently "better left to political bodies, who are far better equipped than courts" to formulate them.[60] The government, within its sphere of competence, thus has a great deal of prudential latitude over the decision whether to intervene. But the very existence of mediating structures checks government intervention: the "will of the [intermediate] groups themselves . . . jealous of their own autonomy will prevent the state from abusing its power by creating pretexts for intervention."[61]

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56. *See* MILLON-DELSOL, *supra* note 29, at 59-61. The conviction that all societal entities (not just the state) contribute to the common good departs from both classical liberalism and socialism. *See id.*

57. Russell Hittinger, *Introduction to Modern Catholicism*, *in* 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS AND HUMAN NATURE, *supra* note 54, at 23.

58. MILLON-DELSOL, *supra* note 29, at 131-33 (commenting on Taparelli's work) (author's trans.).

59. *Id.* at 123-26 (author's trans.).

60. Czarnetzky & Rychlak, *Empire of Law*, *supra* note 8, at 121 (discussing application of subsidiarity to International Criminal Court).

61. MILLON-DELSOL, *supra* note 29, at 144-50 (author's trans.).

Given subsidiarity's basic flexibility, one may ask legitimately whether it provides reliable standards for conditioning state intervention, and for attributing competences among governmental actors, private associations and individuals.[62] But proponents of subsidiarity find in its apparent "vagueness" not a defect, but the concept's central asset. Subsidiarity is supposed to calibrate the relationship between civil society and the state within the flux of circumstances, in pursuit of a maximum amount of liberty. But liberty expresses itself in concrete conditions that cannot be predicted and managed by *a priori* rules.[63] The imprecision latent in subsidiarity therefore is exactly the point.[64] Authority acts in a truly subsidiary fashion only if it can adapt itself flexibly to the changing concrete demands of liberty. Thus, subsidiarity does not furnish a blueprint delimiting the functions of the state and this-or-that social group. Rather, it is a "purely formal" principle that manages the relationship between the state and civil society, while their own interactions fix the concrete boundaries between them. Subsidiarity does not allow us to ascribe rigid limits to the competences of any social entity.[65]

D. *The Person, Conscience and the Subsidiary State*

As we have seen, subsidiarity views persons as naturally social creatures, requiring the relationships society provides to be genuinely autonomous.[66] It therefore discards the individualistic view of classical liberalism, first and foremost, as artificially ignoring human beings' basic social and political nature.[67] In turn, society is more than a mass of atom-

62. *See, e.g.*, Michael P. Moreland, *Subsidiarity, Localism and School Finance*, 2 J. CATH. SOC. THOUGHT 369 (2005) (discussing "recurring theme in the literature on subsidiarity. . . that the principle of subsidiarity is indeterminate, vague, and ultimately unhelpful to the resolution of concrete legal and policy questions").

63. *See* MILLON-DELSOL, *supra* note 29, at 190. Thus, "[t]o begin to delimit this condition [of developing liberty] would be absurd, since the capacity for liberty varies continually." *Id.* (author's trans.); *see also* Czarnetzky & Rychlak, *Empire of Law*, *supra* note 8, at 122 (noting that as applied to International Criminal Court, subsidiarity suggests that, "[b]y focusing on an inquiry into the common good of the nation and, therefore, the actual human beings involved, the calculus of whether to assert jurisdiction in a particular case is not mechanically foreordained").

64. *See* MILLON-DELSOL, *supra* note 29, at 190.

65. *See id.* at 193-94.

66. *See id.* at 39-42, 70-71; *see also* FINNIS, *supra* note 10, at 144-45 (discussing subsidiarity and communism); Carozza, *supra* note 1, at 42-43 ("[S]ubsidiarity presupposes that the human person toward whose flourishing the application of the principle is aimed is naturally social. Her dignity requires relationship with others, in a variety of ways and settings, from family life to political participation.") (internal quotations omitted).

67. *See* MILLON-DELSOL, *supra* note 29, at 185. By contrast, in Lockean classical liberalism, the individual can provide for everything he needs, except the security necessary to enjoy it. These premises give rise to a particular conception of state competence. *See id.* at 85-86; LOCKE, SECOND TREATISE ON GOVERNMENT, *supra* note 43, § 123 (explaining man chooses to enter political society because, in state of nature, "the Enjoyment of [his freedom] is very uncertain, and constantly ex-

ized individuals. As Russell Hittinger writes, "[s]ociety . . . is not a mere instrument . . . [but rather] [i]t consists of plural and intrinsic forms, not 'masses' to be aggregated."[68] Free associations within society widen the range and efficacy of individual action and because a person defines himself through actions, foster greater human development.[69]

The liberty at the heart of subsidiarity involves more than freedom to participate in governance; rather, it embraces a broader freedom to pursue various kinds of activities.[70] Individual rights are consequently not understood exclusively "with an eye toward the lonely rights bearer," as Paolo Carozza puts it.[71] Freedom and rights are not abstractions nor are they simply claims against the government. Instead the rights of naturally relational individuals are situated in the context of associations that are themselves primary to the state. They take on flesh by emerging from the background of everyday life.[72] Within free associations, individuals can both transcend themselves and create bulwarks against the state, as Robert Vischer describes: "When afforded their natural vitality and vibrancy . . . associations are the vehicle by which we transcend our individual, atomistic existences and carve out a communal role for ourselves that is distinct from, and often in opposition to, the identity of the state."[73]

Consequently, genuine human autonomy is likely not to be marked by a strict equality, but instead by the inevitable, healthy variations of free people with different abilities and interests.[74] "Fake people"[75] exhibit a leveled sameness that is rooted in excessive individualism and counterfeits authentic freedom.[76] Because the atomized individual possesses merely a

posed to the Invasion of others"); *id.* § 131 (discussing consequent limitations on state power); JOHN LOCKE, *A Letter Concerning Toleration*, *in* ON POLITICS AND EDUCATION 21, 25 (Howard R. Penniman ed., 1947) (discussing limitation on civil magistrate's jurisdiction over "the salvation of souls").

68. Hittinger, *supra* note 57, at 22; *see also* Endo, *supra* note 1, at 618 ("[S]ubsidiarity presupposes . . . not the dichotomous society of atomised individuals and a strong State, but the graduated hierarchy in which various organisations enjoy their autonomies.").

69. *See* MILLON-DELSOL, *supra* note 29, at 24-25, 42. Conversely, when the government deprives an individual of his ability to freely manage his own areas of competence, it "steal[s] a particle of his being [and] mutilate[s] [him] by breaking a naturally stable continuity." *Id.* at 67 (author's trans.); *see also* MONTESQUIEU, *supra* note 33, Books VI, VIII.

70. *See* MILLON-DELSOL, *supra* note 29, at 23.

71. Carozza, *supra* note 1, at 46-47 (citing MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 47-75 (1991)).

72. *See* MILLON-DELSOL, *supra* note 29, at 49-54.

73. Vischer, *Associations*, *supra* note 46, at 958.

74. *See* MILLON-DELSOL, *supra* note 29, at 67-71.

75. *Id.* at 69 (author's trans.); *see also* 2 TOCQUEVILLE, *supra* note 33, at 663 (describing character of persons under mild despotism as "an innumerable crowd of like and equal men" and as "a herd of timid and industrious animals of which the government is the shepherd").

76. *See* MILLON-DELSOL, *supra* note 29, at 70-71. As Millon-Delsol writes:

> A person alone will never or rarely develop his own capacity for freedom. He will remain proud, but naked, clothed only with the abstract essence

truncated, abstract liberty, he therefore must be sustained by what Tocqueville called the "immense tutelary power" of the omnipotent state.[77] By contrast, the ordered liberty of subsidiarity is a concrete mean between the poles of authoritarian government and purely individual liberty, mediated through social groups and situated in the details of practical life, as the following lyrical description attempts to capture: "Before legislating, administrating, constructing palaces and temples, [and] waging war, society works, labors, navigates, exchanges, [and] profits from the sea and the earth. Before consecrating kings and instituting dynasties, a people founds the family, blesses weddings, constructs cities, [and] stabilizes property and succession."[78]

Modern theorists, principally the neo-thomist scholar Luigi Taparelli, have developed the relationship between subsidiarity and rights, particularly the rights of conscience.[79] The subsidiary state is empowered to intervene by creating the conditions for individual action, by aiding particular groups in need, and by undertaking tasks useful to the common good, but which had been neglected. This state power carries with it the concomitant responsibility of protecting a person's basic rights, grounded in human dignity—the right to live, to have means for preserving life and to apply oneself freely to activities.[80] But these rights, as Russell Hittinger underscores, come not from the state but rather from the "proper mode

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of the free man that declarations confer upon him. But associating himself with others elevates him to the realization of autonomy, and he becomes genuinely free.

Id. (author's trans.); *see also* 2 TOCQUEVILLE, *supra* note 33, at 482-84 (describing individualism in democratic countries).

77. *See, e.g.*, 2 TOCQUEVILLE, *supra* note 33, at 663 (describing actions of mildly despotic state); 1 *id.* at 426 ("As conditions become more and more equal and each man in particular becomes more like all the others, weaker and smaller, one gets used to no longer viewing citizens so as to consider only the people; one forgets individuals so as to think only of the species."). *See generally id.* at lxiii-lxvi (discussing Tocqueville's treatment of equality and individualism).

78. MILLON-DELSOL, *supra* note 29, at 111 (author's trans.) (quoting M. RIVIÈRE, DE LA CAPACITÉ POLITIQUE DES CLASSES OUVRIÈRES 215 (1924)).

79. *See, e.g.*, Hittinger, *supra* note 57, at 16, 23 (describing contribution of Taparelli to modern understanding of subsidiarity). Apparently, none of Taparelli's work on subsidiarity has been translated into English. Of his work, Millon-Delsol remarks that "in his *Essay on Natural Law*, and in his numerous articles appearing in [the journal] *Civiltà Cattolica*, Taparelli laid the groundwork for the social doctrine that would soon be articulated by the Vatican, opposing himself both to liberalism and socialism and seeking an alternative to modern individualism." MILLON-DELSOL, *supra* note 29, at 131 (author's trans.).

80. *See* MILLON-DELSOL, *supra* note 29, at 119-38. Because of its different conception of the human person, the Lockean state has a more restricted role, providing only for basic peace and security. It also lacks the capacity to conceive of, and therefore to positively foster, any objective notion of the common good of its subjects. It tends to "suspect in the development of groups the birth of particular despotisms," and holds that "only the individual is the subject of rights." *Id.* at 86-89 (author's trans.).

of action" of social groups themselves.[81] The upshot is that the state has no power to interfere with the consciences of persons, an insight that allowed Taparelli to ground the right of conscience firmly within subsidiarity. As Millon-Delsol describes, Taparelli

> affirm[ed] that no one, and above all not the political authority, can force someone to believe. Spiritual allegiance depends on personal decision and authority has no right in that regard. But the perfect society would be that in which there is a general allegiance to perfect values. And authority cannot help but try to guide society towards that perfection.[82]

Integrating subsidiarity into its social teaching in the nineteenth century, the Catholic Church grounded the affirmative duties of the state on the protection of human dignity rather than on abstract equality or individual liberty.[83] The Church's view of human persons as having a fundamental and equal dignity by virtue of *being* human included both their liberty and equality, but sought a richer autonomy than either alone provided.[84] The Church's social teaching thus avoided absolutizing individ-

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81. *See* Hittinger, *supra* note 57 at 23 (explaining that, in Taparelli's thought, subsidiarity "describes the right (*dritto ipotattico*) of social groups, each enjoying its own proper mode of action").

82. MILLON-DELSOL, *supra* note 29, at 136 (author's trans.). This is a notable development because the theory of subsidiarity had developed earlier in the context of societies, such as the seventeenth century of Althusius, where the state guaranteed religious conformity, often enforcing a single religious system on all persons and communities. There was, in short, no subsidiarity with regard to religious practice or belief. The theory of subsidiarity should be distinguished from its application in different eras, with different conceptions of liberty of conscience. As Millon-Delsol explains with regard to Althusius:

> Althusius is not antidemocratic and it is this that distinguishes him from his antecedents. He believes in popular sovereignty and cannot conceive of legitimation without consent. His entire social system belies the smallest intention of dictatorship, except on the religious plane. But he is a child of his own era: the notion of liberty of conscience remains unknown to him . . . . This reveals, instead, the conception of the era and recalls for us the immense religious disputes of that period in which Althusius was the administrator of Emden. Beyond that, it reminds us that the liberty of autonomy claimed in the *Politics* [of Althusius] is a liberty as far as means, but not as far as ends. It is only in the 20th century that the notion of a subsidiarity state will truly consider liberty as extending to ends, when the individualistic society will have become an inescapable reality.

Id. at 56 (author's trans.).

83. *See generally id.* at 119-26, 138-50 (discussing Church's adoption of subsidiarity as foundation of social teaching); Bermann, *supra* note 1, at 339 (noting concept of subsidiarity can be traced to twentieth-century Catholic social philosophy); Carozza, *supra* note 1, at 41-42 (describing development of Catholic social theory and subsidiarity); Endo, *supra* note 1, at 627-22 (explaining Catholic roots of subsidiarity); Vischer, *Beyond Devolution*, *supra* note 1, at 108-10 (explaining Catholic roots of subsidiarity).

84. *See* MILLON-DELSOL, *supra* note 29, at 119-26. The concept of human dignity necessarily embraces individual liberty and personal responsibility, "[b]ut at

ual liberty, as in classical liberalism, and equality, as in socialism. On this view, a person's rights are various facets of the entire complex of human dignity itself.[85] As with Taparelli, the upshot of this reasoning placed strict limits on the power of the state to interfere with the individual or social groups in matters of conscience. For example, commenting on the thought of Pope Pius XII and John Courtenay Murray, Russell Hittinger explains that the "juridical" (that is, limited or "instrumental") state "coordinates and facilitates rather than exemplifies the perfections and actions of society. Not being an end in itself, the state cannot be sacralized nor directly assigned juridical care of religious institutions."[86] These interrelated ideas—the limited state, human dignity, and the rights of conscience and religious freedom—would prove decisive in the documents of the Second Vatican Council, most famously *Dignitatis Humanae*, affirming a robust view of the inviolability of human conscience by the state and of the state's responsibility to protect religious freedom.[87]

This delicate relationship between conscience and the subsidiary state can also be appreciated from a different angle: how some theorists of subsidiarity have worked out the apparent tension between individual rights of conscience and the state's promotion of the common good. Admittedly, there must be some minimal objective vision of the common good if the state hopes to fulfill its affirmative, albeit subsidiary, role in guiding society toward its realization. But the problem remains of how such a vision is compatible with an individual's freedom of opinion and belief.[88] By shifting from the older concept of an organic society to a newer vision of an organized society, modern theorists of subsidiarity have adapted its view of the common good to the modern understanding of rights, especially the rights of conscience.

The organic concept of society presupposed a relation in which "an individual is tied to society as a branch is to a tree or a hand to a person."[89] The common good emerged from an internal consensus of society, but was itself an objective truth transcending any individual's own conception. Contradicting that common good would be viewed as irrational, a conclusion in tension with a modern understanding of liberty of conscience.[90] Simply imposing such a view of the common good would involve a kind of despotism.[91] To adapt subsidiarity to a modern individualistic society required reconceiving the common good in terms of the

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the same time it implicates a decent life, humanized work, [and] a minimum of 'possessions' that liberty cannot always grant." *Id.* at 121 (author's trans.).

85. *See id.* at 121-26. Indeed, Catholic social thought saw a fundamental danger in selecting certain rights to the exclusion of others.

86. Hittinger, *supra* note 57, at 21 & nn.50-51.

87. *See generally id.* at 23-26.

88. *See* MILLON-DELSOL, *supra* note 29, at 136-38.

89. *Id.* at 169-76 (author's trans.).

90. *See id.* at 176-77.

91. *See id.* This is not to say that the older understanding of the common good was a form of despotism, but simply that the changed conditions of modern

human person. The personalistic philosophy of theorists like Jacques Maritain[92] furnished one of the primary theoretical bases for this task.[93]

Personalism is a philosophy that places the human person at the center of society, but not as the isolated individual of classical liberalism. It seeks to preserve (as classical liberals did not) a notion of the common good as a positive objective of the state.[94] Embracing a pluralistic society with its diversity of goals, the state would no longer define the common good, but would instead facilitate society's pursuit of it through individual action and purposes.[95] As James Schall explains, "any political common good is always itself related to the individual persons whose good it fosters and . . . it is their good or purpose, not its own, for which any organized civil society exists."[96] The community is thus ordered to the person, not only as to the means of action, but also as to the ends of action.[97] This is perhaps best summed up in what Patrick Brennan calls "the most famous line associated with Maritain: 'Man is by no means for the State. The state is for man.'"[98] While the classical liberal conceives the common good simply as a complex of circumstances the state secures, a personalist would claim the state must positively foster individual human dignity.[99] The

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society make that notion of an objectively held common good, if imposed from above, despotic. *See id.* at 178.

92. *See generally* JACQUES MARITAIN, MAN AND THE STATE (Richard O'Sullivan ed., 1954) [hereinafter MARITAIN, MAN AND THE STATE] (discussing sovereignty and rights of man); JACQUES MARITAIN, THE PERSON AND THE COMMON GOOD (1947) (distinguishing between individuality and personality); *see also* JAMES V. SCHALL, JACQUES MARITAIN: THE PHILOSOPHER IN SOCIETY (1998); Brennan, *supra* note 54, at 75-114 (describing and explaining Maritain's philosophy).

93. *See* MILLON-DELSOL, *supra* note 29, at 169; *see also* Endo, *supra* note 1, at 617-14 (discussing role of personalism in subsidiarity). Another important philosophical basis was the notion of solidarity, which sought to provide a moral grounding for societal ties among persons while emphasizing the realistic limits of societal perfection. *See* MILLON-DELSOL, *supra* note 29, at 169-70; *see also* Susan J. Stabile, *Subsidiarity and the Use of Faith-Based Organizations in the Fight Against Poverty*, 2 J. CATH. SOC. THOUGHT, 313, 333-34 (2005) (discussing relationship of subsidiarity to solidarity).

94. *See* MILLON-DELSOL, *supra* note 29, at 171.

95. *See id.* at 178-79.

96. SCHALL, *supra* note 92, at 205 (describing Maritain's understanding of common good).

97. *See* MILLON-DELSOL, *supra* note 29, at 179 ("Personalism opposes the person to the state, in order to make of the state a means, and the person an end.") (author's trans.). Maritain sharply dismissed the idea that the state itself has a personality to which human persons are subordinate. *See* SCHALL, *supra* note 92, at 204-05. Instead, the state is simply an "instrument in the service of man[.]" MARITAIN, MAN AND THE STATE, *supra* note 92, at 11; *see also* Czarnetzky & Rychlak, *Empire of Law*, *supra* note 8, at 101 & n.170 (discussing Maritain's personalist view of common good).

98. Brennan, *supra* note 54, at 94 (quoting MARITAIN, MAN AND THE STATE, *supra* note 92, at 19).

99. *See* MILLON-DELSOL, *supra* note 29, at 179; *see also* Brennan, *supra* note 54, at 96 (explaining that "Maritain defined the state as that part of the body politic

common good is inextricably bound to the good of individual persons, as Maritain explains in his classic work, *Man and the State*:

> What is the final aim and most essential task of the body politic or political society? It is . . . to improve the conditions of human life itself, to procure the common good of the multitude, in such a manner that each concrete person, not only in a privileged class but throughout the whole body politic, may truly reach that measure of independence which is proper to civilized life and which is ensured alike by the economic guarantees of work and property, political rights, civic virtues, and the cultivation of the mind.[100]

The common good thus transcends vague notions of public welfare and order, possessing "more concrete human implications, for it is by nature the good human life of the multitude and is common to both the *whole* and the *parts*, the persons into whom it flows back and who must derive benefit from it."[101] This personalist re-calibration of subsidiarity seeks a middle ground between an impersonal common good and the detached good of isolated individuals. Subsidiarity thus "places the necessity of individual development within the context of the common good."[102] For these reasons, Paolo Carozza can accurately affirm that subsidiarity's "basis is personalistic, rather than contractual or utilitarian," and that "the value of the individual human person is ontologically and morally prior to the state or other social groupings."[103]

The question that remains is how to determine the content and practical application of this person-centered common good, given that it simply cannot be imposed from on high as a matter of blind traditionalism or authoritarianism.[104] What is required is a means of achieving broad consensus that is not necessarily the same as majoritarian determination. Millon-Delsol describes this process as a "battle of argumentation to convince [others] of the justice of the content which they would give to the common good."[105] This does not subjectivize the content or application of

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whose aim is to secure the common good, including persons' achieving their normality of functioning, for the body politic").

100. MARITAIN, MAN AND THE STATE, *supra* note 92, at 49. Describing Maritain's thought, James Schall explains that "[t]he state is subordinate to and stands in the service of the reality of the person who has freedom and intelligence and who is directly related to the external common good." SCHALL, *supra* note 92, at 205.

101. MARITAIN, MAN AND THE STATE, *supra* note 92, at 10.

102. MILLON-DELSOL, *supra* note 29, at 181 (author's trans.).

103. Carozza, *supra* note 1, at 42.

104. *See, e.g.*, Brennan, *supra* note 54, at 97 (distinguishing between Maritain's thoughts regarding legitimate authority in law—which arises from law's comporting with human practical reason—and exercise of power, "which is force others are merely obliged to obey").

105. MILLON-DELSOL, *supra* note 29, at 185-88 (author's trans.).

the common good. To the contrary, the common good represents the prudential working out of a distinct notion of human dignity, grounded in cultural history, philosophical notions of right, and religious conceptions of the human person.[106] Notably, Millon-Delsol identifies "secularization"—or the concrete relationship between religion and public life—as an apt subject for this process of public argumentation in which the content of the common good is hammered out.[107] Such a debate on the place of religion in society does not simply pit two monolithic and irreconcilable positions against each other, but rather "express[es] the contradictions that one confronts when one must translate these values into concrete terms."[108] In this debate, the state does not somehow adopt a supra-moral and abstract stance of neutrality.[109] At the same time, while society's common good must include the spiritual ends of human beings, this does not mean that the state has direct superintendence over those ends. To the contrary, as Patrick Brennan explains, "although the common good is society's ultimate end, even society is limited insofar as the person has an end in another, surpassing order."[110] Maritain recognized that society should seek to foster conditions favorable to persons' spiritual development, but also affirmed that "[t]he end of political society is not to lead the human person to his spiritual perfection and to his full freedom of autonomy."[111]

The personalistic emphasis of subsidiarity informs the question of when the state should intervene with regard to lower organizations. As discussed, the pivot of subsidiarity in its modern form is the dignity of the human person. Instead of abstract liberty, "it is [a person's] dignity that defines him, in the measure that his dignity includes liberty, the need for security, the need for minimal material well-being, [and] the need for con-

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> In any case, determining the content of the common good by consensus remains the only possibility open to us in the conditions of diversity in which we find ourselves. We have no other choice, if we are not to return to religious or ideological coercion. This will not prevent anyone from believing that an objective notion of the common good exists, but he will have to persuade others of his idea without any longer being able to impose it. This will involve a battle of argumentation to convince others of the rightness of the content that one gives to the common good—a difficult but legitimate prospect, given that to convince others one will have to refine his own theses.

Id. at 186 (author's trans.).

106. *See id.* at 187 (discussing foundations of notion of common good); *see also* Brennan, *supra* note 54, at 95 (observing that, for Maritain, "[t]he common good is the shared life of a political community of free persons living oriented toward justice, friendship, and the transcendent").

107. *See* MILLON-DELSOL, *supra* note 29, at 187.

108. *Id.* (author's trans.).

109. *See id.*

110. Brennan, *supra* note 54, at 95.

111. *Id.* (quoting JACQUES MARITAIN, INTEGRAL HUMANISM; TEMPORAL AND SPIRITUAL PROBLEMS OF A NEW CHRISTENDOM 134 (Joseph W. Evans trans., 1973)).

sideration, among other things."[112] A person's rights concretely express that intrinsic dignity. Those rights are inseparable from an ability to develop oneself through actions, which in turn reminds us that full human flourishing requires association with others and the aid various associations provide.[113] This conception of rights suggests that state intervention demands not just a purely subjective desire, but also a need "felt by the individual in relationship to his requirements of dignity, and also in relationship to the society in which he lives."[114] At a minimum, the rights protected by the subsidiary state must include "immunity from external coercion as well as psychological freedom."[115] But at bottom the personalist re-imagination of subsidiarity reinforces the idea that the cornerstone principle of government non-interference applies not only to action, but also to thought and belief.[116] As Maritain wrote, even if the state may punish someone for an act of conscience that violates the law, "in like circumstances the State has not the authority to make me reform the judgment of my conscience, any more than it has the power of imposing upon intellects its own judgment of good and evil, or of legislating on divine matters, or of imposing any religious faith whatsoever."[117] Here again appears the interplay between the subsidiary state, the essential dignity of the human person and that person's rights of conscience.

III. SUBSIDIARITY AND FEDERALISM

What has been said so far about subsidiarity provides sufficient tools to apply the theory to the question of religious establishments as such.[118] But if the theory is to be applied to the Establishment Clause as well, one additional question needs exploring. That question is whether the principle of subsidiarity can be expressed in a constitution and if so, what form that expression should take. As will be discussed, the answer to this question will affect how subsidiarity applies to the Establishment Clause. Specifically, this answer will determine whether it makes more sense to say

112. MILLON-DELSOL, *supra* note 29, at 198 (author's trans.).

113. *See id.* at 196-99 (explaining necessity of human associations).

114. *Id.* at 202-06 (author's trans.).

115. Philip A. Pucillo, *Toward a Subsidiarity-Based Judicial Federalism*, 2 J. CATH. SOC. THOUGHT 463, 466 (2005) (citing POPE PAUL VI, DIGNITATIS HUMANAE para. 2 (1965)). Pucillo also observes that when the state intervenes to vindicate individual rights, subsidiarity

> would require [the state] to minimize the extent to which its ruling would disturb the pursuits of individuals and communities who have no direct involvement in the dispute. That way, the state can intervene for the purpose of performing an essential function while respecting the rights of any number of individuals and communities to pursue their objectives.

Id. at 468.

116. *See* MILLON-DELSOL, *supra* note 29, at 202-06.

117. Brennan, *supra* note 54, at 99-100 (citing JACQUES MARITAIN, THE RIGHTS OF MAN AND NATURAL LAW 77-78 (Doris C. Anson trans., 1943).

118. For a discussion of the theory of subsidiarity, see *supra* notes 9-117 and accompanying text.

there is a substantive notion of subsidiarity embedded in the Clause itself—one which a court presumably could apply to particular church-state problems—or whether the Clause serves a subsidiary function in the overall constitutional structure by severing the federal government from a particular area of social policy. As will be seen, the latter view better captures the subsidiary function of the Clause in relation to the federal structure of the Constitution.

Subsidiarity can apply to the role of any authority, public or private.[119] Asking how subsidiarity illuminates the relationship between *state* authority and civil society, however, raises the interconnected questions of whether the principle is intelligibly embedded in a constitution and whether the principle is susceptible to judicial enforcement. Certainly, subsidiarity is expressed in various ways in several European constitutions.[120] But the theory and function of subsidiarity raise doubts about the utility of simply "writing subsidiarity into" a limiting constitutional provision—for example, a provision requiring a higher governmental authority to "take action in accordance with the principle of subsidiarity" only to the extent that lower states cannot "sufficiently achieve" proposed objectives.[121] While the classical liberal state confines the competences of state authority to definite boundaries, "the idea of subsidiarity implicates, to the contrary, that public intervention does not have virtually any limit preventatively fixed by socio-political doctrine."[122] Subsidiarity, then, is better described as a *condition* on the exercise of state authority, rather than an *a priori* limit on it:

> The conditions requiring intervention cannot be objectively defined: incapacity, negligence, [and] pressing need are oscillating

119. As Millon-Delsol explains, subsidiarity can apply to "every field of social life which poses the problem of the attribution of competences." MILLON-DELSOL, *supra* note 29, at 207 (author's trans.).

120. *See id.* at 213 (discussing provisions in German constitutions directly inspired by subsidiarity); *see also* Maastricht Treaty on European Union art. A, Feb. 7, 1992, 1757 U.N.T.S. 30615 (requiring new European Union "decisions [to be] taken as closely as possible to the citizen"); *id.* art. B (requiring Community institutions to "respect[ ] . . . the principle of subsidiarity" in pursuing their objectives under the treaty); *id.* art. 3b (requiring Community, in non-exclusive areas, to "take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States"); Bermann, *supra* note 1, at 344-47 (discussing provisions in European Community treaties based on subsidiarity); Lorenza Violini, *Subsidiarity and Modern Public Administration: The State of the Art in Matters Related to the Implementation of the Principle in Italian Regions*, 2 J. CATH. SOC. THOUGHT, 401, 402-04 (2005) (discussing failed attempt to embed subsidiarity in Italian Constitution and its eventual implementation at regional level).

121. Maastrict Treaty on European Union art. 3b. *See also* Bermann, *supra* note 1, at 345-46; *see also* Violini, *supra* note 120, at 406-07 & n.9 (observing "[t]he decision whether to assign the judiciary a role in reviewing legislative respect for subsidiarity has been considered a highly problematic one" and collecting sources addressing issue).

122. MILLON-DELSOL, *supra* note 29, at 212 (author's trans.).

> criteria that depend on circumstances. The essential characteristic of the principle is its flexibility without which it would have no reason to exist, since it seeks to create an equilibrium. One could not, in any case, render it rigid . . . by prescribing in a juridically obligatory manner a sector of reserved competences; to the contrary, [subsidiarity] presupposes that there are no reserved competences.[123]

Thus subsidiarity does not translate easily into a judicially enforceable set of rules and, to that extent, does not function as an *a priori* constitutional limit on state authority.[124] Even theorists such as George Bermann, who see a limited role for the European Court of Justice in enforcing subsidiarity principles, view the primary function of subsidiarity as informing the political judgments of legislatures, to which courts should strongly defer.[125]

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123. *Id.* at 215 (author's trans.).

124. Millon-Delsol envisions a limited judicial role in enforcing subsidiarity, reasoning that "its juridical formulation can help avoid both the excesses of state intervention as well as the gaps of non-intervention, leaving open the possibility of recourse to the law in a case of conflict." *Id.* (author's trans.). But she cautions that:

> [T]he principle cannot be applied directly, but can only guide the valuations of political and social actors. In German and Swiss law, the idea of subsidiarity appears, not so much as a norm of right, as much as an atmosphere, a kind of background, an implicit reference point. It inspires the entire federal system.

Id. (author's trans.). George Bermann notes that:

> The German Constitutional Court has in effect determined that the largely comparable provisions on federal subsidiarity in the German Constitution are nonjusticiable, with the result that the "necessity" for federal government legislation in areas of concurrent competence is essentially a political question to be decided by the political branches without judicial interference.

Bermann, *supra* note 1, at 393-94 (footnotes omitted); *see also id.* nn.248-49 (commenting on German Constitutional Court decisions on justiciability of Article 72 of Grundgesetz Constitution); P.J.C. Kapteyn, *Community Law and the Principle of Subsidiarity*, 2 REVUE DES AFFAIRES EUROPÉENNES 35, 42-51 (1991) (arguing principle should be considered categorically nonjusticiable) (cited by Bermann, *supra* note 1, at 393 n.247). For a different view of subsidiarity and judicial review based on a variation of federal abstention doctrine, see Pucillo, *supra* note 115, at 485-93.

125. Bermann reasons that:

> If, as seems evident, subsidiarity addresses issues that are ordinarily relegated to the political realm, then subsidiarity's central function must be its legislative one. This means in turn that each participant in the Community's legislative process should . . . determine whether the measure under consideration meets the test of subsidiarity, and act on the measure accordingly.

Bermann, *supra* note 1, at 367; *see also id.* at 378-90 (describing subsidiarity as "mode of legislative analysis"). Bermann takes a limited view of the Court of Justice's role in enforcing subsidiarity. *See id.* at 390-403 (discussing judicial enforcement). He notes that the contingencies which make subsidiarity difficult for a legislature to apply "make the inquiry even more problematic for the Court." *Id.* at 391. He therefore advocates limiting Court review to the procedural question of

This question takes on a different aspect if we ask not whether subsidiarity can be translated into judicially enforceable constitutional rules, but whether the principle can be integrated into, and expressed through, a governmental structure. Federalism bears the strongest earmarks of a subsidiary structure.[126] Indeed, for Millon-Delsol, a federal system represents "the concrete expression of the formal principle [of subsidiarity and] its most meaningful and elaborated expression."[127] In a federal system, a central government comprehends entities that are themselves genuine state authorities. The system exemplifies subsidiarity because the coalition of lower state entities *preexisted* the formation of the central government, consenting to its creation and empowerment. The constituent states already possessed the competences of self-government, but decided, in view of their mutual benefit, to divest themselves of certain competences "without themselves abandoning the tasks thought necessary to the common good."[128] The clearest examples of the creation of federal systems, explains Millon-Delsol, are the United States and Switzerland, and her description of the dynamics of those systems tracks the structure of the U.S. Constitution:

> [T]he powers of the federal state are delegated to it, and all the powers not devolved on the federal state remains with the federated states. This transmission from low to high reveals where the origins of power lie. The [governmental] competences belong naturally and without need of any rational justification to the nearest entities. The competences of the [central] state must, on the contrary, receive justification, since they emerge from a secondary need. The competences of the federal state are enumerated, that is, restrictive and based on rational calculation.[129]

Thus, the formation of a federal state is subsidiarity-in-action, the structural elaboration of the theory itself. Millon-Delsol can thus say broadly that the "history of federalism follows the philosophical history of the principle of subsidiarity."[130]

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whether the Community institutions properly considered local remedies, as opposed to the substantive question of whether Community action comports with a norm of subsidiarity. *See id.* at 391-92, 400. Review would "pay[ ] pronounced deference to [legislative] judgments on the substance of the matter." *Id.* at 400.

126. *See generally* MILLON-DELSOL, *supra* note 29, at 215-20.

127. *Id.* at 215 (author's trans.).

128. *Id.* at 215-16 (author's trans.). Such a divestment of governmental functions—"guaranteed by a contract at the moment of the creation of the central state"—stands in marked contrast to the downward concession of powers by a preexisting central sovereign. *Id.* at 216 (author's trans.).

129. *Id.* at 217 (author's trans.).

130. *Id.* (author's trans.). Among some commentators, there appears to be a sharp difference of opinion about the relationship between subsidiarity and American federalism. Thus, David Currie claims that "subsidiarity is the guiding principle of federalism in the United States," while George Bermann concludes that subsidiarity is neither in the "lexicon of U.S. Constitutional law" nor a "central

Subsidiarity also provides insight into the most difficult practical aspect of federalism: the division of competences between the central and constituent governments.[131] From the viewpoint of subsidiarity, the division is not so much a rationalized parceling-out of discrete governmental functions—one to the central government, another to the lower governments—but rather "a question of equilibrium" that can itself change according to circumstances.[132] This equilibrium must be understood, of course, within the context of the delegated competences of the central government. The combination of those two aspects in the matrix of subsidiarity suggests the twin aspects of federal power in the U.S. Constitution—i.e., that the powers of the federal government are limited in the sense that they are delegated, but also plenary within their sphere of oper-

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feature of U.S. Constitutional practice" and is "foreign to the law and practice of federal legislation." *Compare* David P. Currie, *Subsidiarity*, *in* 1 GREEN BAG 2D 359, 359 (1998), *with* Bermann, *supra* note 1, at 403, 406. But the divergence may not be as deep as it sounds. Currie is essentially echoing Millon-Delsol in discerning the lineaments of subsidiarity in the American federal structure, specifically in the enumeration of congressional powers, which Currie calls "a concretization of the subsidiarity principle." Currie, *supra*, at 360. But as to the actual operation of federal powers, Currie sees subsidiarity at work, not as an independent limiting principle, but as a background premise seen, for example, in the interstitial and ad hoc nature of federal law, in the gradual expansion of federal power in areas beyond state competence and in judicial decisions limiting the reach of federal power. *See id.* at 360-64. Bermann, on the other hand, focuses primarily on whether there is an independent subsidiarity check in the American system on the operation of federal power. Beyond political checks inherent in the federal structure itself, Bermann discerns no independent subsidiarity principle in that structure. He does, however, see the potential for application of subsidiarity in, for instance, legislative frameworks, judicial enforcement of commerce power and other doctrines, and agency regulations (although he is skeptical about how well subsidiarity meshes in practice with American federalism). *See* Bermann, *supra* note 1, at 403-48, 449-53. For our purposes, the important difference between these two commentators centers on whether a federal structure *as such* qualifies as a structural expression of subsidiarity. Millon-Delsol and Currie think a federal structure does not necessarily function as a subsidiary structure, while Bermann believes it does. The difference may simply lie in an emphasis on substantive outcomes over structure. Robert Vischer takes both commentators' views into account, but like Currie and Millon-Delsol, finds subsidiarity reflected in the theoretical and structural premises of American federalism. *See* Vischer, *Beyond Devolution*, *supra* note 1, at 122-26; *see also* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 836 (1996) (proposing model of American constitutional federalism based on subsidiarity); Douglas W. Kmiec, *Liberty Misconceived: Hayek's Incomplete Relationship Between Natural and Customary Law*, 40 AM. J. JURIS. 209, 215 (1995) (discerning subsidiarity in Tenth Amendment).

131. *See* Kmiec, *supra* note 130, at 217-19; *see also, e.g.*, THE FEDERALIST NO. 37 (James Madison) (describing difficulties in drawing line between federal and state competences in drafting of U.S. Constitution).

132. MILLON-DELSOL, *supra* note 29, at 218 (author's trans.). Millon-Delsol illustrates this dynamic equilibrium by reference to the history of power sharing between the Swiss cantons and the central government. One could find analogues of this equilibrium in American federalism—for instance, in the waxing and waning of federal congressional power throughout the twentieth century, or in the gradual incorporation of the federal bill of rights against the states.

ation, and that these powers are constrained ultimately by the representative structure of the government and by the sheer existence of lower governments and social groups.[133]

Viewed through the lens of subsidiarity, federalism integrates governmental structure with individual freedom.[134] The federal organization resonates with subsidiarity because it promotes a liberty situated less within the confines of abstract theories of right than within concrete situations and realistic human capacities.[135] In effect, federalism declares itself unable to provide rationalized solutions to intractable political and social dilemmas.[136] Rather, it proposes a flexible matrix for pluralistic societies through a graduated governmental structure. As Millon-Delsol explains:

> Defenders of federalism maintain that [subsidiarity's] political organization of proximity, which ties the necessity of sovereignty to respect for autonomies, would be the only one able to effectively manage the increasingly explosive diversities of contemporary societies. It deals above all with managing and not resolving, since politics for [its defenders] is not a science capable of resolving human problems. The idea of subsidiarity—and consequently also of the federal organization—implies a realistic philosophy in which human paradoxes can be held together, assumed, managed, without attempting to resolve them, given the inherent imperfection of nature.[137]

By this account then, federalism provides a structure within and through which the theoretical substance of subsidiarity is aptly expressed. This is not to say, of course, that a federal governmental structure is the only means of expressing subsidiarity in practice. But it is to say that one sees subsidiarity clearly at work within the lineaments of federalism. Further, subsidiarity allows one to grasp better the purpose of a federal structure. For at bottom, subsidiarity is not simply about devolution of power to the lowest possible level of government. Instead, as Russell Hittinger explains, subsidiarity is "a normative structure of plural social forms . . . an

133. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 378 (1819) (concluding federal power supreme within its sphere); THE FEDERALIST No. 9 (Alexander Hamilton), No. 10 (James Madison) (discussing nature of federal power).

134. *See* MILLON-DELSOL, *supra* note 29, at 219.

135. *See id.*

136. A famous example of this sort of "refusal" to provide definite solutions to social and political problems is Madison's explanation in *Federalist 10* and *51* of the Constitution's solution to the problem of factions. In those writings, Madison explained that an extended federal republic remedied the problem of majority factions through indirect and mechanical means—i.e. an extended geography, increasing pluralism and divided governments would prevent majority factions from coalescing—rather than the direct means of, for instance, creating a monarchical "will" separate from the majority. *See* THE FEDERALIST Nos. 10, 51 (James Madison); *see also* GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC (1989) (discussing Madison's treatment of majority factions).

137. MILLON-DELSOL, *supra* note 29, at 220 (author's trans.).

account of the pluralism in society."[138] The theory of subsidiarity therefore clarifies the animating purpose of federalism—to offer a structure for managing pluralism. Federalism provides a matrix within which diverse constituent governments can co-exist for their mutual benefit without relinquishing their own identities or capacities for self-government.

As we will see, this account of federalism resonates with the formation and operation of the U.S. Constitution. This will be crucial in understanding the role of the Establishment Clause within our federalist structure. The problem of how religious associations relate to a secular state, particularly the problem of religious establishments, is a paradigm instance of delicate social issues that demand political management rather than mathematical solutions. A subsidiary account of the Establishment Clause depicts the Clause *not* as providing courts with the overarching equation for deriving solutions to the establishment problem, but instead as insuring the fundamental political and social conditions within which the problems posed by religious establishments can be, and in fact were, resolved. Part IV will explore the intricacies and challenges presented by this subsidiary view of the Establishment Clause.

IV. SUBSIDIARITY, ESTABLISHMENTS AND THE ESTABLISHMENT CLAUSE

We can now use the theory of subsidiarity to construct a framework for understanding the general problem of religious establishments and the narrower question of how the Establishment Clause addresses that problem. This will present its share of difficult questions, but grappling with them will show how subsidiarity can clarify thinking about this area. First, this part of the Article will translate the notion of a religious establishment into the vocabulary of subsidiarity. This will suggest a helpful way of understanding the establishment problem, one rooted in the actual functioning of religious associations and the state, and one unencumbered by the tedious conceptual baggage of establishment clause jurisprudence.

The Article will then address the Establishment Clause itself and ask how subsidiarity can illuminate its function within the wider framework of the U.S. Constitution. As the analysis thus far suggests, subsidiarity is not a source for judicially-enforceable rules about relationships between state authority and religious associations. Paradoxically, this will help explain the role of the Establishment Clause within the constitutional structure. Through the lens of subsidiarity, the Clause can be understood as a strategy for partitioning the national government from the divisive issue of founding-era religious establishments, consequently leaving to states the task of managing how various religious groups would coexist with each other and with state authority.

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138. Hittinger, *supra* note 57, at 23.

A. *Subsidiarity and the Establishment Problem*

Religious associations are a prime example of mediating structures—social groups that provide individuals with meaning, opportunities for action and a matrix for relationships unavailable to them in isolation—those intermediate associations which, as we have seen, are central to the functioning of the subsidiary state.[139] As associations, they possess their own unique identities and range of competences capable of transmitting meaning to society and to the state, and capable of contributing to the common good. Situating religious associations within the framework of subsidiarity enables us to evaluate their functions in relation to other associations and to the state. A problematic religious "establishment" can then be conceived as a situation in which state authority has compromised a religious association's mediating functions. Conversely, an "establishment" could arise when a religious association has improperly absorbed the governing functions of state authority. This provides a helpful vantage point from which to view a religious "establishment," one measured against the concrete interactions between state and associations, instead of against the elusive standards of modern establishment clause jurisprudence.

Situating the problem of religious establishments within the vocabulary of subsidiarity first requires explaining why religious associations are properly seen as social groups that mediate between individuals and the state.[140] This is a straightforward concept, and so requires only a brief sketch. As subsidiarity has increasingly embraced individual liberty of conscience, the theory naturally includes religious associations as mediating structures. That inclusion meshes with the treatment of religious associations in both state and federal jurisprudence in this country. Religious groups have long been deemed autonomous legal associations capable of interacting with other groups and with the state in order to transmit values and work for the common good.

Subsidiarity developed in significant part during a period in Western European history when state authority enforced religious orthodoxy.[141]

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139. Robert Vischer explains that "[t]he mediating status of a group or institution stems . . . from their tendency to facilitate self-empowerment and foster a sense of belonging and civic purpose." Vischer, *Beyond Devolution*, *supra* note 1, at 117. A mediating structure

> connect[s] individuals to the wider society in ways that heighten their social awareness and maximize the impact of their actions, yet preserve their own unique spheres of operation and identity. From a subsidiarity perspective, these attributes are invaluable because they instill a sense of responsibility for one's self and one's surroundings, along with the tools needed to act in betterment of both.

Id.

140. On the nature of associations as mediating structures, see generally Vischer, *Associations*, *supra* note 46.

141. For a discussion of the development of the principle of subsidiarity in Europe, see *supra* notes 1-23 and accompanying text. *See also* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 9-19 (2000). On the relationship between church and state throughout the

The common good was understood as an objectively verifiable, universally held truth that encompassed religious belief and practice, one that was upheld by the state. Individuals and groups may have been free to choose *means* for accomplishing their own purposes, but their autonomy did not include free *ends*, including religious ends. Those ends lay in state custody. This was less a product of subsidiarity itself than of the era's limited notion of the liberty of conscience and of the common good.[142] Subsidiarity has since developed, particularly in the work of Catholic social theorists and the Catholic Church itself, into a careful integration of liberty of conscience with the common good.[143] With this development, subsidiarity naturally embraces religious associations as mediating structures, both as to ends (i.e., religious opinions and beliefs, worship and organization) and means (i.e., religiously-motivated social action, such as charity, education or political action). Modern theorists of subsidiarity classify religious groups among the most important of mediating structures.[144] For instance, in their pioneering work, Richard Neuhaus and Peter Berger emphasize that religious institutions "are singularly important to the way people order their lives and values at the most local and concrete levels of their existence," and that consequently "they are crucial to understanding family, neighborhood, and other mediating structures of empowerment."[145]

American law has long echoed this insight of subsidiarity by treating religious groups as autonomous legal associations deserving statutory and constitutional protection. There are many ways of demonstrating this, but two in particular will serve here. First, American states have consistently

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Middle Ages and beyond, see generally HAROLD J. BERMAN, LAW & REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 85-119, 165-224 (1983); BRIAN TIERNEY, THE CRISIS OF CHURCH AND STATE, 1050-1300, 159-210 (1988).

142. *See* MILLON-DELSOL, *supra* note 29, at 56.

143. For a discussion of subsidiarity as Catholic social theorists understand it, see *supra* note 83 and accompanying text.

144. *See, e.g*, Carozza, *supra* note 1, at 47 (considering "religious communities" and "the freedom of religious belief and worship" as building blocks of subsidiarity in context of international human rights law); Pucillo, *supra* note 115, at 466 (including among mediating structures "religious, national, cultural and educational organizations").

145. Neuhaus & Berger, *Mediating Structures*, *supra* note 14, at 228. Elaborating this claim, Robert Vischer explains that:

> Nearly one-half of all associational memberships in this country are church related, one-half of all volunteering occurs in a religious context, and one-half of all personal philanthropy is religious. Further, there is a significant spillover effect, as churchgoers are substantially more likely to be involved in secular associations. And because religion is, at its center, about community, religious associations provide valuable insight into the sense of belonging that is made possible by associational life.

Vischer, *Associations*, *supra* note 46, at 960 (citing ROBERT NISBET, THE SOCIAL PHILOSOPHERS: COMMUNITY AND CONFLICT IN WESTERN THOUGHT 162 (1973); ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 66 (2000)); *see also* Stabile, *supra* note 93, at 334-55 (discussing role of faith-based organizations as mediating structures in poverty alleviation programs).

and strongly affirmed the legal autonomy of religious associations. Most early state constitutions explicitly recognized the religious pluralism reflected in the variety of religious "institutions," "societies," "associations" and/or "corporations."[146] Such entities took a broad array of forms besides traditional churches: "lower schools, colleges, seminaries, charities, cemeteries, hospitals, asylums, poor houses, mission societies, [and] religious clubs[.]"[147] Thirty-six state constitutions guaranteed equality for these associations.[148] A few constitutions went further, granting affirmative constitutional rights to religious associations for purposes such as incorporating, holding property, receiving donations and entering employment contracts.[149] The existence of this robust associational pluralism was not only an end in itself, but also, as John Witte observes, a critical means of "ensuring religious liberty . . . [by] serv[ing] as a natural check both on the monopolistic inclination of any church and on the establishment tendencies of any state."[150]

Second, although one could look to modern jurisprudence[151] and scholarship[152] affirming the associational integrity of religious groups, the example of pre-incorporation Supreme Court jurisprudence makes the

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146. As John Witte describes:

> The Delaware Constitution guaranteed the "rights, privileges, immunities and estates of religious societies." Kansas included a right of religious groups to incorporate and to hold corporate property. Louisiana and Maryland protected the rights of religious trusts and charities to receive donations. Maine and Massachusetts provided that religious societies had freedom to enter contracts with their ministers. New Mexico explicitly protected the church authority's right to acquire and use sacramental wines. But most states left the issue of particular religious group rights to statutory, rather than constitutional, formulation.

WITTE, *supra* note 141, at 91.

147. *Id.* at 90.

148. *See id.* (explaining state constitutional guarantees for religious associations).

149. *Id.* at 91. Two states, Virginia and West Virginia, went in the opposite direction and "banned the right of religious groups to organize themselves as corporations." *Id.*

150. *Id.* at 90.

151. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 602 (1979) (explaining requirement that "civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization"); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) (holding religious controversies are not proper subject of civil court inquiries); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107 (1952) (asserting organizational integrity of cathedral).

152. *See generally, e.g.*, DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 101-02 (2003); Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001) [hereinafter Garnett, *Henry Adams's Soul*]; Mark DeWolfe Howe, *The Supreme Court, 1952 Term Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91 (1953); Douglas Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217 (2004); Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71 (2001).

point forcefully.Before the incorporation of the religion clauses against the states in the 1940s, the Supreme Court had heard only seventeen cases touching religion, nine of which concerned church property disputes.[153] Justice Miller's observation in *Watson v. Jones*,[154] an 1871 intra-church dispute over religious property, summarizes the Court's positive view of religious associations: "Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."[155] John Witte explains that in such cases, the Court acted on the premise that "[r]eligious groups, like all other legal associations, must be allowed to retain a corporate charter once lawfully given and must be allowed to use their properties in any lawful manner they deem apt, without undue interference by the state."[156] The Court even deferred to the decisions of religious authorities, reasoning in a famous passage that:

> [T]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association . . . is unquestioned.[157]

These early religion cases embraced the premise that religion, as both an individual and corporate enterprise, deserved legal protection, and that religious groups were entitled to use property and arrange internal business according to their own self-understanding.[158] Consequently, it is easy to say that the basic conditions for applying subsidiarity to religious

153. *See* WITTE, *supra* note 141, at 108.

154. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

155. *Id.* at 714 (noting Court's view of religious associations, as discussed in WITTE, *supra* note 141, at 109).

156. WITTE, *supra* note 141, at 108 (describing Justice Story's opinion in *Terrett v. Taylor*) (citing Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815)). In *Terrett*, the Supreme Court's first religion case, the Court struck down an 1801 Virginia law rescinding the 1776 charter of the Episcopal Church and requiring it to dispose of its glebe lands because the law violated "principles of natural justice." *Terrett*, 13 U.S. (9 Cranch) at 52 (rejecting complainant's contention that church lands had been divested after revolution and that complainants (overseers of poor of parish of Fairfax) were enjoined from claiming title to land).

157. *Watson*, 80 U.S. at 728-29. Witte also discusses the 1872 case, *Bouldin v. Alexander*, in which the Court stated: "[W]e have no power to revise or question ordinary acts of church discipline, or of excision of church membership . . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off." WITTE, *supra* note 141, at 109-10) (quoting Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 139-40 (1872)).

158. *See* WITTE, *supra* note 141, at 110; *see also* JAMES HITCHCOCK, 1 THE SUPREME COURT AND RELIGION IN AMERICAN LIFE 3-17 (2004) (discussing Supreme Court's treatment of church property and governance disputes).

associations—associational integrity and autonomy—have long existed in American law.[159]

Recognizing that religious groups function as mediating associations invites inquiry into the particular roles and competences of such groups.[160] Religious associations perform a myriad of societal functions that go beyond providing individuals with a place for religious worship.[161] Reflection on any period of history finds religious groups at work in virtually every field of social endeavor.[162] One barely starts by mentioning charities, health care, education, counseling, legal reform and social and political advocacy.[163] Unsurprisingly then, much of the Supreme Court's religion jurisprudence involves the participation of religious groups in social functions—preeminently education, but also, in the Court's first disestablishment case, the provision of health care.[164]

Since subsidiarity is supposed to adapt its requirements to the concrete demands of liberty in particular circumstances, the theory itself forecloses an exhaustive list of the competences of religious associations. Those competences will fluctuate depending on the kind of association and its particular social and historical milieu. The basic point is that reflection on how religious associations act as mediating structures begins by considering how religious groups function in a definite time and place. While it is difficult to speak comprehensively about a topic as broad as the "function" of religious associations in our pluralistic society, Robert Vischer has constructed a helpful taxonomy of how associations generally perform mediating functions—"identity, expression, purpose and meaning"—which "correspond to the four dimensions in which the mediating relationship occurs: place (identity), voice (expression), power (purpose) and autonomy (meaning)."[165] Indeed, Vischer uses religious associations as primary examples of such mediating functions.[166] In terms of Vischer's

159. *See, e.g.*, Garnett, *Henry Adams's Soul*, *supra* note 152, at 1842 (observing Supreme Court cases recognizing freedom of expressive and religious association are "true to the principle of subsidiarity").

160. *See* CHRISTOPHER DAWSON, RELIGION AND THE RISE OF WESTERN CULTURE 161-80 (1950).

161. *See id.*

162. A striking and instructive example from the Middle Ages is the role of religiously-grounded guild associations in the creation of the very notion of the city. *See id.*

163. An excellent starting point for reflection on the societal roles that religious groups have played in our own history is the two-volume set, A DOCUMENTARY HISTORY OF RELIGION IN AMERICA TO 1877 (Edwin S Gaustad & Mark A. Noll eds., 3d ed. 2003), particularly Volume 2, chapter 8, entitled "Religion and Society Engaged."

164. *See* Bradfield v. Roberts, 175 U.S. 291, 297-300 (1899) (upholding congressional grant to build two hospitals in District of Columbia that were run by order of Roman Catholic nuns); *see also* WITTE, *supra* note 141, at 107-08 (discussing jurisprudence of religious organizations acting in societal roles).

165. Vischer, *Associations*, *supra* note 46, at 963-64.

166. *See, e.g.*, *id.* at 960 (noting that "much of my analysis focuses on religious associations, primarily because they are such a crucial component of voluntary as-

categories, one begins to imagine the powerful and wide-ranging roles that religious associations perform in our society. To sketch a few, the religious association is a vital center for individuals to join freely together and forge a place for constructing a common set of values and beliefs, for speaking and acting more powerfully and coherently in the surrounding society, and for creating effective buffers against corrosion by the state or other societal forces.[167] Given that most religious associations focus on those questions at the deepest heart of human concern, it is difficult to overstate the delicate character of their mediating function. As Vischer observes, "[t]he worldview embodied by a particular association of individuals dedicated to a like-minded conception of ultimate meaning is at the center of those individuals' very beings."[168]

In view of the various functions of religious associations—whether the more inwardly-focused ones of providing places for communal belief, worship and support, or the more externally-focused ones of providing loci for care, social criticism and political action, one naturally considers their interaction with state authority. Subsidiarity, as we have seen, fundamentally concerns the attribution of competences among societal groups, including the state itself. It is precisely here that subsidiarity can illuminate the problem of religious establishments. Subsidiarity suggests thinking through the practical problems of church-state relationships, not only descriptively, but normatively. The theory does not merely illuminate the contours of the competence problem, but goes further by considering how the competences of religious associations *ought* to co-exist with, overlap or be kept separate from, the competences of the state. Subsidiarity aims to preserve the vitality of mediating structures—in this case the religious association—in the societal web, and thereby promote both the genuine freedom of the person within the association, the vitality of the association itself and the common good.[169]

Like any other healthy social group, a religious association mediates between individuals and the state by creating a unique relational space, one standing in constructive, creative tension with both the state and individuals.[170] Robert Vischer describes this relational role of associations:

[T]he value of associations derives, in significant part, from the extent to which associations stand in tension with the individual on one side

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sociations in this country"); *id.* at 986 (focusing on religious associations to illustrate mediating dimension of "power," or "allowing [members] to join together in pursuit of a common purpose").

167. *See id.* at 969-1011 (generally discussing these four kinds of associational mediation).

168. *Id.* at 984.

169. *See, e.g.*, Vischer, *Beyond Devolution*, *supra* note 1, at 116 (finding subsidiarity's "focus is on fostering the vitality of mediating structures in society"); *id.* at 118 ("While mediating structures do function as bulwarks against government encroachment, they are also facilitators of individual empowerment and efficacy.").

170. *See* Vischer, *Associations*, *supra* note 46, at 963.

and the state on the other. In other words, associations are important relationally, as their relationship with the individual and the state equips them to fulfill a mediating role. This role allows associations to serve as bridges between the individual and the surrounding, impersonal society, but it also injects tension into the association's relationships with the individual and the state.[171]

Because subsidiarity is designed to safeguard the integrity of associations, as applied to religious groups, the theory leads one to conceive of a problematic religious "establishment" as an attribution of competences among the state and religious associations that compromises an association's mediating character to the detriment of the association itself, to the person, to the state and to society at large. One might say that because the state has taken too much from the association (or given too much to it), the association's basic ability to create a particular relational space has been damaged. This approach to thinking about religious establishments has some distinct advantages over the ways we have become accustomed to contemplating them.[172]

An adequate, stable description of a religious establishment continues to elude American jurisprudence and scholarship. Even if one were limited to describing an establishment as a legal phenomenon with historical roots in sixteenth and seventeenth century England and its American colonies, formulating a useful legal taxonomy would be daunting.[173] The difficulties are vastly compounded by taking the view that a "law respecting an establishment of religion" is not merely an identifiable historical legal construct, but rather a governmental practice that partakes of some "aspect" of an historical establishment, or one that tends to manifest the "evils" of bona fide establishments.[174] One can thus understand, if not excuse, the

171. *Id.* at 951-52 (citations omitted).

172. Indeed, as I discuss below, the most dramatic advantage that subsidiarity affords is to encourage us not to think of the "establishment problem" necessarily as a problem of constitutional magnitude, but rather to conceive most of the dilemmas that we now call "establishment problems" as prudential matters subject to political management. In this section, however, I am simply comparing a subsidiarity-driven analysis of common "establishment problems" with the usual analysis, which is of course driven by a variety of constitutional law tests. For a discussion of subsidiarity's application to establishment problems, see *infra* notes 178-92 and accompanying text.

173. *See, e.g.*, Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131-81 (2003) [hereinafter McConnell, *Establishment and Disestablishment*] (developing legal taxonomy for founding-era religious establishments).

174. Michael McConnell writes that:

> In the absence of more serious historical consideration of establishment and disestablishment at the time of the Founding, the Supreme Court has based its interpretation of the First Amendment on abstractions, such as "advancement of religion," "entanglement," "coercion," "endorsement," "neutrality," and above all the "wall of separation between church and state." While not entirely inaccurate, these abstractions are several steps removed from the actual experiences that lay behind the decision to deny

excrescence of judicial tests formulated to root out establishments—e.g., whether a law lacks a "secular purpose," "advances or inhibits religion," "entangles the government in religion," "psychologically coerces religion," "endorses religion," creates "divisiveness" or fails to be "neutral" between "religion and non-religion" and so on.[175] These formulations may be of little help in reaching objective decisions,[176] but at least it is clear *why* they exist: to identify an undesirable church-state arrangement, or an "establishment of religion" that is putatively banned by the Establishment Clause.[177]

Reconfiguring this quest within the framework of subsidiarity does not promise a new test, but it does point toward an analysis that transcends slogans and attempts to get to the heart of why certain relationships between religion and government are problematic. As already explained, subsidiarity holds that state authority should act to remedy the incapacities of social groups, but should never absorb them, in the sense of substituting its own maladapted functions for their more precisely calibrated ones. Thus, subsidiarity would see the archetypal "religious establishment" as presenting, in essence, a problematic distribution of competences among state authority and religious associations. The analysis would focus on how that distribution impacts the mediating character of the religious associations and, by extension, the freedom of the persons within them. Generally speaking, one would want to identify church-state arrangements in which religious associations' mediating role becomes degraded because of involvement with state authority.[178] Perhaps the function of a religious

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> the government authority to erect or maintain an establishment of religion. At best they are oversimplifications; in some respects they are misleading.

Id. at 2205-06.

175. *See generally* WITTE, *supra* note 141, at 149-84; Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 161-74 (2004); Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 117-68 (1992).

176. As Steven Smith observes, "[n]early all scholars—and, in less judicious moments, many judges and Justices—complain that the constitutional doctrines of religious freedom elaborated by the Supreme Court make little sense, and that the decisions rendered under these doctrines are chaotic." STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 1 (2001) [hereinafter SMITH, EQUALITY]; *see also id.* at 10 ("[T]here is something approaching unanimity on the proposition that the prevailing *discourse* of religious freedom—or the official framework and language within which issues of religious freedom are argued about and judicially resolved—is deeply incoherent.").

177. *See id.*

178. Throughout his discussion of the mediating functions of associations, Robert Vischer describes various examples of such degradation. *See* Vischer, *Associations*, *supra* note 46, at 965 (stating that if state intervention prevents association from pursuing "ventures found meaningful by members, the functions of expression, identity, and purpose would be eviscerated; the association would cease playing a mediating role, and would simply be an arm of the state"); *id.* at 990 (discussing "an association that unwittingly eviscerates its own mediating function by becoming reliant on governmental largesse"); *id.* at 1000 ("[If a religious association] forego[es] its core mission or water[s] down its identity, . . . [this

association has been compromised because it has lost religious authority to the state—as when, for instance, the government dictates a form of worship or meddles in a church doctrinal dispute. Perhaps the association has been compromised in the opposite direction by absorbing coercive authority *from* the state—as when, for instance, the government hands over licensing authority to a religious group. This approach is structural and functional, and it consequently suggests a baseline for thinking about problematic church-state relationships; as to any discrete function, state authority and a religious association should never coalesce into an identical, entirely overlapping entity. In the vocabulary of subsidiarity, the state would have completely absorbed the function of a religious association, and henceforth those functions of governing authority and religious association would be indistinguishable.

One might reasonably claim, however, that the object of the analysis is outdated. After all, such overlapping church-state relationships have not existed in the United States since 1833, when Massachusetts jettisoned the last trappings of its congregationalist establishment.[179] True enough, but one should note why subsidiarity wants to avoid the paradigm example of a religious establishment in which church and state authority coalesce. Subsidiarity condemns the arrangement, but not because, as we are used to saying, it "advances religion" or is "non-neutral with regard to religion"—these formulations both prove too much and nothing at all about the undesirability of certain church-state arrangements. Subsidiarity, by contrast, operates on a more concrete plane. It condemns the paradigm religious establishment because the state has inappropriately involved itself in the functions and competences of a religious association. That sort of involvement is undesirable precisely because of its impact on the mediating function of the religious group and its members, and also because of the accompanying impact on the mediating function of other social groups and on the ability of the state to manage the common good. Through the lens of subsidiarity, an "establishment" describes a situation in which the mediating function of a religious association has been compromised. Its absorption into the state means either that it can no longer

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would] . . . necessarily preclude any mediating function—i.e., as allegiance to the government as a funding source increases, the association's ability to serve as a mediating force between individuals and the government necessarily declines."). Vischer's analysis shows how a focus on mediating structures helps flesh out why a religious establishment is undesirable. I am not proposing the analysis, as he seems to, as a means of interpreting the Establishment Clause itself. *See, e.g.*, *id.* at 984-85 (discussing application of Establishment Clause in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000)); *id.* at 996-1000 (discussing *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) and school vouchers). For a further discussion of these analyses, see *infra* notes 183-87 and accompanying text.

179. *See, e.g.*, WITTE, *supra* note 141, at 93-94 (discussing disestablishment aspects of amendment of Massachusetts Constitution in 1833); *see also* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 23-24 (1987) [hereinafter BRADLEY, RELATIONSHIPS IN AMERICA] (describing that in 1833, Massachusetts became last state to abandon "public prop" of tax-supported congregations).

contribute to the greater human flourishing of its own members (because it is no longer an autonomous organization), or that it can no longer contribute to, and indeed would impede, society's realization of the common good (because it has monopolized one or more important aspects of that common good). Directing the inquiry in this way is appropriate not only analytically but historically, because it focuses on the central rationale for founding-era establishments.[180] As Michael McConnell explains, the "dominant purpose of the establishment" in both England and the colonies "was not to advance religious truth, but to control and harness religion in service of the state."[181]

Of course, modern establishment problems rarely present the complete absorption of a religious association's functions by the state. In few cases does a government entity either itself control, or delegate its own functions to, a religious group.[182] Instead the problem typically lies somewhere on a spectrum short of complete absorption. For instance, school voucher controversies present a struggle between state and religious education that falls somewhere in this intermediate realm.[183] The problem arises because the state attempts, through a voucher program, to create more educational flexibility for schoolchildren.[184] One side of the dispute fears that the state is surrendering its public educational function to religious groups, or conversely, that religious associations will find their own autonomy co-opted by participation in the voucher program. The other side wants to equip parents with broader educational choices and to share the fruits of private schools, whether religious or non-religious, with the less wealthy. This side also wants to create healthy competition for public schools and thereby improve overall educational quality. The voucher problem, in short, is not the simple case of the state bluntly co-opting religious organizations, but instead presents a web of competing and partially overlapping interests and functions—public vs. private, religious vs. non-religious, less wealthy vs. affluent.[185]

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180. *See* McConnell, *Establishment and Disestablishment*, *supra* note 173, at 2208.

181. *Id.*

182. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (striking down Massachusetts law granting churches discretion to veto liquor licenses within 500 feet of their premises); *see also* JOHN T. NOONAN, JR., & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 881-82 (2001) (discussing cases on exercise of governmental authority by churches).

183. *See generally* Ira C. Lupu & Robert W. Tuttle, Zelman*'s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003) [hereinafter Lupu & Tuttle, Zelman's *Future*].

184. *See id.*

185. *See* Robert K. Vischer, *Subsidiarity as Subversion: Local Power, Legal Norms, and the Liberal State*, 2 J. CATH. SOC. THOUGHT 277, 282-84 (2005) [hereinafter Vischer, *Subversion*] (discussing school choice movement in terms of subsidiary). On the clash of interests and the constitutional issues involved in voucher debates, see generally Richard W. Garnett, *The Right Questions about School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281, 1313 (2002)

Thinking through this problem in terms of subsidiarity would begin with refusing to dilute its complexity. The problem does not map onto formulae like "neutrality" or "choice," not least because the contours of those formulae are themselves debatable (as is the prior question of whether the Establishment Clause proposes them as norms).[186] Subsidiarity takes a different route. Subsidiarity seeks to establish a constructive equilibrium among an array of actors and their social functions: state authority, public schools, religious schools and their connected associations, non-religious private schools, religious and non-religious associations without connected schools, students eligible for vouchers and their parents and so on. Rejecting on principle that there is a neat solution, a subsidiarity analysis would investigate the unique circumstances of a particular voucher problem (considering, for instance, the variety and types of religious and non-religious groups in the area, its educational resources, its history of religious conflict, its socio-economic and religious makeup, etc.) and assess the relative competences of the various associations involved. It would seek to locate decision-making authority as locally as possible (individual schools or school districts), while recognizing that higher authorities (school boards or state educational boards) would need to discern what kinds of interventions would be necessary to remedy problems as they arise. The overarching concern would be to preserve the maximum amount of autonomy for all private associations involved, consistent with the freedom of the children and parents participating in the program. In superintending this complex minuet, state authorities would be acting to maximize the educational health of the entire society, while recognizing at the same time that they are doing so not through a monopoly, but through cooperation with private associations who are capable of pursuing the common good themselves.[187]

Needless to say, this sketch barely scratches the surface and an exhaustive, subsidiarity-based analysis of any particular situation is beyond the scope of this Article. Generally speaking, however, working through the analysis might result in an array of differently-configured school voucher programs. Or it might result in none at all. A particular state authority might reasonably decide that, in the interest of the educational common good, voucher programs should be rejected precisely because of their potential for creating religious conflict or because of their risk of diluting religious associations' educational missions. By the same token, local authorities might decide to experiment with vouchers on a limited

(stating that Ohio's voucher program is consistent with Establishment Clause); Lupu & Tuttle, Zelman*'s Future*, *supra* note 183 (discussing Supreme Court's effect on relationships between government and religious institutions).

186. *See, e.g.*, SMITH, EQUALITY, *supra* note 176, at 13-17 (discussing difficulty of applying concept of "equality" to substantive questions of religious freedom).

187. *Cf. generally* Vischer, *Associations*, *supra* note 46, at 995-1000 (analyzing school voucher issue in *Zelman* from viewpoint of religious associations' mediating role). For a discussion of *Zelman*, see *infra* note 248.

basis, or to forego experimentation. Individual religious schools might decide to participate in a voucher program, or instead might decide the risks are too great.[188] But whatever resolution is reached will not depend on a pre-programmed rule about the right relationship between religion and government. From the point of view of subsidiarity, general rules of the genre—"separation of church and state" or "neutral between religion and non-religion"—simply fail to do justice to the concrete paradoxes and complexities that inevitably present themselves in a religiously pluralistic society.[189]

The above sketch shows that, unlike current analyses of religious establishments, subsidiarity does not propose any *a priori* substantive view about the "correct" relationship between church and state. Such a substantive view—e.g., that the state should be formally or effectively neutral between religion and non-religion—would be foreign to subsidiarity because it would introduce a substantive bias into what is essentially a procedural inquiry. It would create rigid divisions where subsidiarity seeks flexibility and adaptability. That is, subsidiarity is interested in facilitating the creation of a constructive equilibrium in which religious associations, and the people in them, are as free as possible to pursue their goals, consistent with the overall common good. It is inconsistent with that goal, however, to say that the common good already includes some substantive view of the relationship between government and religion.[190]

To be sure, we might say that subsidiarity has a built-in *procedural* view of church-state relationships. As already explained, it holds that government should not absorb the functions of religious associations and vice versa. But this procedural "separation of church and state" is far more modest than the well-known varieties of substantive "separation"—again, such as theories of neutrality or non-endorsement. Consequently, the separation latent in subsidiarity would leave a broader space within civil soci-

188. *See, e.g.*, STABILE, *supra* note 93, at 355-63 (discussing potential threats to religious associations' identities from acting as mediating institutions for social services); Vischer, *Associations*, *supra* note 46, at 999 (suggesting that particular religious associations might decline to pursue state funding because "the outside influence that accompanies the funding—whether through government regulation, public pressure or otherwise—may actually hinder the groups' pursuit of their original purposes, alienating core constituencies in the process").

189. The kind of analysis subsidiarity suggests for these problems can be described as "prudential." For an excellent discussion of prudential decision-making in the context of religious freedom, see SMITH, EQUALITY, *supra* note 176, at 62-82.

190. Patrick Brown writes that since "subsidiarity should be viewed as an open and heuristic notion," then "[u]ltimately there is no rule, formula, or concept that can tell us precisely how power should be delegated or tasks should be distributed between any particular hierarchy of communities or organizations or within communities or organizations. Everything depends on concrete insights appropriate to particular and often changing situations." Patrick Brown, *Overcoming "Inhumanly Inept" Structures: Catholic Social Thought on "Subsidiarity" and the Critique of Bureaucracy, Law, and Culture*, 2 J. CATH. SOC. THOUGHT 413, 428 (2005) (describing functional subsidiarity and its contribution to common good).

ety for the interaction of religious associations and government.[191] Thus, by comparison to traditional establishment analysis, subsidiarity is more attuned to the distinct interactions between government and religious associations. It is not, however, concerned with background substantive theories that prophylactically limit the permissible interactions between religious associations and government. Nor, by the same token, is it interested in predicting, as current establishment analysis does, whether those interactions will have the "effect" of "advancing religion" or creating "divisiveness." One might say, in sum, that the key difference between a subsidiarity-driven analysis of establishments and a traditional analysis is that subsidiarity is far more substantively modest.

It must be emphasized, however, what a subsidiarity analysis of religious establishments does not say. It does not suggest that subsidiarity provides a new and more powerful tool for *courts* to analyze church-state problems. Indeed, the very difficulty and contingency of the subsidiarity analysis confirm in practice what theory suggests: i.e., that subsidiarity does not function comfortably as a source of *a priori* judicial standards. Instead, it is a general conditioning principle for attributing relative competences among associations, which can aid decision-makers in chiseling out solutions to multifaceted problems. The decision-maker, however, is not necessarily, or even preferably, a court applying a constitutional or statutory principle that purports to concretize, in advance, the requirements of subsidiarity.[192] On the positive side, the analysis suggested by subsidiarity functions without the baggage of slogans such as "separation of church and state" or "maximum religious liberty." Whether or not those phrases have any determinate practical content is debatable. Taken on their own terms as sources of legal rules, however, they rarely provide enough guidance to resolve the difficult problems that the church-state area seems determined to present.

These conclusions present a problem, however. In light of them, one is tempted to conclude further that subsidiarity is useless for interpreting the Establishment Clause of the Constitution. After all, for the last sixty years, that Clause has been applied to church-state disputes through the matrix of judicially-created legal rules. This part of the Article has thus far

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191. In a recent essay, Michael Novak articulates a similar understanding of a more modest "separation of church and state." He writes that:

> [Separation] does point to an important difference of function and public role. But that "separation" is not the same thing as demanding an end to the interpenetration of religion and society. *Church* and *state* do not cover the same territory as *religion* and *society*. *Church* and *state* are narrower, institutional concepts. Citizens have a right to the free exercise of their religion in private *and* in the full range of the public activities of civil society.

Michael Novak, *The Truth About Religious Freedom*, FIRST THINGS 19 (Mar. 2006).

192. For a discussion of the problems this conclusion presents in terms of current Establishment Clause jurisprudence, see *infra* notes 193-97 and accompanying text.

suggested: (1) that subsidiarity itself does not function comfortably as a source for fixed judicial rules; and (2) that the "establishment problem" viewed through the lens of subsidiarity is therefore not amenable to rule-based determination. The natural conclusion would seem to be that, whatever policy aid subsidiarity might furnish at the intersection of religion and government, it can offer no help in interpreting the Establishment Clause. The next section grapples with this forceful objection.

B. *Subsidiarity and the Establishment Clause*

We can now attempt to understand the Establishment Clause itself as an expression of subsidiarity. This will involve three steps, two of which have already been discussed. First, in one aspect, subsidiarity describes a structural strategy for allocating government powers, best seen in a federalist structure. Second, the federalist structure of the U.S. Constitution evokes that aspect of subsidiarity. The third step—one that will be explored for the remainder of this Article—is to suggest that the Establishment Clause can be understood as part of the subsidiary strategy of the Constitution. Applied in this way, subsidiarity helps explain a great deal about the content and function of the Clause, about its history and application and about its place within the overall constitutional structure.

Recall the two related but distinct aspects in which subsidiarity appears: (1) as a normative ordering principle guiding a decision-maker in hammering out an equilibrium between competing social groups and the state; and (2) as a description of the strategic allocation of governmental powers in a federalist structure.[193] In its first aspect, subsidiarity appears ill-fitted as a source for judicially-enforceable rules delimiting state authority in advance because subsidiarity is by definition a conditioning influence on state intervention that demands flexibility. Limiting intervention ahead of time to rigid categories or contingencies would sap the principle of its power or change it into a toothless hortatory provision. Such is not the case, however, when subsidiarity is expressed in a federalist system. There the pre-existence of the constituent states allows subsidiarity to be expressed through a governmental structure. Already possessing the competences of self-government, the pre-existing states assign to the new central government certain spheres of competence that they judge better located there. Here subsidiarity does not function as a normative rule for evaluating the exercise of governmental powers but is rather the theoretical blueprint for a tangible structure.[194]

As a simple illustration will show, the U.S. Constitution has obvious affinities with such a structure.[195] About a decade after the American col-

193. For a discussion of subsidiarity's application to allocation of governmental powers, see *supra* note 62 and accompanying text.

194. For a discussion of subsidiarity's use as a blueprint for a governmental power structure, see *supra* note 65 and accompanying text.

195. For a discussion of the relationship between the American governmental structure and the concept of subsidiarity, see *supra* note 67 and accompanying text.

onies broke free from England, a group of states decided to reconfigure their relationship from a loose confederation into a more tightly bound and complexly imagined federal republic. The "people" of the constituent states were envisioned as reclaiming sovereignty and redistributing portions of it to a new central government, "in order to form a more perfect Union."[196] The new government of the "United States" possessed powers divided among branches and delimited to spheres of sovereignty with respect to the states. For instance, the national legislature's powers were enumerated in terms of areas of competence, such as to "declare War," to "establish a uniform Rule of Naturalization" and to "regulate Commerce with foreign nations."[197] Other provisions calibrated areas of competence between the states and the national government—e.g., with regard to militias or the election of federal representatives.[198] The essentially limited nature of the grant of powers is explicitly recognized by the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[199] This strategy of formation articulates concretely what subsidiarity prescribes in theory.

A glance at the ratification debates (well reflected in the Federalist Papers and the writings of their anti-federalist opponents) shows that the overriding concern of the framing generation was to confine the new federal government's powers and to reserve to the states sufficient autonomy to preserve a healthy measure of autonomy and *a fortiori* their very existence.[200] Recurring throughout anti-federalist authors, for instance, is a fear, often cast in the idiom of subsidiarity, that the powerful central government will "absorb" or "annihilate" the states.[201] In response, various

196. U.S. CONST. pmbl.

197. *See id.* art. I, § 8, cl. 3-4, 11 (listing Congress's powers).

198. *See id.* cl. 16 (empowering Congress to "provide for organizing, arming, and disciplining, the Militia" while "reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"); *id.* § 4, cl. 1 (declaring that state legislatures shall prescribe "Times, Places and Manner of holding Elections for Senators and Representatives," but Congress may "at any time by Law make or alter such Regulations, except as to the Places of choosing Senators").

199. *Id.* amend. X.

200. On the contours of this debate, see generally FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 185-293 (1985); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1776-1787) 469-562 (2d. ed. 1998). On the debate's relationship to the Bill of Rights, see generally AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 3-19 (1998).

201. For instance, in the sixth of his essays against ratification, "Brutus" summarizes his concerns as:

> [W]hether the general government of the United States should be so framed, as to absorb and swallow up the state governments? or whether, on the contrary, the former ought not to be confined to certain defined national objects, while the latter should retain all the powers which concern the internal police of the state[s]?

numbers of *The Federalist* take pains to reassure states that their own existences will survive, and indeed flourish, under the aegis of the newly created central government, and also that its powers have been carefully limited to those necessary to promote the common welfare of the whole.[202]

But our initial question remains: Assuming that subsidiarity accurately describes the structural allocation of competences in the American federal system, how does that help us understand the Establishment Clause as a component of that system? For applying subsidiarity to the Clause immediately creates a paradox. Subsidiarity would view the Clause as a decision by the constituent states *not* to vest the new central government with competence over a field the Clause describes as laws "respecting an establishment of religion," and a concomitant decision to retain power over that field at the state level. It follows that the Clause would not posit any comprehensive substantive theory of church-state relationships at the federal

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Brutus No. 6 (Dec. 27, 1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 280 (Ralph Ketcham ed., 1986). In his second letter, the "Federal Farmer" warns that the imbalance between federal and state power would inevitably mean that "the state governments must be annihilated, or continue to exist for no purpose." *Letters from the Federal Farmer to the Republican, No. 2* (Oct. 9, 1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra*, at 268. As Gordon Wood explains, the anti-federalists "had no doubt that it was precisely an absorption of all the states under one unified government that the Constitution intended, and they therefore offered this prospect of an inevitable consolidation as the strongest and most scientifically based objection to the new system that they could muster." WOOD, *supra* note 200, at 526.

202. *See, e.g.*, THE FEDERALIST NO. 45, at 237, 241 (James Madison) (addressing "whether the whole mass of [federal powers] will be dangerous to the portion of authority left in the several states," and reasoning that "[t]he powers delegated by the proposed constitution to the federal government, are few and defined," whereas "[t]hose which are to remain in the state governments, are numerous and indefinite"); *see also* THE FEDERALIST NO. 9, at 37-41 (Alexander Hamilton), NO. 46, at 242-48 (James Madison). *See generally* THE FEDERALIST NOS. 41-44, at 207-37 (James Madison). My claim is not that subsidiarity, as a political theory, is embedded in the U.S. Constitution. Rather, my point is simply that the federal structure erected by the Constitution evidences in concrete practice the theoretical lineaments of subsidiarity. Furthermore, this claim concerns the *structure* of the U.S. Constitution, and not necessarily the *operations* of the national government's powers. To make the latter claim would re-introduce all the problems inherent in using subsidiarity as a source of normative constitutional rules. While subsidiarity gives an account of why the federal government was allocated certain areas of competence, it may well *not* describe how the federal government actually exercises its powers. For instance, the federal government might well exercise its powers to regulate interstate commerce in a way that disregards the competing competences of state governments, or it may act in a more restrained manner. Regardless, the claim is not that subsidiarity is an *a priori* constitutional limit on the exercise of federal power (although it may function as a prudential limitation on federal representatives), nor is the claim that federal courts are somehow "enforcing" subsidiarity when they police the boundaries of the commerce power. One would do better to speak of a court enforcing subsidiarity *indirectly* when it enforces the constitutional limits on federal power.

level. The Clause would also appear to be an unlikely source for judicially enforceable rules about most church-state issues. The paradox presented, of course, is that this subsidiary view of the Establishment Clause bears little resemblance to the Clause the Supreme Court has been struggling to interpret for the past two generations.[203] *That* Clause is supposed to contain, albeit in a maddeningly obscure fashion, answers to questions such as: "Does a large menorah next to a Christmas tree outside city hall constitute a forbidden establishment of religion?"[204] The subsidiary Clause, by greatest contrast, would offer as its only response to such a question: "We have thought it best to leave such questions to the states."[205]

So we are thrown back again, and now even more pointedly, on the original dilemma: What good is subsidiarity to understanding the Establishment Clause? But again, simply refining the question suggests some answers. The counter-intuitive picture of the subsidiary Establishment Clause actually illuminates a basic difficulty courts and commentators have encountered in interpreting and applying the Clause. Specifically, subsidiarity shows why it is difficult to reconcile modern Establishment Clause jurisprudence, which treats the Clause as a source of rules for resolving specific church-state issues, with the history of the Clause, which suggests that the Clause was neither proposed as a normative source for resolving most church-state disputes, nor intended to embody any overarching theory of church-state relationships.

The genesis of the Constitution and the First Amendment bedevils our modern search for "constitutional" church-state principles. The framing, text and ratification of the First Amendment do not reveal what substantive church-state theory, if any, was being promoted by the religion

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203. In another sense, however, subsidiarity simply underscores and provides a fuller theoretical account for something that religion clause scholars have long observed, so much so that Steven Smith describes it as a "commonplace": i.e., that "[t]he religion clauses, as understood by those who drafted, proposed, and ratified them, were an exercise in federalism." STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 18 (1995) [hereinafter SMITH, FOREORDAINED FAILURE] (listing sources collected in Note, *Rethinking the Incorporation of the Establishment Clause*, 105 HARV. L. REV. 1700, 1703 n.25 (1992)).

204. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 600-01 (1989) (noting Establishment Clause "limits religious content of the government's own communications" as well as "[prohibits] government support and promotion of religious communications by religious organizations . . . . By prohibiting government endorsement of religion, the Establishment Clause prohibits precisely . . . the government's lending its support to the communication of a religious organization's religious message").

205. That is not to say, it bears noting, that the menorah-and-Christmas-tree situation even implicates the basic idea of a religious *establishment*, nor that the subsidiary Establishment Clause would bar the federal government from setting up such a display. The example is meant to suggest only that the subsidiary Clause would not have been formulated to answer substantive questions such as the one the Court labored at so mightily in *Allegheny County*. For a discussion of *Allegheny County*, see *supra* note 204.

clauses.[206] The Constitution those clauses amended contains only one substantive rule about the place of religion in the federal government (Article VI's ban on federal, but not state, religious tests for office) and one subtle accommodation of religious scruples (the "oath or affirmation" provisions).[207] Debates over substantive church-state theories in framing and ratifying the original Constitution[208] are sparse and inconclusive,[209] supporting Gerard Bradley's common sense conclusion that "[t]he Philadelphia Framers were not concerned with religion, because they believed theirs was a project unrelated to it."[210] A straightforward search for constitutional church-state theories in the framing and ratification debates thus seems to lead nowhere.

Subsidiarity reorients our search for Establishment Clause meaning to the states' perspectives, focusing on their concerns about the powers of the new central government and their own abilities to continue to govern themselves. When we do that, the lack of substantive theorizing about church-state relations becomes less surprising. It is widely understood that the overriding concerns about the Constitution as a whole centered around the nature and extent of the powers being confided to the new central government, and the possible consequences of the exercise of those powers on the states.[211] Subsidiarity would see state concerns about church-state matters as mirroring states' wider concerns about federal

206. *See, e.g.*, BRADLEY, RELATIONSHIPS IN AMERICA, *supra* note 179, at 112 ("Not a single state recorded debates, and individual voting behavior was rarely memorialized."); WITTE, *supra* note 141, at 64 ("The record of the Congress's effort [to draft the religion clauses] is considerably slimmer than is apt for such a momentous act.").

207. U.S. CONST., art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); *id.* (binding all federal and state officers "by Oath or Affirmation, to support this Constitution"); *id.* art. II, § 1, cl. 8 (setting forth "Oath or Affirmation" of President as "I do solemnly swear (or affirm)").

208. The one exception is the debate over the No Religious Test Clause in Article VI. For a discussion of the Religious Test Clause, see *supra* note 205. For a discussion of the debate, which centered on state concerns that the absence of any federal religious test would open federal office to Catholics, Muslims, Jews and other undesirables, see generally BRADLEY, RELATIONSHIPS IN AMERICA, *supra* note 179, at 74-75; Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 694-711 (1987) [hereinafter Bradley, *The No Religious Test Clause*].

209. James Hitchcock has written that "[t]he great enigma of the Religion Clauses of the Bill of Rights is the fact that they occasioned so little discussion during their enactment." 2 HITCHCOCK, *supra* note 158, at 29 (2004). He notes further that "there is little record of the way in which the Religion Clauses were received in the states." *Id.*

210. Bradley, *The No Religious Test Clause*, *supra* note 208, at 711.

211. *See generally, e.g.*, MCDONALD, *supra* note 200, at 186 (observing that "one absolutely central issue—perhaps the absolutely central issue—before the [Philadelphia] convention was the role, if any, that the states would play in the reorganized and strengthened common authority"); WOOD, *supra* note 200, at 519-32 (describing political debates surrounding extent and nature of federal powers under new Constitution).

power in general. The framers and ratifiers would thus have had no inclination to debate what substantive theory of church-state relationships to embed in the new Constitution (as opposed to debating, for instance, the scheme of representation in Congress or the taxing power of the federal government). This makes sense of John Witte's observation that "[i]t was commonly assumed at the convention that questions of religion and of religious liberty were for the states and the people to resolve, not the budding federal government."[212]

The church-state issue that did occupy the states was not substantive, but jurisdictional: Whether the new Constitution reliably limited federal power over their own church-state arrangements.[213] Thus six states were moved to condition ratification on the adoption of limitations on federal power, variously phrased, over some aspect of religion or religious establishments.[214] These proposals and the formulations that then percolated through the Congress, while motivated by substantive church-state theories,[215] were clearly not designed to create new federal powers modeled on those theories. Instead they were meant to curtail federal power over a sensitive area of state competence. Subsidiarity readily makes sense of such proposals within the framework of building a federalist, and hence a subsidiary, governmental structure. On the threshold of their bold new experiment in a federal republic, the pre-existing constituent states wanted to safeguard their own prerogatives in an area where the bitter memories of an established national church were still fresh. The Establishment Clause was drafted to declare and underwrite that understanding. As Carl Esbeck explains, the Clause was not only a vertical, federalism-based restraint on federal power,

> [i]t was also a public proclamation of sorts. The First Congress was laying to rest latent but widespread fears about the new central government by declaring the popular sentiment: although

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212. WITTE, *supra* note 141, at 61.

213. *See* 2 HITCHCOCK, *supra* note 158, at 29 & n.70 (listing authorities). Commenting on the "mysterious" silence of the Framers on the content of the Religion Clauses "given the passionate debates engendered by those terms in later history," James Hitchcock writes that the "silence is comprehensible on the assumption that the terms were largely devoid of positive content and were intended merely to ensure that the federal government did not interfere with the religious arrangements of the various states." *Id.* at 29

214. *See* WITTE, *supra* note 141, at 63-64.

215. *See id.* at 64 (citing several proposed amendments on religious liberty, in particular stating that those from New Hampshire, Virginia, New York and North Carolina were "critical"). For instance, Virginia's proposal claimed:

> That religion, or the duty which we owe our creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.

Id.

> there were state-by-state disagreements concerning official support for religion, the national government was one of limited delegated powers and hence had no say in the matter.[216]

Subsidiarity thus supports the understanding that the framing and ratification of the religion clauses, and the Establishment Clause in particular, were principally directed to preserving state power and confining federal power over church-state arrangements.[217] Behind the amendment proposals and the final Clause itself was the background goal of preventatively limiting the exercise of some inchoate power of the new federal[218] government over a particular realm of state decision-making (a power which, of course, federalist proponents of the new Constitution vehemently denied).[219] When federalists denied that such amendments were necessary, they did not emphasize positive federal guarantees in favor of religious liberties. Instead they stressed the lack of enumerated federal power to interfere in state religious arrangements and, famously in Madison's *Federalist 10* and *51*, the checking function of a thriving multiplicity of religious sects.[220] In that vein, Gerard Bradley writes that the

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216. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 16-17 (1998) [hereinafter Esbeck, *Establishment Clause*] (citing THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 193-94, 215-16 (1986)).

217. This understanding of the original meaning of the Establishment Clause has occasioned a lively debate among scholars. *See generally* Ira C. Lupu & Robert Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19 (forthcoming 2006), *available at* www.ssrn.com/abstract =900372 (last visited Oct. 31, 2006) (summarizing debate over federalism aspects of Establishment Clause) [hereinafter Lupu & Tuttle, *Federalism and Faith*]. The purpose of this article is not to take sides in the debate, but to argue that subsidiarity supports the view that the primary goal of the Establishment Clause was federalist—i.e., to keep the federal government out of state church-state arrangements—and that the Clause affirmatively did not posit any independently substantive theory of church-state relationships at the federal level.

218. *See* WITTE, *supra* note 141, at 48, 300 n.84. Underscoring this point, Madison alone showed an interest in amending the Constitution to extend guarantees and disabilities in the area of religion to the states, but his view was not widely held and was not influential in the drafting debates. *See id.* at 48, 74-75.

219. *See, e.g.*, *id.* at 61 (reporting Madison's comment to Virginia Ratifying Convention that "[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation" and James Iredell's remark to North Carolina Ratifying Convention that federal government "certainly [has] no authority to interfere in the establishment of any religion whatsoever, and I am astonished that any gentlemen should conceive they have").

220. *See id.* at 79-80; *see also* THE FEDERALIST NO. 10, at 42-48 (James Madison) (discussing structural remedies against factionalism and including within causes of faction "[a] zeal for different opinions concerning religion"); THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison) (claiming that "[i]n a free government the security for civil rights must be the same as that for religious rights . . . consist[ing] in the one case in the multiplicity of interests, and in the other in the multiplicity of sects"). In his remarks to the Virginia Ratifying Convention in June 1788, Madison remarked that "[h]appily for the states, they enjoy the utmost freedom of religion," which "arises from that multiplicity of sects, which pervades

thrust of the proposed religion amendments "reveals that the religious liberty endangered, and for which protection was sought, was that liberty the people had long enjoyed, which was currently enshrined in all state constitutions and accorded with contemporary popular views on the subject."[221]

Subsidiarity's focus on limiting federal power also clarifies the sparse records of the framing of the religion clauses.[222] Instead of attempting to wring theoretical substance from the subtle shifts in the clauses' phrasing,[223] subsidiarity suggests concentrating on the framers' structural motivations and how they afforded a surprising measure of consensus among federalists and anti-federalists. As Gerard Bradley describes, these complementary motivations were "the federalist view that Congress had no enumerated authority over religion in the first place . . . [and] the basic antifederalist endeavor to preserve existing state constitutional regimes from intermeddling federal legislation."[224] Those twin goals around which both sides could unite capture subsidiarity's project of allocating distinct governmental competences during the formation of a federal structure. The Establishment Clause thus becomes not a latent formula for resolving church-state disputes, but a political compromise designed to avoid making those disputes a convulsive national issue.

This approach also helps contextualize the reservations expressed during debates over the phrasing of the religion clauses. It becomes clear that these reservations were neither about the contours of federal power recognized by the clauses nor about what church-state theory the clauses were instantiating, but instead were anxieties about what possible *misuse* of the provisions would mean for state religious arrangements. For instance, during the House debate, Representative Peter Sylvester of New York worried that a misguided "construction" of the amendment "might be thought to have a tendency to abolish religion altogether," while Roger Sherman "thought the amendment [was] altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments," a position also suggested

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America, and which is the best and only security for religious liberty in any society." 5 THE FOUNDERS' CONSTITUTION 88 (Philip B. Kurland & Ralph Lerner eds., 1987).

221. BRADLEY, RELATIONSHIPS IN AMERICA, *supra* note 179, at 78. Bradley concludes that, in flat contradiction to the *Everson* Court's historical understanding of the Establishment Clause as representing a revolution in church-state relationships, "the ratifying process was deeply conservative in its celebration of the present and immediate past and in its insistence that the prevailing regime need be preserved inviolate." *Id.* at 80.

222. *See, e.g.*, WITTE, *supra* note 141, at 64-72 (discussing drafting of First Amendment religion clauses).

223. *See id.* at 72 (noting that "[t]he final text [of the religion clauses] has no plain meaning" and "[t]he congressional record holds no Rosetta Stone for easy interpretation").

224. BRADLEY, RELATIONSHIPS IN AMERICA, *supra* note 179, at 92 (commenting on Samuel Livermore's addition of "Congress" to clarify House version of amendment, but stating that his comments apply equally to entire drafting process).

more subtly by Madison in the debate.[225] Taking a different tack, Daniel Carroll supported the amendment and suggested that "[h]e would not contend with gentlemen about the phraseology," but only because "it would tend more towards conciliating the minds of the people to the Government."[226] Elbridge Gerry's reaction to the proposed insertion of "national" before "religion" shows that worries over federal power were foremost in his mind.[227] Gerry objected to the change from "no religion shall be established" to "no *national* religion shall be established," not because he wanted to clear the way for Congress to found a national religion, but because the word "national" raised the specter of a consolidated government so repugnant to anti-federalists.[228] Finally, Benjamin Huntington's anxieties most dramatically illustrate solicitude for state religious arrangements. Huntington feared that a broad interpretation of the amendment would grant a federal court jurisdiction to interfere in New England states' enforcement of compulsory support for ministers' salaries, but Madison assured him it would not.[229] As generations of religion clause scholars can attest, the unhappy truth is that these minimalist debates provide little help in defining an "establishment of religion." Subsidiarity helps us see, however, that the debate was not even directed to the question of resolving anything so momentous as "the church-state question." Rather, the debates strongly suggest a shared anxiety about reserving state management over a sensitive area of social policy.[230] Although

225. WITTE, *supra* note 141, at 66. Madison followed Carroll's comments by explaining his view that the provision meant "that Congress should not establish a religion," enforce it by law, nor compel anyone to worship contrary to his conscience. *Id.* But Madison immediately added that "[w]hether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain" fears about Congress' power under the necessary and proper clause." *Id.*

226. *Id.*

227. *Id.* at 67.

228. *Id.* (explaining that "[i]t has been insisted upon by those who were called antifederalists, that this form of Government consolidated the Union").

229. *See id.* at 66-67 (explaining views of Huntington and Madison); *see also* 5 THE FOUNDERS' CONSTITUTION, *supra* note 220, at 92-94 (setting out House debates on religion clauses). Gerard Bradley accurately parses the final exchange between Huntington and Madison. Huntington, as Bradley explains, "was asking Madison whether the New England system, much more coercive than even the general assessment opposed by Madison in 1785, might be an establishment. . . . Madison alleviated this fear, clearly indicating that there was no conflict." *Id.* Bradley adds that, in *Everson*, Justice Rutledge's dissent got this exchange exactly backwards, understanding Madison to be saying that the compulsory clergy tax was in fact an "establishment of religion." *See* BRADLEY, RELATIONSHIPS IN AMERICA, *supra* note 179, at 91; *see also* Everson v. Bd. of Educ., 330 U.S. 1, 11-23 (1947) (Rutledge, J., dissenting).

230. *See* 5 THE FOUNDERS' CONSTITUTION, *supra* note 220, at 90. In that vein were the remarks of future Supreme Court Justice James Iredell at the North Carolina Ratifying Convention in July 1788, one year before the drafting of the religion clauses. Iredell defended at length Article VI's prohibition on federal religious tests as a prime instance of the proposed Constitution's solicitude for religious liberty. The connection in Iredell's thinking between the discrete limitation over

the participants did not know the term, this was a debate over subsidiarity, and not one over substantive church-state matters.

In addition to suggesting that the Establishment Clause was originally concerned with protecting state competences over establishment policy, subsidiarity also suggests it is anachronistic to read the Clause as offering a comprehensive theory of church-state relationships for enshrinement at the national level (or, for that matter, for incorporation against the states).[231] The absence of church-state theory in the Clause follows from the withholding of federal competence over religious establishments. Viewed through the lens of subsidiarity, if the Clause represents the election *not* to nationalize church-state relationships, then the last thing we should expect to find within the Clause is a substantive theoretical account of those relationships. A "substantive theoretical account" simply refers to what Steven Smith calls "first-order or substantive" questions about religion and the state, such as: "Should the state subsidize a religion? Should it support all religions, or at least all Protestant religions, on equal terms? Should religious heresy or blasphemy be punished?"[232] By contrast, "second-order" questions concern "governmental organization, or the allocation of jurisdiction."[233] In Smith's terms, subsidiarity suggests that the Establishment Clause is not concerned with first-order religion questions. Instead, the subsidiary Clause underscores the answer already implicitly given by the Constitution to the second-order question about jurisdiction over state religious establishments.

Unlike most originalist examinations of the Clause, a subsidiarity analysis of the Clause's theoretical content avoids the hopeless task of parsing different formulations of the religion clauses and divining the in-

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religion in Article VI and the generalized absence of federal power over state religious establishments is evident from the following remarks:

> Upon the principles I have stated, I confess the restriction on the power of Congress [in Article VI] . . . has my hearty approbation. They certainly have no authority to interfere in the establishment of any religion whatsoever; and I am astonished that any gentleman should conceive they have. Is there any power given to Congress in matters of religion? Can they pass a single act to impair our religious liberties? If they could, it would be a just cause of alarm.

Id. Iredell reinforced this point by pointing to the Guarantee Clause of Article IV, Section 4 ("The United States shall guarantee to every State in this Union a Republican form of government"), which implied some potential for federal interference in state governments. By contrast, if the federal Congress had "undertaken to guaranty religious freedom, or any particular species of it, they would then have had a pretence to interfere in a subject they have nothing to do with." This was not the case, and therefore, Iredell assured the Convention, "[e]ach state . . . must be left to the operation of its own principles." *Id.*

231. For a discussion of incorporation of the Establishment Clause, see *infra* notes 246, 249 & 251 and accompanying text.

232. SMITH, FOREORDAINED FAILURE, *supra* note 203, at 19.

233. *Id.*

tentions of their authors or ratifiers.[234] If, as subsidiarity suggests, the states' overriding concern centered on the exercise of federal power over the subject matter of religious establishments, then the religion clause architects likely would have avoided as impractical and unnecessary the task of formulating some preferred theory of church-and-state and projecting it into the Constitution. This view does not tempt us to search the entrails of the various religion clause formulations for hidden theories, but instead to take a wider view of the background against which those amendments were made and debated. For subsidiarity, the key historical point is this: Before and after the passage of the Constitution and its religion clauses, the hard substantive work in the church-state area occurred not at the national level but in the states, where it would continue for another century-and-a-half.[235] As Carl Esbeck explains, the "disestablishment" of existing state establishments was neither a national watershed nor was it even the work of the First Amendment. Instead, "disestablishment unfolded more gradually, state by state, and somewhat differently in each state, depending on the state's unique colonial background."[236] Given where the work of disestablishment occurred, the state level was where church-state theories were needed, and a subsidiary Establishment Clause would be chiefly concerned to see that they were kept there.

As a subsidiary provision, the Clause is in fact the opposite of grand theorizing. As already observed, theories of church-state relationships certainly lay behind founding-era debates about whether an Establishment

234. After a careful parsing of the various state proposals, the numerous House and Senate formulations and the recorded debates, John Witte concludes that "[t]he final text has no plain meaning, . . . [t]he congressional record holds no Rosetta Stone for easy interpretation," and that, even given twenty separate drafts of the clauses to sift, "[t]he congressional record holds no dispositive argument against any one of the nineteen interim drafts and few clear rules on why the sixteen words that comprise the final text were chosen." WITTE, *supra* note 141, at 72; *see also* SMITH, FOREORDAINED FAILURE, *supra* note 203, at 46-48 (discussing difficulties of modern, originalist project of trying to reconstruct answers to first-order religion questions from historical evidence).

235. Commenting on the surface secularity of the new Constitution, John Witte elaborates precisely this point:

> The seeming impiety of the work of the 1787 Constitutional Convention must be understood in political context. It was commonly assumed at the convention that questions of religion and of religious liberty were for the states and the people to resolve, not the budding federal government. By 1784, eleven of the thirteen states had already crafted detailed constitutional provisions on religious liberty. . . . The mandate of the 1787 convention was to create a new national sovereign with enumerated powers and delineated procedures. What was specifically not given to this new federal sovereign was to be retained by the sovereign states and the sovereign people.
>
> Federal power over religion was not considered part of this new constitutional calculus.

WITTE, *supra* note 141, at 61.

236. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1393 (2004).

Clause (and the Religious Test Clause) was desirable. The content of those theories, however, differs from a subsequent decision to *vest* a church-state theory in the federal constitutional milieu via the Establishment Clause. Separating these two distinct ideas is crucial to a subsidiary view of the Clause. Subsidiarity as a structural principle is not concerned with managing substantive legal theories or legal outcomes. In this area, for example, it does not arbitrate between "benevolent neutrality" or "strict neutrality." Nor does it propose to answer the problem of religious symbolism in the public square. Instead, as it relates to federalism and the Establishment Clause, subsidiarity concerns the assignment of competences among constituent governmental structures. Thus subsidiarity asks whether the Clause integrates into a federal structure and, if so, whether it adds or subtracts competences to or from the central government. As discussed above, subsidiarity supports a view of the Clause's historical context which suggests that the Clause is a *negative* provision vis-à-vis the federal government. But in any case, the answers to those questions are separate from the question of whether the Clause enacts a theory of church-state relationships. The latter is not a concern of subsidiarity when one views it as a principle of structural allocation of competences.

Subsidiarity would thus read the historical context as contradicting the idea that the "religion" clauses of the First Amendment are actually concerned with the finer points of religious political theory. Their objective would have been emphatically to avoid adding a substantive layer of church-state theory to the nascent federal government. This helps explain why the framers and ratifiers were able to agree on the religion clauses in the first place. An abiding mystery is how the founding generation—with church-state views as divergent as Virginia voluntarists, Massachusetts traditionalists and Baptist dissenters—managed to agree with such apparent ease on a national "religion" amendment. Subsidiarity supports the commonsense, but paradigm-shifting, answer of a theorist like Steven Smith, who states that, in fact:

> [T]hey did *not* agree; instead, they chose in effect to avoid answering the first-order question [about religion and government] by leaving it to the states. The religion clauses kept the national government out of religion not because governmental support for religion was generally regarded as improper—*that* was precisely the issue on which the traditional and voluntarist positions divided—but rather because the religion question was within the jurisdiction of the states.
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> . . .
>
> If we ask, therefore, what principle or theory of religious liberty the framers and ratifiers of the religion clauses adopted, the most accurate answer is "None."[237]

237. SMITH, FOREORDAINED FAILURE, *supra* note 203, at 21. *But see* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002).

On this account, theoretical accounts of church-and-state in the First Amendment elude us because the framers and ratifiers of the First Amendment could have never agreed which theory to include there.[238] Subsidiarity thus underwrites Smith's elegant explanation that amending the Constitution sought to keep the application and development of such theories off of the national stage.[239]

As subsidiarity elaborates, the dynamics of building a federalist structure are deeply incompatible with the idea that the Establishment Clause *added* a new sphere of federal competence to the Constitution. The next one-hundred-and-fifty years of American religious history silently but eloquently illustrate that same point: The Constitution and its religion clauses played virtually no direct role in regulating church-state relationships.[240] As it had before, the delicate task of balancing the interactions of religious groups, non-religious groups and government authority continued in myriad state constitutional provisions, statutes and judicial decisions.[241] In short, the states' broad police powers over church-state arrangements were not touched by the First Amendment. As Forrest McDonald vividly explains, this meant "the states could still, in the interest of public morality, establish the mode and manner of religious worship and instruction, and they could levy taxes for the support of religion—as Connecticut and Massachusetts continued to do for many years."[242] At most, the religion clauses could be said to have maintained the political and sociological conditions under which various aspects of religious liberty could emerge through experimentation and evolution. This has all the earmarks of a subsidiary solution to a thorny problem—seeking equilibrium, as opposed

238. As Daniel Conkle observes, the various actors involved in framing and ratification of the religion clauses

> simply could not have agreed on a general principle governing the relationship of religion and government . . . . If the establishment clause had embraced such a principle, it would not have been enacted. What united the representatives of all the states, both in Congress and in the ratifying legislatures, was a much more narrow purpose: to make it plain that Congress was not to legislate on the subject of religion, thereby leaving the matter of church-state relations to the individual states.

Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U. L. REV. 1113, 1133 (1988).

239. *See* SMITH, FOREORDAINED FAILURE, *supra* note 203, at 21 (arguing that "it is futile to try to extrapolate or reconstruct a principle or theory of religious liberty from the original meaning of the religion clauses," given that "[t]hose clauses quite simply were not based on any such principle or theory").

240. *See, e.g.*, WITTE, *supra* note 141, at 87 (observing that "[f]or the first 150 years of the republic, principal responsibility for the American experiment in religious rights and liberties lay with the states"). Witte observes that the Free Exercise Clause figured in slightly more than a dozen Supreme Court cases before 1940, but that the Court never found a free exercise violation and "often employ[ed] rudimentary analysis of the religion clauses." *Id.* at 101. The Establishment Clause factored into even fewer cases, with the Court also finding no violations. *See id.* at 107-08.

241. *See generally id.* at 87-100.

242. MCDONALD, *supra* note 200, at 288 (citations omitted).

to definitive solutions by locating decision-making authority at the level best adapted to managing the issue.

But this subsidiary view of the Establishment Clause's object and theoretical content confounds our modern expectations of the substantive work the Clause is supposed to do. Dating from the 1940s, the Supreme Court's Establishment Clause project has trained us to expect courts to massage a substantive theory of church-state relationships from the Clause with a caravan of accompanying rules and tests. *Everson v. Board of Education of Ewing Township*,[243] the first modern disestablishment case, attempted to do just that in one sweeping paragraph—a kind of judicial *fiat lux*—whose contradictions are still contorting the Supreme Court's jurisprudence.[244] But the prevalence that subsidiarity affords to the Clause's function in the federalist structure unhappily opens a void where we seek substance. While such analysis has impressive explanatory power, it leaves one viewing the Establishment Clause as a constitutional appendix where

243. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

244. In *Everson*, the Court announced:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

Id. at 15-16. *Everson*'s tendentious use of history to interpret the Establishment Clause has been widely criticized. *See, e.g.*, BRADLEY, RELATIONSHIPS IN AMERICA, *supra* note 179, at 91-92 (stating that Justice Rutledge "misfired, badly and momentously"); SMITH, FOREORDAINED FAILURE, *supra* note 203, at 5 (mentioning Court's "dismal historical performance in *Everson*"); Conkle, *supra* note 238, at 1130-35 (discussing "*Everson*-Rehnquist historical debate"); Esbeck, *Establishment Clause*, *supra* note 216, at 25-26 (summarizing that "[i]gnoring federalism in the Clause was an act of sheer judicial will [by the Supreme Court] which is still debated by academicians today"); John Courtney Murray, *Law or Prepossessions?*, *in* ESSAYS IN CONSTITUTIONAL LAW (Robert G. McCloskey ed., 1957); Michael Stokes Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317-18 (1986) (commenting that in *Everson*, Supreme Court "forced a square historical peg into a round doctrinal hole by filing off a few of the more inconvenient sharp edges of history"). As Michael McConnell writes, "[w]hen the Supreme Court began to decide cases involving claims about an establishment of religion in the 1940s, . . . the Justices made no serious attempt to canvass the legal history of establishment . . . or to distinguish between the First Amendment and the various conflicts over establishment at the state level." McConnell, *Establishment and Disestablishment*, *supra* note 173, at 2107.

one was used to seeing it as a major organ. But the theory of subsidiarity furnishes more than a negative account of the limits of the Establishment Clause. At the same time, it provides an affirmative account of the role the Establishment Clause has played in managing the problem of religious establishments in our complex, religiously pluralistic society.

As we have seen, subsidiarity is at bottom a conditioning principle for attributing competences to the state and various social groups. In its modern form, subsidiarity can help construct a stable equilibrium in disputes about the role of religious associations in a pluralistic society. While we are accustomed to resolving such disputes through interpreting the Establishment Clause, the upshot of our discussion is that in the church-state sphere, subsidiarity does not comfortably function as a source for *a priori* rules for resolving those disputes. Thus subsidiarity, as said, is in tension with the post-1940s development of Establishment Clause jurisprudence, but it is able to provide what that jurisprudence has lacked from its beginning: an intelligible account of the relationship between our constitutional structure and the Establishment Clause itself. Simply put, subsidiarity interprets the Clause as directing argumentation about church-state issues and the concrete resolution of those issues out of the federal sphere, where it virtually always existed before the 1940s. In that way, the Establishment Clause interacts with subsidiarity just as federalism interacts with the Clause. Just as federalism is the structural expression of subsidiarity-in-action, so too is the Establishment Clause in the specific realm of "law[s] respecting an establishment of religion."

Several consequences follow from this subsidiary view of the Clause. First, the Clause becomes a direct assertion about the allocation of government power and, at the same time, an indirect assertion about individual and collective rights. While it evidences a decision not to nationalize church-state relationships, subsidiarity also explains that this decision is not merely a negative judgment about centralized authority, nor does it simply ignore the question of individual rights and the common good. To the contrary, the Clause stands as a prudential judgment about where the common good regarding church-state matters was to be reliably pursued and consequently, where individual and collective religious liberties were to emerge most securely and concretely. Subsidiarity thus instructs us that a limited Establishment Clause has nonetheless advanced a positive good because it underwrites both federalism and religious pluralism as a way of managing the problem of religious establishments. This supports Steven Smith's argument that, in the two generations following the framing, a combination of federalism and religious pluralism worked powerfully in favor of religious liberties at the state level:

> [I]t seems clear that this [religious] pluralism deserves most of the credit for the elimination of religious establishments in this country and for the spectacular growth of a diversity of religions and faiths. For example, within a half-century after the adoption

> of the Constitution, all states had eliminated their official religious establishments—wholly without prodding, we should note, from the Supreme Court. During this same period a large number of religious movements and experiments sprang up throughout the country.[245]

Second, while subsidiarity limits the theoretical content of the Establishment Clause, it does not empty the Clause of all judicially-enforceable content. Importantly, however, it shifts our expectations about the *kind* of content to be found in the Clause. If we understand the Clause as an expression of structural subsidiarity (as opposed to subsidiarity as a substantive norm), then we should expect to find in the clause, for lack of better terms, "boundary" rules as opposed to "substantive" rules. That is, if the major thrust of the Clause is to cordon off an area of competence from the central government and reserve it to the constituent states, then one should be able to derive from the Clause fairly concrete rules for policing those boundaries.[246] Conversely, one should not expect to find rules for resolving disputes that clearly lie across the boundary. Thus, one would employ the Clause in accord with subsidiarity by saying that a federal law violates the Clause by trenching on state competence in managing its own church-state relationships. But one would employ the Clause against the grain by using it to say that a particular resolution of a church-state problem is or is not appropriate in accord with some *a priori* rule latent in the Clause.

This more limited scope for the Clause does not drain it of substance. The boundary, after all, must be delineated. Consequently, a federal court enforcing the Clause would need to discern the area of competence withheld from the central government—according to the Clause, laws "respecting an establishment of religion." But this does not simply throw us back on the perennial difficulty of defining that phrase. Viewing the Clause as a subsidiary measure would have the additional benefit of limiting and channeling the inquiry as to what constitutes a "law respecting an establishment of religion." Because the Clause would now be viewed as a concrete political compromise developed in a particular historical and legal context, the questions a court would ask about the Clause's boundaries would be accordingly limited. For example, one would be interested in understanding as precisely as possible the legal contours of an "establishment of religion" at the time of the framing and ratification of the Clause. One would also inquire into the political and religious motivations behind

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245. SMITH, EQUALITY, *supra* note 176, at 21. Smith goes on to note that although this process was uneven and sometimes allowed persecution, "the ferment that caused religious diversity to flourish—and that is largely responsible for the condition of religious freedom we enjoy today—was a product of pluralism; it owed little or nothing to judicial review, or to the legal elaboration and enforcement of any constitutional 'principle of religious freedom.'" *Id.*

246. *Cf.* Esbeck, *Establishment Clause*, *supra* note 216, at 104-09 (exploring question of "boundary keeping" posed by structural view of Establishment Clause).

the collective decision not to vest the new federal government with control over state religious establishments. Furthermore, one would need to identify the legal mechanisms that would have been used by states to "disestablish" the existing establishments, which would be strongly indicative of the legal means that were denied the federal government by the Clause. Of course, we are not operating on a blank slate here, for there is a rich body of historical and legal scholarship on these issues.[247] It should be said, however, that a subsidiary view of the Establishment Clause is not simply a call for improved originalism. Subsidiarity focuses the legal-historical inquiry in such a way as to help fill out the substantive content of the Clause. It also prevents legal history from being crudely co-opted as simply another pillar of support for a particular theorist's preferred notion of church-state relationships.

Moreover, viewing the Clause as a source for boundary rules does not necessarily exclude some residual substantive content. Even positing that the Clause was meant to assign governmental competences over church-state matters, it is plausible that the Clause would also disable the federal government from passing laws that produce secondary effects which would trespass into state competences. For instance, if the federal government established its own national religion, this would effectively interfere with state decisions in the church-state area, while formally leaving those relationships untouched. Or the federal government might enact a nationwide voucher scheme that practically impedes state-crafted voucher solutions, assuming that voucher schemes would fall within the "establishment" competences of the states. Another upshot of this analysis is that the Establishment Clause would not necessarily deprive the federal government of all power over the general subject matter of religion (so that it might have the power to pass laws like the Religious Land Use and Institutionalized Persons Act (RLUIPA)[248] or Title VII's exemption for religious employers[249]). The Clause would instead be understood as cordoning off the federal government from an area of competence defined in terms of a

247. *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); McConnell, *Establishment and Disestablishment*, *supra* note 173, at 2131-81 (discussing legal components of establishments in colonies and early states). McConnell argues that the Supreme Court's historical understanding of what a religious establishment was, and how that should bear on interpretation of the Establishment Clause, has been "truncated" and "careless." He contends that "[i]t is difficult to know what the Framers of the First Amendment opposed if we do not know what those who favored establishment supported." But "attempt[ing] to describe the actual laws and debates over establishment and disestablishment . . . will help foster a richer, and perhaps less brittle and bipolar, understanding of the issues we face today." *Id.* at 2109-10.

248. *See* Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding section three of Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a)(1)-(2)).

249. *See* Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding exemption of religious organizations from Title VII's prohibition of employment discrimination on basis of religion, 42 U.S.C. § 2000e-1).

distinct set of legal conditions, conceived in light of the historical experience of establishments of religion. The Clause would speak only by inference to the exercise of other federal powers with regard to the broader subject matter of religion.

The third consequence of a subsidiary view of the Clause, related to the second, concerns the feasibility of deriving judicial norms from the Clause. The view that a subsidiary Clause is a more likely source for boundary rules than substantive rules helps explain core difficulties in the Court's Establishment Clause cases. There is no need to rehearse the convolutions of that jurisprudence,[250] but subsidiarity suggests two general explanations for the difficulties: (1) many church-state problems present complex, intractable conflicts that are not amenable to rule-based judicial resolution; and (2) judges and justices must develop and apply their own theoretical premises to resolve church-state problems. Subsidiarity offers no solutions to these dilemmas except to say that they were predictable. If, as subsidiarity suggests, church-state problems often present irreducible paradoxes that cannot be solved by *a priori* rules and can only be compromised through political argument, then it is not surprising that judicial attempts to solve them through rules would soon be mired in inconsistency and unpredictability. If, as subsidiarity suggests, the Establishment Clause is appropriately viewed as a structural attribution of governmental competences rather than the incarnation of a particular church-state theory, then it follows that judges attempting to employ the Clause *as if* it contained such a theory would be constrained to import one.

These kinds of judicial rule-making dilemmas are not merely instances of bad rules that fail to provide predictable answers. Rather, they are situations where courts attempt to craft all-encompassing rules for problems that seem inherently resistant to rule-based resolutions. Establishment case law bristles with examples. Arguably, the most tortured was the Court's attempt to discern whether various forms of aid to religious schools "advanced religion," resulting in a labyrinth of super-fine distinctions.[251] Another has been the Court's attempt to discern whether an "accommodation" of religion appropriately lifts a burden on religious activity or unfairly "fosters" it.[252] Yet another quagmire has been the Court's in-

250. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 106-12 (1985) (Rehnquist, J., dissenting) (describing jurisprudential disarray at length and asserting that "in the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified").

251. *See id.* at 110-11 (laying out contradictions of Court's no-aid jurisprudence). Among many possible examples, Justice Rehnquist observed that "a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class," and "[a] State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class." *Id.* (citing Wolman v. Walter, 433 U.S. 229, 249 (1977); Meek v. Pittenger, 421 U.S. 349, 362-66 (1971); Bd. of Educ. v. Allen, 392 U.S. 236 (1968)).

252. *See, e.g.*, *Amos*, 483 U.S. at 334-35 (describing Court's approach as "recogniz[ing] that the government may (and sometimes must) accommodate re-

creasing use of an analysis which asks whether government use of religious symbolism legitimately acknowledges the place of religion in society, or instead wrongly endorses religion.[253] Finally, some members of the Court have begun to inquire whether a law has resulted, or will result, in an unacceptable amount of "religious divisiveness."[254] Applying even sophisticated rules to such situations has not led the Court consistently toward non-subjective solutions, but rather has invited various justices simply to reformulate church-state problems in the rule's terms. Conceivably, the Court might announce blanket rules that would settle some of these questions—e.g., that the Establishment Clause forbade all government use of religious imagery (including, presumably, the Declaration of Independence, the national motto, the national anthem and the names of various cities like Corpus Christi, Texas), or that it forbade all government aid to religion (including, presumably, all tax exemptions for religious organizations and clergy, or perhaps the provision of fire and police services to churches). But my point is that the Court has instead attempted to erect complex rules that ostensibly balance the various competing interests and policies in these conflicts, and this has resulted in spiraling confusion in its

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ligious practices and that it may do so without violating the Establishment Clause"; that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause"; that "[t]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference"; but that "[a]t some point, accommodation may devolve into an unlawful fostering of religion") (internal quotations omitted) (citing Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987); Walz v. Tax Comm'n, 397 U.S. 664, 673, 669 (1970)).

253. *See, e.g.*, McCreary County v. ACLU, 125 S. Ct. 2722, 2733 (2005) (stating that Court's analysis, in part, involves asking whether "the government sends the message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members") (internal quotations omitted) (citing Santa Fe Ind. Sch. Dist. V. Doe, 530 U.S. 290, 309-10 (2000) (quoting Lynch v. Donnelly, 465 U.S. 668, 668 (1984) (O'Connor, J., concurring))).

254. *See, e.g.*, Van Orden v. Perry, 125 S. Ct. 2854, 2857, 2871 (2005) (Breyer, J., concurring) (upholding Ten Commandments display by relying in part on fact that "[t]his display has stood apparently uncontested for nearly two generations" and "[t]hat experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive"); Zelman v. Simmons-Harris, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting) ("I write separately . . . to emphasize the risk that publicly financed vouchers programs pose in terms of religiously based social conflict."); *id.* at 685-86 (Stevens, J., dissenting). Justice Stevens stated:

> Admittedly, in reaching that conclusion I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.

Id. For an excellent discussion of, and demolition of, this divisiveness project, see Richard W. Garnett, *Religion, Division and the First Amendment*, 94 GEO. L. REV. 1667 (2006).

jurisprudence. Viewing the Establishment Clause as a subsidiary provision explains why: the Clause was not built for such uses.

It also explains why Establishment cases have featured dueling theories of church-and-state, most purporting to be derived from the historical genesis of the Clause. At different times and in different cases, various justices have attempted to solve disputes by reference to a smorgasbord of church-state theories, classified under rubrics such as "separation of church and state," "strict separation," "accommodation," "non-preferentialism," "neutrality," "benevolent neutrality" and so on.[255] In the same vein, justices have also taken differing views of the role history should play in the interpretation of the Establishment Clause, often using history to underwrite a particular theory or outcome.[256] My modest point is that a subsidiary view of the Clause explains why such promiscuous theorizing would occur. Because the Clause itself contains no theory, justices would therefore be constrained to import one if they want to use the Clause to solve particular church-state disputes.[257] It is not hard to predict that this will often result in a theoretical stalemate.

Finally, subsidiarity suggests a different approach to the difficult theoretical question of how the Clause can logically apply to the states. In a sense, incorporation of the Clause is where the Supreme Court and religion clause commentators are not on speaking terms. The Court has applied the Clause against the states without ever considering the Clause's

255. *See, e.g.*, WITTE, *supra* note 141, at 152-63 (classifying "unique, and often sharply juxtaposed, approaches" Court has developed since 1947 for addressing Establishment Clause problems).

256. For instance, compare the different conclusions reached by using history to interpret the Establishment Clause in then-Justice Rehnquist's dissent in *Wallace*, Justice Black's majority opinion in *Everson*, Justice Rutledge's dissenting opinion in *Everson*, Justice Souter's concurring opinion in *Lee v. Weisman*, and Justice Scalia's dissenting opinion in *McCreary*. *See McCreary*, 125 S. Ct. at 2748-51 (Scalia, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 612-16 (1992) (Souter, J., concurring); *Wallace*, 472 U.S. at 91-104 (Rehnquist, J., dissenting); Everson v. Bd. of Educ., 330 U.S. 1, 8-15 (1947) (majority opinion of Black, J.); *id.* at 32-43 (Rutledge, J., dissenting).

257. *Cf.* SMITH, FOREORDAINED FAILURE, *supra* note 203, at 63 (discussing possibility of comprehensive constitutional theory of religious freedom). Steven Smith goes further than simply asserting the theoretical emptiness of the religion clauses. He argues that the attempt to formulate any comprehensive constitutional theory of religious freedom—whose purpose is "to mediate among a variety of competing religious and secular positions and interests, or to explain how government ought to deal with these competing positions and interests"—will end up inevitably preferring one of those background "positions and interests" to others. *Id.* This is so, explains Smith, because "any account of religious freedom will necessarily depend on . . . more basic background beliefs concerning matters of religion and theology, the proper role of government, and 'human nature.'" *Id.*; *see also* SMITH, EQUALITY, *supra* note 176, at 45-61 (further elaborating why unified "theory" of religious liberty is impossible). If Smith is correct about the impossibility of formulating a theory of religious liberty that does not silently privilege some competing religious or secular claim, this would exacerbate the problem of unmoored judicial theorizing about the content of the Establishment Clause.

federalism aspects, and has rebuffed any suggestion to reconsider the content of the incorporated Clause in light of its original function.[258] Commentators, whether or not they want to reconsider the content of an incorporated Clause, have often observed that application of the Clause to the states presents a basic logical problem.[259] Along these lines, one might object that the entire analysis presented in this Article is practically irrelevant: Whatever light subsidiarity sheds on the *original* place of the Clause in the constitutional framework, the fact is that since 1947, the Court has applied the Clause to the states via the Due Process Clause of

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258. *See, e.g.*, *Wallace*, 472 U.S. at 48-51 (rejecting as against "elementary proposition of law" district court's "remarkable conclusion" that Establishment Clause should be interpreted as not applying to states). *But see* Cutter v. Wilkinson, 544 U.S. 709, 727-28 (Thomas, J., concurring) (asserting that "an important function of the Clause was to make clear that Congress could not interfere with state establishments," and that Establishment Clause "is best understood as a federalism provision that protects state establishments from federal interference" (internal quotations omitted) (citing Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring); *Zelman*, 536 U.S. at 677-680 (Thomas, J., concurring); *Lee*, 505 U.S. at 641 (Scalia, J., dissenting)).

259. Steven Smith notes that "First Amendment scholars have often noted the federalist element in the religion clauses, particularly in the establishment clause, and have realized that this element poses difficulties, both historical and conceptual, for the theory that the establishment clause was 'incorporated' into the Fourteenth Amendment and thereby extended to the states." SMITH, FOREORDAINED FAILURE, *supra* note 203, at 18 (arguing that "the federalism of the First Amendment may be even more important than its libertarianism") (citing, *inter alia*, MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 29 (1965)); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1158-59 (1991) (stating that conventional wisdom led to idea that "[i]f we assume that virtually all the provisions of the Bill of Rights, except the Tenth Amendment, were essentially designed to protect individual rights, total incorporation of the first nine amendments seems imminently sensible . . . . Unfortunately, that assumption is false"); Conkle, *supra* note 238, at 1133; Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 481 (1991) (asserting that "[a]s a matter of judicial craftsmanship, it is striking in retrospect to observe how little intellectual curiosity the members of the Court demonstrated in the challenge presented by the task of adapting, for application to the states, language that had long [protected] the states against the federal government"); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH U. L.Q. 371, 389 (declaring that "the First Amendment built not one, but two walls of separation"); Note, *Rethinking the Incorporation of the Establishment Clause*, 105 HARV. L. REV. 1700, 1703 n.25 (1992) (commenting that there is "mounting evidence that a main purpose of the Clause was 'to protect state religious establishments from national displacement") (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1161 (2d ed. 1988)). Akhil Amar captures the conundrum well:

> [T]he nature of the states' establishment-clause right against federal disestablishment makes it quite awkward to mechanically 'incorporate' the clause against the states via the Fourteenth Amendment. . . . [T]o apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right clearly confirmed by the establishment clause itself.

AMAR, *supra* note 200, at 33-34. For a recent exploration of the federalism-incorporation debate among Establishment Clause scholars, see generally Lupu & Tuttle, *Federalism and Faith*, *supra* note 217.

the Fourteenth Amendment. That brute fact would seem to make the insights of subsidiarity superfluous to modern application of the Clause. But, as before, identifying seemingly intractable analytical difficulties often reveals unexpected ways that subsidiarity can aid our understanding of the Clause. In this case, subsidiarity provides both a critique of the Clause's incorporation against the states, as well as a way of helpfully re-conceiving it.

Incorporation of the Clause has actually been in the background of this Article all along. Incorporation is, after all, the mechanism that enabled the Court to apply the Clause to church-state problems in the states. But the Court has never drawn a distinction between application of the Clause against the federal government and against the states—it has purported to apply the Clause in the same way against both. Thus, a subsidiarity-based criticism of the Court's Establishment Clause jurisprudence is, at the same time, a criticism of the way incorporation itself has been carried out. It is not necessarily a criticism of the idea of incorporation of the Clause itself.

But one could further object that a subsidiary view of the Clause by definition forecloses its application against the states. If the Clause is primarily a structural barrier against federal interference in state establishment matters, then is it not true, as Steven Smith has argued, that incorporating the Clause effectively *repeals* it?[260] Possibly, but that conclusion has less to do with subsidiarity than with the content of the Fourteenth Amendment. If, correctly understood, the Fourteenth Amendment mechanically applies against the states all the substantive guarantees formerly applicable only against the federal government, then simple logic dictates that the Establishment Clause could not have been incorporated—there would be no substance to incorporate. On that view, attempting to apply the Clause to the states misses the fact that the pre-incorporation Clause already addressed itself to both the federal and state governments (unlike, for instance, the Fourth Amendment).[261] As subsidiarity enters the analysis, however, its structural aspects suggest a helpful way of looking at incorporation and the Fourteenth Amendment. Fully exploring this issue is beyond the scope of this Article, but it can be addressed briefly.

Just as subsidiarity provides a vantage point for understanding federalism, it can achieve the same result for incorporation. Incorporation, after

260. *See* SMITH, FOREORDAINED FAILURE, *supra* note 203, at 49-50.

261. *See, e.g.*, AMAR, *supra* note 200, at 34 (reasoning that, because "the original establishment clause . . . is not antiestablishment but pro-states' rights [and] . . . is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally," then attempting to incorporate Clause is like attempting to incorporate Tenth Amendment); *id.* at 41 (noting that since "Congress had no more authority in the states to disestablish than to establish . . . . [T]he establishment clause seems more difficult to incorporate against the states").

all, involves a realignment of the federal structure, shifting certain areas of competence from the states to the central government. The extent of that realignment was the subject of intense and lengthy debate mainly focused on the historical context and legal content of the Reconstruction Amendments.[262] A subsidiary analysis of the incorporation of the Establishment Clause would attempt to situate its incorporation within the wider historical and legal context of Reconstruction.

When the Supreme Court decided to apply the Clause to the states, it asked no questions about the feasibility of incorporation. It simply assumed that the protections the Clause provided were in some sense fundamental, and proceeded to apply them with reference to what it now widely recognized as shoddy historiography.[263] Subsidiarity, at the very least, would provide an intelligible matrix for understanding incorporation of the Clause.[264] One would start by focusing on the historical context of Reconstruction, looking for evidence that states wanted to transfer to the central government certain responsibilities with regard to church-state matters. Identifying specific church-state problems at issue would be crucial because subsidiarity holds that the intervention of higher authority should be limited by the contours of the particular incapacities that call for intervention. This would involve intense historical work, but it is likely that a great deal has already been done. Next, one would ask how the Fourteenth Amendment can be understood as effecting a transfer of authority to the nation over the subject matter of church-state relationships, or over some subset of those relationships. This would also be a crucial step in terms of subsidiarity, since the theory would require that such a

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262. *See generally* AMAR, *supra* note 200, at 137-214; RAOUL BERGER, GOVERNMENT BY JUDICIARY 155-89 (2d ed. 1997) (discussing incorporation of Bill of Rights in Fourteenth Amendment); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

263. For a discussion of historiography, see *supra* note 245.

264. Other scholars have suggested rethinking incorporation of the Establishment Clause by reference to the context of Reconstruction. *See, e.g.*, AMAR, *supra* note 200, at 246-57 (concluding after historical analysis that "we can now see how the entire First Amendment was, in profound ways, reconstructed by the Fourteenth"); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) (stating that by Reconstruction, northern state courts had translated prohibition of original Establishment Clause to be expression of fundamental religious liberty); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994) (concluding that "[t]o those who would give effect to the constitutional movements of the People since the Founding, the religion clauses must be read according to the intentions of those who fought a war over slavery and amended their Constitution to incorporate the lessons of that conflict"). Responding to Lash, Steven Smith states that Lash's arguments

> underscore a crucial point: If a new originalism is to be based on a revisionist account of the Fourteenth Amendment, the picture of government's relation to religion that this new originalism produces will likely look very different than anything that would have recommended itself either to Thomas Jefferson or to the justices in *Everson*.

SMITH, FOREORDAINED FAILURE, *supra* note 203, at 50-54.

transfer of authority be effected by an intelligible political compromise, hammered out in light of concrete circumstances. The entire inquiry would be conducted against the background assumption that the original Establishment Clause confided the calibration of the vast majority of church-state matters to the states. That background, of course, is not only a function of subsidiarity, but is an accurate description of American legal history from 1776 until 1947.

Whatever such an inquiry may yield, it is unlikely that it would drain the incorporated Establishment Clause of all substance. But it would probably result in a far more modest Clause. Its primary benefit would be to focus an inquiry concerning a major structural shift in federalism precisely on the dynamics of that shift. It would also remove the aura of unreality surrounding incorporation of the Establishment Clause—namely, that a constitutional provision that had never been used to police religion in the federal government, and whose history suggested no theoretical content beyond a structural limitation on federal power, could somehow be brought to life after 150 years of dormancy and used to regulate the myriad religious controversies of an increasingly pluralistic and religious nation. As with the content of the Establishment Clause, subsidiarity does not promise a solution to the incorporation problem. Instead, it proposes an intelligible way of managing it within a concrete legal structure and historical context, in a way that does not involve endless permutations of church-state theory.

V. CONCLUSION

This Article proposes subsidiarity as a way of understanding the kinds of problems posed by the interaction of religious associations and government. It suggests that such problems are better handled through political management than rule-based judicial resolution. The Article also offers subsidiarity as a way of situating the Establishment Clause within the federalist structure of the U.S. Constitution. It proffers that the Clause is properly understood as a structural strategy for partitioning off the federal government from a volatile area of social policy, one better left to individual states. Both conclusions are in real tension with our modern understanding of religious establishments and the Establishment Clause. But this vexed area of jurisprudence and scholarship needs provocation to shake off unhelpful theoretical baggage and to find promising ways forward.

Subsidiarity suggests several paths. As to the modern problem of religious establishments as such, it proposes that it is far more complex and multifaceted than the slogans of "separation of church and state" and "neutrality" have led us to believe. Conversely, as to the Establishment Clause, subsidiarity posits that the Clause is far more modest than two generations of Supreme Court jurisprudence have led us to believe. A subsidiary Establishment Clause is simply one integrated into the overall

structure of the Constitution. From that point of view, the Clause appears to address structure, function and jurisdiction more than it promotes church-state theories or particular substantive outcomes. A subsidiary Clause may not hold the answers to many of the problems we currently associate with the Clause—for instance, the "correct" answers to religious participation in voucher programs, or to the presence of religious symbolism in government buildings—but it promises to be a Clause that courts can use consistently and coherently.

This Article is only a sketch, albeit a lengthy one, of how subsidiarity interacts with establishments and the Establishment Clause. By necessity, it leaves many areas unexplored, such as how subsidiarity might actually work in a variety of church-state problems, and also what a jurisprudence of a subsidiary Establishment Clause might look like. One significant area for further study is the question of rights. A structural Establishment Clause, even one applied to the states through incorporation, might appear to slight the individual rights we have come to associate with the Clause—such as the right against compelled tax support of religion or the right not to be subjected to official religious ceremonies. The first half of this Article is intended to lay a theoretical foundation for addressing that problem by charting the connections between limited government, associational rights and human dignity. But much more could be said about how that theoretical construct actually works in the context of religious associations, the individuals within them and the individuals in the larger society. As the theoretical sections indicate, subsidiarity would address this problem by focusing on the dignity of the individual person who, precisely because of his personhood, requires vibrant associations to be genuinely free.

Exploration of those questions awaits further study, but a key insight of subsidiarity, which this Article has attempted to explicate, is that before we can understand how the Establishment Clause protects individual and associational rights, we must first understand how the Clause interacts with the federal structure of the Constitution as a whole. Incorporation of the Establishment Clause has not liberated us from that difficult task. In fact, the spectacle of the Supreme Court's establishment clause jurisprudence should warn us that foundational questions about the meaning and function of the Clause are unavoidable. The fruit of ignoring them, as *Everson* did two generations ago, seems to be congenital incoherence. Subsidiarity provides key theoretical insights into the relationship between the Clause and federalism, and thus contributes to an ongoing conversation about the future role the Clause should play in resolving church-state disputes.

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CAN THE DOCTRINE OF SUBSIDIARITY HELP COURTS INTERPRET THE ESTABLISHMENT CLAUSE? [1]

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This article proposes that the concept of subsidiarity from Catholic social doctrine can be useful in understanding the function of the Establishment Clause in the First Amendment to the U.S. Constitution. Subsidiarity, however, does not serve as a source for judicially enforceable rules for applying the Clause; rather, it explains the Clause as essentially a federalism provision that leaves the resolution of church-state questions to the states.

Introduction

Since the 1940s, the federal courts have used the Establishment Clause of the U.S. Constitution to calibrate the relationship between church and state in every corner of the United States. Courts have inevitably had to adjust the myriad interactions between religious associations, religious individuals, and the government, propagating a gaggle of vague principles and multi-factor tests. The Catholic social doctrine of subsidiarity would seem a good candidate for cleaning up this doctrinal confusion, for subsidiarity promises a framework within which to adjust the respective competencies of public and private associations. Moreover, subsidiarity readily embraces the religious association as exactly the kind of structure that mediates constructively between the individual and the state.

But simply "applying" subsidiarity to the problem of religious establishments is far more difficult than at first blush. Subsidiarity does address itself to the problems of "religious establishments" as such, but at the same time it appears singularly *mal*adapted as a source for judicially enforceable rules for resolving such problems. A court needs fairly rigid and predictable standards for saying what is and is not a prohibited religious establishment. But subsidiarity provides, instead, a flexible procedural framework which can help hammer out the complex interactions between religious associations and the state—one that is far more comfortable in the prudential sphere of politics than in the sphere of courts and legal rules. Thus, at first glance, one might conclude that subsidiarity not only provides *no* help to a court applying the Establishment Clause, but also that the Establishment Clause itself could not intelligibly embody a judicially enforceable norm of subsidiarity.

But here first impressions are misleading. Subsidiarity does help us understand the Establishment Clause, and in a profound and surprising way. Subsidiarity does not tell a court how to apply the Clause, but instead explains what the Clause *is*. In short, subsidarity shows that the Establishment Clause is all about federalism, and says virtually nothing about substantive church-state issues. The subsidiary Establishment Clause contains the "right" answer about *where* church-state issues should be hammered out, not about how such issues should be resolved substantively. This is a radical view of the Establishment Clause, of course, but in the helpful sense that it points us to what lies at the roots of the Clause. Subsidiarity can help clear away over sixty years worth of jurisprudential detritus and see what the Establishment Clause was actually supposed to *do*. Subsidiarity also helps make sense of the framing and ratification of the Establishment Clause. Finally, it also explains why the Supreme Court's Establishment Clause jurisprudence—which, since 1947 has attempted to orchestrate the minute details of American church-state relationships—has been such a failure.

A. Absolutely Not!

Before exploring how subsidiarity can help understand the Establishment Clause, it is necessary to explain how subsidiarity *cannot* help. This section briefly outlines the Catholic doctrine of subsidiarity. It emphasizes that, as useful as subsidiarity is as a conceptual framework for adjusting the competencies of public and private associations in society, it is not a good candidate for a judicially-enforceable constitutional norm. In other words, subsidiarity helps us talk intelligibly about the problems posed by religious "establishments," but it does not help a court derive useful tests for policing the boundaries between church and state and, *a fortiori*, for liquidating the meaning of the Establishment Clause. Subsidiarity, instead, instructs us that church-state issues are the kinds of issues better resolved by prudential judgments in the political sphere. As we will see in the next section, this also points to a paradoxical, but useful, answer to the question of what function the Establishment Clause is supposed to perform in our federal system.

Subsidiarity is a theory about the relationships among social structures, the common good, and human dignity with a venerable pedigree in European political thought. It concerns how persons become genuinely free by associating with others, and what those associations, or "mediating structures," imply about state authority.

Paradoxically, subsidiarity both empowers the state to remedy the incapacities of social groups, and limits state intervention by reference to the integrity of those groups.[2] The state *helps* but does not *absorb* intermediate associations. In that way, it is thought, the people within them will flourish most fully in their humanity, in their communities, and in their relationships to the state.[3]

Substantively, subsidiarity orders the relationships among state authority and social groups. Structurally, it describes the distribution of competencies among higher and lower public entities in a single system.[4] Thus, subsidiarity may apply substantively to the interactions between the state and labor unions, and it may apply structurally to the interactions between a central government and its constituent governmental entities.[5] The structural aspect of subsidiarity is closely connected to federalism.[6]

But however applied, subsidiarity focuses on the person. It assumes that the basic aim of societal structures, private and public, is to promote human dignity and, hence, genuine freedom. Persons are ends-in-themselves; they are also social beings and thus most authentically human only in community with others.[7] Subsidiarity builds upward from this basic focus on the person. Human personhood requires a kaleidoscope of associations for its full expression. For instance, individuals need family associations to nurture their basic affective, material, educational, and spiritual needs.[8] Such groups cannot function in isolation but must interact with other groups to serve their members fully.[9] What results is an organically intermeshed civil society, "understood as the sum of the relationships between individual and intermediate social groupings, which are the first relationships to arise and which come about thanks to 'the creative subjectivity of the citizen.'"[10]

Subsidiarity seeks to nourish these intermediate social groups—or "mediating structures"—whether by protecting them from government interference, empowering them through limited but effective government intervention, or coordinating their various pursuits.[11] A mediating structure could refer to any voluntary association—a family, a neighborhood, a church, a civic club—that "stand[s] between the individual in his private life and the large institutions of public life."[12] A legal policy or social structure resonates with subsidiarity if it furthers this basic principle of facilitating, through mediating structures, both the flourishing of persons and the greater justice and responsiveness of state authority.

Subsidiarity recognizes that the state has an obligation to intervene in aid of lower societal structures in appropriate and well-

defined ways, but that the intervention must be of a limited, incremental, temporary, and remedial nature. Theorists of subsidiarity thus speak of its *positive* and *negative* aspects.[13] Positively, the state (or any higher societal association) offers help to subordinate associations to the extent they cannot accomplish their own ends. But negatively, there is a strong presumption against extensive state intervention into lower associations. Subsidiarity thus exhibits a "principled tendency toward solving problems at the local level and empowering individuals, families and voluntary associations to act more efficaciously in their own lives."[14] The ultimate goal, built upon the uniqueness of every human person, is to realize a "genuinely pluralistic society."[15]

No association nourishes its members' dignity by dissolving their individuality into a homogenized mass. This is true by definition, given the purpose of an association is to nourish individual development. Just so, higher associations must not absorb the unique qualities and functions of lower associations. Interventions by higher associations are necessitated and limited by the same problem—*i.e.*, that the lower organization requires some aid because it, for whatever reason, cannot achieve its goals. But to preserve those lower associations as genuine associations, the nature of the intervention must be partial and incremental—"subsidiary" to the function and character of the association aided. Subsidiarity's guiding principle, then, is that intervention should "assist but not usurp" mediating structures.[16]

The Catholic Church's formulations of the principle of subsidiarity—contained principally in late 19th and early 20th century papal encyclicals on labor relations—are the most carefully elaborated modern statements of the principle and have consequently become benchmarks for its development.[17] This foundational passage is from Pius XI's encyclical *Quadragesimo Anno*:

> Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them. The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it

> alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of "subsidiary function," the stronger social authority and effectiveness will be, the happier and more prosperous the condition of the State.[18]

Much more could be said about the historical development of subsidiarity, and particularly its increasing accommodation of personalist philosophy and the freedom of conscience.[19] But for purposes of this paper, what needs emphasizing is the mode in which a subsidiary state manages the common good. The subsidiary state pursues a substantive vision of the common good, but in a manner subsidiary to the efforts of social groups.[20] A just government constructs an ordered framework that assumes the diverse projects of individuals and social groups. The state does not define the common good, but safeguards and promotes it, making up for the natural incapacities of social groups, whose own efforts contribute to the common good.[21] Russell Hittinger identifies this principle as central to subsidiarity: "[S]ubsidiarity presupposes that there are plural authorities and agents having their 'proper' (not necessarily lowest) duties and rights with regard to the common good."[22]

This subsidiary view of the relationship between state power and the common good is anti-perfectionistic. Limited human beings and their institutions will never ideally realize human dignity, as Chantal Millon-Desol describes:

> To social problems, one cannot simply find a solution in the sense of a definitive systematization. There are means, imperfect and tentative, for managing this critical condition permanently in the equilibrium of the possible.[23]

Consequently, subsidiarity does not furnish *a priori* criteria for state intervention, in contrast with classical liberalism on the one hand (which allows minimal intervention only for basic security) and with socialism on the other (which allows comprehensive state intervention). As John Czarnetzky and Ronald Rychlak explain, because subsidiarity focuses on the common good, applying it requires judgments that are "nuanced, comprehensive, and political"—judgments, consequently, "better left to political bodies, who are far better equipped than courts" to formulate

them.[24] The government thus has a great deal of prudential latitude over the decision whether to intervene, subject to the countervailing pressures of mediating structures.

Given subsidiarity's basic flexibility, one may legitimately ask whether it provides reliable standards for conditioning state intervention, and for attributing competencies among governmental actors, private associations, and individuals.[25] But subsidiarity boasts that its "vagueness" is not a defect, but its central asset. Subsidiarity calibrates the relationship between civil society and the state within the flux of circumstances, in pursuit of a maximum amount of liberty. But liberty expresses itself in concrete conditions that cannot be predicted by *a priori* rules.[26] The imprecision latent in subsidiarity therefore is exactly the point.[27] Authority acts in a truly subsidiary fashion only if it can adapt itself flexibly to the changing concrete demands of liberty. Thus, subsidiarity does not furnish a blueprint delimiting the functions of the state and this-or-that social group. Rather, it is a "purely formal" principle that manages the relationship between the state and civil society, while their own interactions fix the concrete boundaries between them. Subsidiarity itself does not ascribe rigid limits to the competencies of any social entity.[28]

After this relatively brief outline of the theory of subsidiarity, we can say two things about applying the theory to the problem of religious establishments. First, the theory can help illuminate the nature of the problem and point us toward solutions. But, second, the theory appears ill-adapted to being embedded in a constitution as a norm that courts are supposed to apply to concrete situations.

Subsidiarity can help us talk intelligibly about what—at least in American constitutional jurisprudence—can often seem like an impossibly elusive concept: the precise nature of a religious "establishment" and why it is undesirable. As explained, the subsidiary state acts to remedy the incapacities of social groups, but never absorbs them, in the sense of substituting its own maladapted functions for their more precisely calibrated ones. Thus, subsidiarity would see the archetypal "religious establishment" as presenting a problematic distribution of competencies among state authority and religious associations. It would ask how that distribution hobbles the mediating character of the religious associations and, by extension, the freedom of the persons within them. One would look for church-state arrangements in which religious associations' mediating role becomes degraded because of involvement with state authority.[29] Perhaps the religious association's function has been compromised by losing religious authority to the state—as when, for instance, the government dictates a

form of worship or meddles in a church doctrinal dispute. Or perhaps the association has been compromised in the opposite direction by absorbing coercive authority *from* the state—as when, for instance, the government hands over licensing authority to a church. This structural and functional approach suggests a baseline for thinking about problematic church-state relationships: as to any discrete function, state authority and a religious association should never coalesce into an identical, entirely overlapping entity. In the vocabulary of subsidiarity, the state would have completely absorbed the function of a religious association, and henceforth those functions of governing authority and religious association would be indistinguishable.

Instructively, subsidiarity condemns the religious establishment *not* because, as we are used to saying, it "advances religion" or is "non-neutral with regard to religion"—these formulations both prove too much and nothing at all about the undesirability of certain church-state arrangements. Subsidiarity operates on a more concrete plane. It condemns the religious establishment because the state has inappropriately involved itself in the functions and competencies of a religious association. That involvement is undesirable precisely because of its impact on the mediating function of the religious group and its members, on the mediating function of other social groups, and on the ability of the state to manage the common good. The religious association's absorption into the state means either that it can no longer contribute to the greater human flourishing of its own members (because it is no longer an autonomous organization), or can no longer contribute to, and indeed would impede, society's realization of the common good (because it has monopolized one or more important aspects of that common good). Framing the inquiry in this way is helpful not only analytically but historically, because it targets the central rationale for founding-era establishments. As Michael McConnell explains, the "dominant purpose of the establishment" in both England and the colonies "was not to advance religious truth, but to control and harness religion in the service of the state."[30]

Subsidiarity thus provides a flexible tool for illuminating the core problem of a religious establishment. But its very adaptability—its sensitivity to the flux of structural relationships between state and religious associations—at the same time points to its uncomfortable fit with modern constitutional "tests" in the Establishment Clause area. Unlike current judicial analyses of religious establishments, subsidiarity does not propose any *a priori* substantive view about the "correct" relationship between church and state. Such a substantive view—*e.g.*, that the state should be formally or effectively "neutral" between religion and non-religion—would be foreign to subsidiarity because it

would introduce a substantive bias into what is essentially a procedural inquiry. It would create rigid divisions where subsidiarity seeks flexibility and adaptability. Subsidiarity is interested in facilitating the creation of a constructive equilibrium in which religious associations, and the people in them, are as free as possible to pursue their goals, consistent with the overall common good. It is inconsistent with that goal, however, to say that the common good already includes some substantive view of the relationship between government and religion. [31]

To be sure, we might say that subsidiarity has a built-in *procedural* view of church-state relationships—as already explained, it holds that government should not absorb the functions of religious associations, and vice versa. But this procedural "separation of church and state" is far more modest than the well-known varieties of substantive "separation"—again, such as theories of neutrality or non-endorsement. Consequently, the separation latent in subsidiarity would leave a broader space within civil society for the interaction of religious associations and government.

Whatever benefits it promises, subsidiarity is not a new and more powerful tool for *courts* to analyze church-state problems. Subsidiarity is a conditioning principle for attributing competencies among associations, which can aid political decision-makers in chiseling out solutions to multifaceted problems. But the decision-maker is not necessarily, or even preferably, a court applying a constitutional principle that purports to concertize, in advance, the requirements of subsidiarity.

But doesn't this mean that subsidiarity is useless for interpreting the Establishment Clause of the U.S. Constitution? For the last sixty years, the Clause has managed church-state disputes through the matrix of judicially-created legal rules. But we have just suggested that the "establishment problem" viewed through the lens of subsidiarity is not amenable to rule-based determination. The natural conclusion would seem to be that, whatever policy aid subsidiarity might furnish at the intersection of religion and government, it can offer no help in interpreting the Establishment Clause. Or can it?

B. On Second Thought, Yes!

The key to seeing how subsidiarity can, in fact, illuminate the Establishment Clause is to understand the relationship between subsidiarity and federalism. This is to ask not whether subsidiarity can be translated into judicially-enforceable constitutional rules, but whether

the principle can be expressed through a governmental structure. It is federalism that bears the strongest earmarks of subsidiary.[32] Indeed, for Chantal Millon-Delsol, a federal system represents "the concrete expression of the formal principle [of subsidiarity] [and] its most meaningful and elaborated expression."[33] A federal system exemplifies subsidiarity because the coalition of lower state entities *preexisted* the formation of the central government, consenting to its creation and empowerment. Millon-Delsol explains the creation of federal systems in terms of subsidiarity:

> The [governmental] competencies belong naturally and without need of any rational justification to the nearest entities. The competencies of the [central] state must, on the contrary, receive justification, since they emerge from a secondary need. The competencies of the federal state are enumerated, that is, restrictive and based on rational calculation.[34]

Thus, the formation of a federal state is subsidiarity-in-action, the structural elaboration of the theory itself.[35]

A federal organization resonates with subsidiarity because it promotes a liberty situated less within the confines of abstract theories of right than within concrete situations and realistic human capacities.[36] Rather than promising rationalized solutions to political and social dilemmas, federalism proposes a flexible matrix for pluralistic societies through a graduated governmental structure.[37] Subsidiarity and federalism, consequently, are concerned with managing pluralism, and not simply with decentralizing governmental power. Subsidiarity is not simply about devolution of power to the lowest possible level of government, but, as Russell Hittinger explains, it is "a normative structure of plural social forms … an account of the pluralism in society."[38] Likewise, federalism provides a matrix within which diverse constituent governments can co-exist for their mutual benefit without relinquishing their own identities or capacities for self-government.

Consequently, it can be said that the federalism of the U.S. Constitution shows subsidiarity at work. In ratifying the Constitution, the people of the constituent states reclaimed sovereignty and redistributed portions of it to a new central government. The new government possessed powers divided among branches and delimited to spheres of sovereignty with respect to the states. For instance, the national legislature's powers were enumerated in terms of areas of competence, such as to "declare War," to "establish a uniform Rule of Naturalization," and to "regulate Commerce with foreign nations."[39] The

limited nature of the grant of powers is confirmed by the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[40] This strategy of formation articulates concretely what subsidiarity prescribes in theory.[41]

But even if subsidiarity describes the structural allocation of competencies in the U.S. federal system, how does that help us understand the Establishment Clause as a component of that system? Subsidiarity would view the Clause—one expressing what Congress may *not* do—as a decision by the constituent states *not* to empower the central government in a field the Clause describes as laws "respecting an establishment of religion," and a concomitant decision to retain power over that field at the state level. The Clause would thus not posit any substantive theory of church-state relationships at the federal level, and would also be an unlikely source for judicially enforceable rules about church-state issues. The problem is, of course, that *this* Establishment Clause bears little resemblance to the Clause the Supreme Court has been struggling to interpret for the past two generations. *That* Clause is supposed to contain answers to questions such as "Does a large menorah next to a Christmas tree outside city hall constitute a forbidden establishment of religion?"[42] The subsidiary Clause, by greatest contrast, would offer as its only response to such a question: "Such questions are better left to the states."[43]

But the counter-intuitive picture presented by subsidiarity ends up illuminating the Establishment Clause. For instance, subsidiarity shows why it is difficult to reconcile modern Establishment Clause jurisprudence—which treats the Clause as a source of rules for resolving specific church-state issues—with the history of the Clause, which suggests that the Clause was neither proposed as a normative source for resolving most church-state disputes, nor intended to embody any overarching theory of church-state relationships.

The genesis of the Constitution and the First Amendment bedevils our modern search for "constitutional" church-state principles. Framing, text, and ratification debates do not reveal what substantive church-state theory, if any, was being promoted by the Constitution and the religion clauses.[44] Gerard Bradley has come to the common-sense conclusion that "[t]he Philadelphia Framers were not concerned with religion, because they believed theirs was a project unrelated to it."[45] But subsidiarity reorients our search for Establishment Clause meaning to the states' perspectives. State concerns about the Constitution as a whole centered around the powers being confined to the new central government, and their likely effect on the states.[46] Subsidiarity sees state

concerns about church-state matters as mirroring their wider apprehensions about federal power. The framers and ratifiers would thus have had no inclination to debate what substantive theory of church-state relationships to embed in the new Constitution (as opposed to debating, for instance, the scheme of representation in Congress, or the taxing power of the federal government). This turns out to be the case, as John Witte observes: "It was commonly assumed at the convention that questions of religion and of religious liberty were for the states and the people to resolve, not the budding federal government."[47]

The church-state issue that did occupy the states was not substantive, but jurisdictional: whether the new Constitution reliably limited federal power over their own church-state arrangements.[48] Thus, six states were moved to condition ratification on the adoption of limitations of federal power, variously phrased, over some aspect of religion or religious establishments.[49] These proposals, however phrased, could not have been designed to create new federal powers over religion. Instead, they sought to curtail federal power over a sensitive area of state competence. Subsidiarity interprets such proposals within the framework of building a subsidiary government. Pre-existing constituent states wanted to safeguard their own prerogatives in an area in which the bitter memories of an established national church were still fresh. The Establishment Clause was to declare and underwrite that understanding.[50]

Subsidiarity thus supports the understanding that the framing and ratification of the religion clauses, and the Establishment Clause in particular, were directed to preserving state power, and confining federal power, over church-state arrangements.[51] The Clause forestalled the exercise of federal power over a particular realm of state decision-making (a power which, of course, federalist proponents of the new Constitution disclaimed).[52] When federalists denied that such amendments were necessary, they emphasized, not positive federal guarantees of religious liberties, but the lack of enumerated federal powers to interfere in state religious arrangements and the checking function of a thriving multiplicity of religious sects.[53]

This subsidiary view clarifies the sparse records of the framing of the religion clauses.[54] Instead of poring over subtle shifts in the clauses' phrasing,[55] subsidiarity emphasizes how the framers' structural motivations afforded consensus among federalists and antifederalists. The Establishment Clause thus becomes, not a latent formula for resolving church-state disputes, but a political compromise designed to avoid making those disputes a convulsive national issue. This also contextualizes the opaque debates over the phrasing of the religion

clauses. It shows that these reservations were not about what church-state theory the clauses were instantiating, but instead expressed anxieties about what possible *misuse* of the clauses would mean for state religious arrangements. For instance, Benjamin Huntington feared that a broad interpretation would grant federal jurisdiction to interfere in the New England states' compulsory ministerial taxes, but Madison assured him it would not.[56] Although the participants did not know the term, this was a debate over subsidiarity, and not over substantive church-state matters.

Unlike much originalist treatment of the Establishment Clause, a subsidiarity analysis avoids pummeling history for answers to unforeseen church-state problems.[57] For subsidiarity, the key historical point is this: before and after the passage of the Constitution and its religion clauses, the hard substantive work in the church-state area occurred not at the national level but in the states, where it would continue for another century-and-a-half. As Carl Esbeck explains, the "disestablishment" of existing state establishments was not the work of the First Amendment, but instead "unfolded more gradually, state by state, and somewhat differently in each state, depending on the state's unique colonial background."[58] The subsidiary Establishment Clause was concerned to see that church-state theories and debates were kept where they were useful—in the states.

Subsidiarity counsels that it is folly to think the Establishment Clause *added* a new sphere of federal competence to the Constitution. The next 150 years of American religious history silently but eloquently make that very point: the religion clauses played virtually no direct role in regulating church-state relationships.[59] That delicate task continued, as it had before, in myriad state constitutional provisions, statutes, and judicial decisions.[60] At most, the religion clauses could be said to have maintained the political and sociological conditions under which religious liberty could emerge through state experimentation and evolution. This has all the earmarks of a subsidiary solution to a thorny problem—seeking equilibrium as opposed to definitive solutions by locating decision-making authority at the level best adapted to managing the issue.

But the subsidiary Establishment Clause confounds our modern expectations. Dating from the 1940s, the Supreme Court has trained us to expect courts to massage a substantive church-state theory from the Clause, with a caravan of accompanying rules and tests. The first modern disestablishment case itself, *Everson*, attempted to do just that in one sweeping paragraph—a kind of judicial *fiat lux*—whose contradictions are still contorting the Supreme Court's

jurisprudence.[61]Subsidiarity whipsaws us in the opposite direction: it leaves one viewing the Establishment Clause as a constitutional appendix, where one was used to seeing it as a major organ. But subsidiarity furnishes more than a negative account of the Clause. At the same time, it affirmatively explains the role the Clause has played in managing the problem of religious establishments in our complex, pluralistic society.

The subsidiary Clause is more than a negative judgment about centralized authority, nor does it simply ignore the question of individual rights. To the contrary, the Clause stands as a prudential judgment about where the common good regarding church-state matters was to be reliably pursued and, consequently, where individual religious liberties were to emerge most securely and concretely. Subsidiarity thus shows that a limited Establishment Clause nonetheless advances a positive good, because it underwrites both federalism and religious pluralism as a way of managing the problem of religious establishments. This supports Steven Smith's argument that, in the two generations following the framing, a combination of federalism and religious pluralism worked powerfully in favor of religious liberties at the state level:

> [I]t seems clear that this [religious] pluralism deserves most of the credit for the elimination of religious establishments in this country and for the spectacular growth of diversity of religions and faiths. For example, within a half-century after the adoption of the Constitution, all states had eliminated their official religious establishments, wholly without prodding, we should note, from the Supreme Court. During this same period a large number of religious movements and experiments sprang up throughout the country.[62]

Further, subsidiarity does not empty the Clause of all judicially-enforceable content. But it shifts our expectations about the *kind* of content to be found there. We should expect to find in the subsidiary Clause "boundary" rules as opposed to "substantive" rules. If the thrust of the Clause is to cordon off an area of competence from the central government, and reserve it to the constituent states, then one should be able to derive from the Clause fairly concrete rules for policing those boundaries.[63] Conversely, one should not expect to find rules for resolving disputes that clearly lie across the boundary.

This more limited scope for the Clause does not drain the Clause of substance. The boundary, after all, must be delineated. A

court would need to discern the area of competence withheld from the central government—laws "respecting an establishment of religion." But this does not simply resurrect the perennial difficulty of defining an establishment. The subsidiary Clause limits and channels the historical inquiry, because the Clause would now be viewed as a concrete political compromise worked out in a particular historical and legal context. For example, one would be interested in understanding as precisely as possible the legal contours of an "establishment of religion" at the time of the framing and ratification of the Clause. One would also inquire into the political and religious motivations behind the collective decision not to vest the new federal government with control over state religious establishments. Further, one would need to identify the legal mechanisms that would have been used by states to "disestablish" the existing establishments, for that would bear strongly on the legal means that were denied the federal government by the Clause. There is already a rich body of historical and legal scholarship on these issues.[64]

Moreover, this view does not exclude all substantive content from the Clause. Even positing that the Clause was jurisdictional, the Clause might also disable federal laws that, as a practical matter, would trespass into state competencies. For instance, if the federal government established its own national religion, this would effectively interfere with state decisions in the church-state area. Or the federal government might enact a nationwide voucher scheme that practically impedes state-crafted voucher solutions, assuming that voucher schemes would fall within the "establishment" competencies of the states. Furthermore, the subsidiary Establishment Clause would not necessarily deprive the federal government of all power over the general subject matter of religion (so that it might have the power to pass laws like RLUIPA[65] or Title VII's exemption for religious employers[66]). The Clause would instead be understood as cordoning off the federal government from an area of competence defined in terms of a distinct set of legal conditions, conceived in light of the historical experience of establishments of religion.

The view that a subsidiary Clause is a likelier source for boundary rules than substantive rules helps explain core difficulties in the Court's Establishment Clause cases. Subsidiarity suggests two explanations for those well-known[67] difficulties: (1) many church-state problems present complex, intractable conflicts that are not amenable to rule-based judicial resolution, and (2) justices must develop and apply their own theoretical premises to resolve church-state problems. To these dilemmas subsidiarity offers no solutions, except to say that they were predictable. If, as subsidiarity suggests, church-state problems

resist resolution by *a priori* rules and cry out for political compromise, then judicial attempts to solve them through rules would inevitably be mired in inconsistency and unpredictability. If, as subsidiarity suggests, the Establishment Clause does not incarnate any church-state theory, then judges attempting to employ the Clause *as if* it contained such a theory would inevitably import their own.

These kinds of judicial rule-making dilemmas are not merely instances of bad rules that fail to provide predictable answers. Rather, they are situations when courts attempt to craft all-encompassing rules for problems that seem inherently resistant to rule-based resolution. Establishment case law bristles with examples: whether aid to religious schools "advances religion"; whether an "accommodation" of religion appropriately lifts a burden on religious activity or unfairly "fosters" it; whether a law results in "religious divisiveness."[68] Applying even sophisticated rules to such situations has not led the Court toward consistent solutions, but has rather invited justices simply to reformulate church-state problems in the rule's terms, endlessly.

Subsidiarity also explains why Establishment cases have featured dueling theories of church-and-state, most purporting to be derived from the historical genesis of the Clause. Justices have adopted a smorgasbord of church-state theories, such as "separation of church and state," "strict separation," "accommodation," "non-preferentialism," "neutrality," "benevolent neutrality," and so on.[69] They have also taken differing views of the role history should play in the interpretation of the Establishment Clause, often using history to underwrite a particular theory or outcome.[70] A subsidiary view of the Clause explains why such promiscuous theorizing would occur. Because the Clause itself contains no substantive church-state theory, justices would have to import one.

Finally, subsidiary suggests a different approach to the difficult question of how the Clause can logically apply to the states. The Court has applied the Clause against the states without seriously considering the Clause's federalism aspects, and has recoiled from reassessing the content of the incorporated Clause in light of its original function.[71] Commentators have often observed that application of the Clause to the states presents a basic logical problem.[72] Subsidiarity provides a helpful way of reconceiving that problem.

But doesn't a subsidiary view of the Clause *by definition* foreclose its application against the states? If the Clause is primarily a structural barrier against federal interference in state establishment matters, then isn't it true, as Steven Smith has argued, that incorporating the Clause effectively *repeals* it?[73] Maybe, but that conclusion has less to do with subsidiarity, than with the content of the Fourteenth

Amendment. If the Fourteenth Amendment mechanically applies against the states all the substantive guarantees formerly applicable against the federal government, then simple logic dictates that the Establishment Clause cannot be incorporated—there is no substance to incorporate. On that view, applying the Clause to the states misses the fact that the pre-incorporation Clause already addressed itself to *both* the federal and state governments (unlike, for instance, the Fourth Amendment).[74] Subsidiarity, however, suggests a helpful way of re-conceiving incorporation.

Just as subsidiarity provides a vantage point for understanding federalism, it can do the same thing for incorporation. Incorporation, after all, involves a realignment of the federal structure. The extent of that realignment was the subject of intense and lengthy debate, with the debate focusing on the historical context and legal content of the Reconstruction Amendments.[75] A subsidiary analysis of the incorporation of the Establishment Clause would attempt to situate its incorporation within the wider historical and legal context of Reconstruction.

When the Supreme Court decided to apply the Clause to the states, it simply assumed that the Clause's protections were fundamental, and proceeded to apply them with reference to what it now widely recognized as shoddy historiography.[76] Subsidiarity, at the very least, would provide an intelligible matrix for understanding incorporation of the Clause.[77] One would focus on the historical context of Reconstruction, looking for evidence that states wanted to transfer to the central government certain responsibilities over church-state matters. Identifying specific church-state problems at issue would be crucial, for subsidiarity holds that the intervention of higher authority is limited by the contours of particular incapacities. Next, one would ask how the Fourteenth Amendment effects a transfer of authority to the federal government over some or all church-state problems. Subsidiarity would require that such a transfer occur through an intelligible political compromise, hammered out in light of concrete circumstances.

Whatever such an inquiry would yield, it would likely not drain the incorporated Establishment Clause of all substance. But it would probably result in a far more modest Clause. Its primary benefit would be to focus an inquiry concerning a major structural shift in federalism precisely on the dynamics of that shift. It would also remove the aura of unreality surrounding incorporation of the Establishment Clause—namely, that a constitutional provision that had never been used to police religion in the federal government, and whose history suggested no theoretical content beyond a structural limitation on federal power, could

somehow be brought to life after 150 years of dormancy and used to regulate the myriad religious controversies of an increasingly pluralistic and religious nation.

Notes

1. This paper is adapted from a much longer treatment of the subject that appears in an article forthcoming in the *Villanova Law Review*. *See* Kyle Duncan, *Subsidiarity and Religious Establishments in the U.S. Constitution*, 52 VILLANOVA LAW REVIEW 67 (2007).

2. *See generally* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 40-46 (2003); Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 108-21 (2001); George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 332-44 (1994); Ken Endo, *The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors*, 44 HOKKAIDO L. REV. 652, 642-10 (ch. I & II) (1994).

3. *See, e.g.*, Carozza, *supra*, note 2, at 45 (subsidiarity results in a "genuinely pluralistic society").

4. *See, e.g.*, Endo, *supra* note 2, at 640-38 (explaining the distinction between "non-territorial" and "territorial" subsidiarity).

5. *See, e.g.*, Carozza, *supra* note 2, at 41 (labor relations); Bermann, *supra* note 2, at 342-43 ("internal divisions of component states").

6. *See* Bermann, *supra* note 2, at 343 (observing the "special relationship that exists between subsidiarity and federalism").

7. *See, e.g.*, Carozza, *supra* note 2, at 42-43 ("subsidiarity presupposes that the human person toward whose flourishing the application of the principle is aimed is naturally social").

8. *See, e.g.*, John Finnis, *Natural Law & Natural Rights* 144-47 (1980) (discussing function of family in subsidiarity).

9. *See* Carozza, *supra* note 2, at 43.

10. COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH, par. 185 (2004) (quoting John Paul II's encyclical *Sollicitudo Rei Socialis*, 15 (1988)).

11. On the role of mediating structures in subsidiarity, *see generally* Vischer *Beyond Devolution*, *supra* note 2, at 116-21, 116 n. 63. Vischer

relies primarily on the seminal works by Richard John Neuhaus & Peter Berger, *To Empower People: The Role of Mediating Structures in Public Policy*, in MARK GERSON, ED., THE ESSENTIAL NEOCONSERVATIVE READER (1996), and Peter L. Berger and Richard John Neuhaus, *Peter Berger and Richard John Neuhaus Respond*, in MICHAEL NOVAK, ED., TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY (2d ed. 1996).

12. Vischer, *Beyond Devolution*, *supra* note 2, at 116 & n. 63 (quoting Neuhaus & Berger, *Mediating Structures*, *supra* note 11, at 213, 214).

13. *See generally* Carozza, *supra* note 2, at 44; Vischer *Beyond Devolution*, *supra* note 2, at 118-21.

14. Vischer, *Beyond Devolution*, *supra* note 2, at 116.

15. *Id.* at 45 (quoting Clifford Kossel, Global Community and Subsidiarity, 8 Communio: Int'l Cath. Rev. 37, 48 (1981)).

16. Carozza, *supra* note 2, at 66.

17. For a general discussion, *see* Carozza, *supra* note 2, at 41-42; Vischer, *supra* note 2, at 108-115; Endo, *supra* note 2, at 627-21.

18. Pope Pius XI, *Quadragesimo Anno*, par. 79, 80 (1931); *see also* Pope Leo XIII, *Rerum Novarum*, par. 35, 36, 37 & 55 (1891); Pope John Paul II, *Centesimus Annus*, par. 48 (1991) (discussing application of subsidiarity to government social assistance). The recently published *Compendium of the Social Doctrine of the Church* (2004) gathers together all the relevant Church texts on subsidiarity. *See* COMPENDIUM, par. 185-88. In his first encyclical letter, *Deus Caritas Est*, Pope Benedict XVI reaffirmed the centrality of subsidiarity to the Church's social teaching. *See Deus Caritas Est*, par. 29b (2005).

19. *See*, e.g., Duncan, *supra* note 1, at 82-90.

20. On the idea of the common good, especially in the work of Jacques Maritain, *see, e.g., generally* Patrick Brennan, *Jacques Maritain*, in 1 THE TEACHINGS OF MODERN CHRISTIANITY 94-95 (2006). In Catholic social thought, the common good is conceived as "the sum total of all those conditions of social life which enable individuals, families, and organizations to achieve complete and efficacious fulfillment." Id. at 96 (quoting *Gaudium et Spes*, in VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS, ed. Austin Flannery (1975) 59, 74).

21. See Chantal Millon-Delsol, L'Etat Subsidiaire: Ingérence et Non-Ingérence de L'Etat: Le Principe de Subsidiarité aux Fondements de

L'Histoire Européenne (1992). All citations will be to the Italian translation of Millon-Delsol's book. See Chantal Millon-Delsol, Lo Stato della Sussidiarietà 59-61 (Rosario Sapienza trans., 1995)

22. Russell Hittinger, *Introduction to Modern Catholicism*, in 1 TEACHINGS OF MODERN CHRISTIANITY 23 (2006).

23. Millon-Delsol, *supra* note 21, at 123-26 (my trans.).

24. John M. Czarnetzky & Ronald J. Rychlak, An Empire of Law? Legalism and the International Criminal Court, 79 Notre Dame L. Rev. 55, 121 (2003) (discussing application of subsidiarity to the International Criminal Court).

25. *See, e.g.*, Michael P. Moreland, *Subsidiarity, Localism and School Finance*, in 2 JOUR. CATH. SOC. THOUGHT 369-70 (2005) (discussing "recurring theme in the literature on subsidiarity … that the principle of subsidiarity is indeterminate, vague, and ultimately unhelpful to the resolution of concrete legal and policy questions").

26. Millon-Delsol, *supra* note 21, at 190; *see also* Czarnetzky & Rychlak *Empire of Law*, *supra* note 24, at 122 (as applied to the International Criminal Court, subsidiarity suggests that, "[b]y focusing on an inquiry into the common good of the nation and, therefore, the actual human beings involved, the calculus of whether to assert jurisdiction in a particular case is not mechanically foreordained").

27. Millon-Delsol, *supra* note 21, at 190.

28. *Id.* at 193-94.

29. Throughout his discussion of the mediating functions of associations, Robert Vischer describes various examples of such degradation. *See, e.g.*, Robert K. Vischer, *The Good, the Bad, and the Ugly: Rethinking the Value of Associations*, 79 Notre Dame L. Rev. 949, 965 (2004) (if state intervention prevents association from pursuing "ventures found meaningful by members, the functions of expression, identity, and purpose would be eviscerated; the association would cease playing a mediating role, and would simply be an arm of the state").

30. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2208 (2003).

31. Patrick Brown writes that, since "subsidiarity should be viewed as an open and heuristic notion," then "[u]ltimately there is no rule, formula, or concept that can tell us precisely how power should be delegated or

tasks should be distributed between any particular hierarchy of communities or organizations or within communities or organizations. Everything depends on concrete insights appropriate to particular and often changing situations." *See, e.g.*, Patrick Brown, *Overcoming "Inhumanly Inept" Structures: Catholic Social Thought on "Subsidiarity" and the Critique of Bureaucracy, Law, and Culture*, in 2 JOUR. CATH. SOC. THOUGHT, *supra* note 25 , at 428.

32. *See generally* Millon-Delsol, *supra* note 21, at 215-20.

33. *Id.* at 215.

34. *Id.* at 217 (my trans.).

35. *Id.* (my trans.). Among some commentators, there appears to be a sharp difference of opinion about the relationship between subsidiarity and American federalism. Thus, David Currie claims that "subsidiarity is the guiding principle of federalism in the United States," while George Bermann concludes that subsidiarity is neither in the "lexicon of U.S. Constitutional law," nor a "central feature of U.S. Constitutional practice," and is "foreign to the law and practice of federal legislation." Compare David Currie, *Subsidiarity*, 1 GREEN BAG 359 (1998), with Bermann, *supra* note 2, at 403, 406. For discussion of this disagreement, see Duncan, *supra* note 1, at 93, n.130.

36. Millon-Delsol, *supra* note 21, at 217.

37. A famous example of this sort of "refusal" to provide definite solutions to social and political problems is Madison's explanation in Federalist 10 and 51 of the Constitution's solution to the problem of factions. *See* THE FEDERALIST Nos. 10, 51.

38. Hittinger, supra note 22, at 23.

39. *See* U.S. CONSTITUTION, Article I, § 8, cl. 11, 4, 3.

40. *See* U.S. CONSTITUTION, Amendment X.

41. For an elaboration of this point, with reference to framing-era debates, see Duncan, *supra* note 1, at 93-94.

42. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 600-01 (1989) (noting Establishment Clause "limits religious content of the government's own communications" as well as "[prohibits] government support and promotion of religious communications by religious organizations.... By prohibiting government endorsement of religion, the Establishment Clause prohibits precisely... the government's lending its support to the communication of a religious organization's religious message").

43. That is not to say that the menorah-and-Christmas-tree situation even implicates the basic idea of a religious *establishment*, nor that the subsidiary Establishment Clause would bar the federal government from setting up such a display. The example is meant to suggest only that the subsidiary Clause would not have been formulated to answer substantive questions such as the one the Court labored at so mightily in the *Allegheny* case.

44. *See, e.g.*, John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties 64* (2000) (commenting that "[t]he record of the Congress's effort [to draft the religion clauses] is considerably slimmer than is apt for such a momentous act"); Gerard V. Bradley, *Church-State Relationships in America* 112 (1987) (commenting that "[n]ot a single state recorded debates, and individual voting behavior was rarely memorialized").

45. Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 Case W. Res. L. Rev. 674, 711 (1987).

46. *See generally* Gordon S. Wood, *The Creation of the American Republic* (1776-1787) 519-32 (2d. ed. 1998) (describing political debates surrounding extent and nature of federal powers under new Constitution).

47. Witte, *supra* note 44, at 61.

48. Commenting on the "mysterious" silence of the Framers on the content of the Religion Clauses "given the passionate debates engendered by those terms in later history," James Hitchcock writes that the "silence is comprehensible on the assumption that the terms were largely devoid of positive content and were intended merely to ensure that the federal government did not interfere with the religious arrangements of the various states." James Hitchcock, 1 *The Supreme Court and Religion in American Life* 29 & n.70 (2004) (collecting authorities).

49. Witte, *supra* note 44, at 63-64.

50. *See, e.g.*, Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 16-17 (1998).

51. This understanding of the original meaning of the Establishment Clause has occasioned a lively debate among scholars. *See generally* Ira C. Lupu & Robert Tuttle, *Federalism and Faith*, 56 EMORY L. J. __ (2006) (summarizing the debate over the federalism aspects of the Establishment Clause).

52. *See, e.g.*, Witte, *supra* note 44, at 61 (reporting Madison's comment to the Virginia Ratifying Convention that "[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation").

53. *Id.* at 79-80; see also THE FEDERALIST No. 10, *supra* note 37, at 42-48 (discussing structural remedies against factionalism, and including within the causes of faction "[a] zeal for different opinions concerning religion"); *id.* No. 51 (claiming that "[i]n a free government, the security for civil rights must be the same as that for religious rights … consist[ing] in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects"). In his remarks to the Virginia Ratifying Convention in June 1788, Madison remarked that "[h]appily for the states, they enjoy the utmost freedom of religion," which "arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society." PHILIP B. KURLAND & RALPH LERNER, EDS., THE FOUNDERS' CONSTITUTION, Vol. V, 88 (1987).

54. *See, e.g.*, Witte, *supra* note 44, at 64-72.

55. See id. at 72 (noting that "[t]he final text [of the religion clauses] has no plain meaning" and "[t]he congressional record holds no Rosetta Stone for easy interpretation").

56. See id. at 66-67.

57. *See, e.g., id.* at 72; STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 46-48 (1995) (discussing the difficulties of the modern, originalist project of trying to reconstruct the answers to first-order religion questions from the historical evidence).

58. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. REV. 1385, 1393 (2004).

59. *See, e.g.*, Witte, *supra* note 44, at 87 (observing that "[f]or the first 150 years of the republic, principal responsibility for the American experiment in religious rights and liberties lay with the states").

60. *See generally id.* at 87-100 & noted authorities.

61. In *Everson*, the Court announced:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.

> Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.

Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947). *Everson's* tendentious use of history to interpret the Establishment Clause has been widely criticized. *See, e.g.*, SMITH FOREORDAINED FAILURE, supra note 57, at 5; Daniel O. Conkle, Toward a General Theory of the Establishment Clause, 82 Nw. U. L. Rev. 1113, 1130-35 (1988); BRADLEY CHURCH-STATE, *supra* note 44, at 91-92; John Courtney Murray, Law or Prepossessions?, in Essays in Constitutional Law (Robert G. McCloskey ed., 1957)

62. Steven D. Smith, *Getting Over Equality: A Critical Diagnosis of Religious Freedom in America* 21 (2001).

63. *Cf.* Esbeck *Structural Restraint*, *supra* note 50, at 104-09 (exploring the question "boundary keeping" posed by a structural view of the Establishment Clause).

64. *See, e.g., generally* McConnell, *Establishment and Disestablishment*, *supra* note 30, at 2131-2181 (discussing the legal components of establishments in the colonies and early states).

65. *See Cutter v. Wilkinson*, 125 S. CT. 2113 (2005) (upholding section 3 of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a)(1)-(2)).

66. *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding exemption of religious organizations from Title VII's prohibition of employment discrimination on the basis of religion, 42 U.S.C. § 2000e-1).

67. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 106-112 (1985) (Rehnquist, J., dissenting) (asserting that "in the 38 years since *Everson* our

Establishment Clause cases have been neither principled nor unified.," and describing the disarray at length).

68. *See, e.g., Amos*, 483 U.S. at 334-35 (describing Court's approach as "recogniz[ing] that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause"); *Van Orden v. Perry*, 125 S. Ct. 2854, 2871 (2005) (Breyer, J., concurring) (upholding Ten Commandments display by relying, in part, on the fact that "[t]his display has stood apparently uncontested for nearly two generations … [and] [t]hat experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive) (emphasis in original). For an excellent discussion of, and demolition of, this divisiveness project, see Richard W. Garnett, *Religion, Division and the First Amendment*, __ GEORGETOWN L. REV. __ (2006).

69. *See, e.g.*, Witte, *supra* note 44, at 152-63 (classifying the "unique, and often sharply juxtaposed, approaches" the Court has developed since 1947 for addressing Establishment Clause problems).

70. For instance, compare the different conclusions reached by using history to interpret the Establishment Clause in then-Justice Rehnquist's dissent in *Wallace*, Justice Black's majority opinion in *Everson*, Justice Rutledge's dissenting opinion in *Everson*, Justice Souter's concurring opinion in *Lee v. Weisman*, and Justice Scalia's dissenting opinion in *McCreary County*. See *Wallace*, 472 U.S. at 91-104 (Rehnquist, J., dissenting); *Everson*, 330 U.S. at 8-15 (majority opinion of Black, J.); id. at 32-43 (Rutledge, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 612-16 (1992) (Souter, J., concurring); *McCreary*, 125 S. Ct. at 2748-51 (Scalia, J., dissenting).

71. See, e.g., *Wallace*, 472 U.S. at 48-51 (rejecting as against an "elementary proposition of law" the district court's "remarkable conclusion" that the Establishment Clause should be interpreted as not applying to the states); *but see Cutter*, 125 S. Ct. at 2126 (Thomas, J., concurring) (asserting that " an important function of the Clause was to make clear that Congress could not interfere with state establishments," and that the Clause "is best understood as a federalism provision" that "protects state establishments from federal interference." (internal quotations omitted) (citing *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring); *Zelman*, 536 U.S. at 677-680 (Thomas, J., concurring); *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

72. Steven Smith notes that "First Amendment scholars have often noted the federalist element in the religion clauses, particularly in the establishment clause, and have realized that this element poses difficulties, both historical and conceptual, for the theory that the establishment clause was 'incorporated' into the Fourteenth Amendment and thereby extended to the states." SMITH FOREORDAINED FAILURE, *supra* note 57, at 18 (collecting sources). Akhil Amar captures the conundrum well: "[T]he nature of the states' establishment clause right against federal disestablishment makes it quite awkward to mechanically 'incorporate' the clause against the states via the Fourteenth Amendment. … [T]o apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right clearly confirmed by the establishment clause itself." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 33-34 (1998).

73. SMITH FOREORDAINED FAILURE, *supra* note 57, at 49-50.

74. See, e.g., AMAR BILL OF RIGHTS, supra note 72, at 34 (reasoning that, because "the original establishment clause … is not antiestablishment but pro-states' rights [and] … is agnostic on the substantive issue of establishment versus nonestablishments and simply calls for the issue to be decided locally," then attempting to incorporate the Clause is like attempting to incorporate the Tenth Amendment).

75. Generally on incorporation, *see Amar* BILL OF RIGHTS, *supra* note 72, at 137-214; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE (1986); RAOUL BERGER, GOVERNMENT BY JUDICIARY 155-89 (2d. ed. 1997).

76. *See supra* note 61.

77. Other scholars have suggested rethinking incorporation of the Establishment Clause by reference to the context of Reconstruction. *See, e.g.*, AMAR BILL OF RIGHTS, *supra* note 72, at 246-257; SMITH FOREORDAINED FAILURE, *supra* note 57, at 50-54; Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L. J. 1085 (1995); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

CHILD PORNOGRAPHY AND FIRST AMENDMENT STANDARDS

Kyle Duncan[*]

This paper explains how the Supreme Court currently applies the First Amendment to laws targeting child pornography. In light of those standards, the paper explores some current areas in child pornography law, principally Congress's legislative response to the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*[1] regarding "virtual" child pornography. The purpose of this paper is primarily descriptive, rather than evaluative, but it does offer some criticisms of these judicial and legislative approaches to the continuing and distressing problem of child pornography. Part I explains the Supreme Court's general approach—known as "categorical balancing"—to defining areas of expression that are withdrawn from the full protection of the First Amendment. Part I then places child pornography within that analytical framework. Part II moves to the most current area of child pornography law—"virtual" child porn—and discusses how the Supreme Court addressed Congress's efforts to combat that problem in the 2002 Ashcroft decision. It then discusses Congress's response to *Ashcroft* in the 2003 amendments to federal child pornography laws. Part III concludes the paper by discussing how the state and lower federal courts have addressed issues posed both by *Ashcroft* and the amended federal law.

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[1] 535 U.S. 234 (2002).

I. FROM INCITING CRIME TO EXPLOITING CHILDREN: HOW THE SUPREME COURT IDENTIFIES UNPROTECTED EXPRESSION

Because all speech cannot be free, it seems inevitable that the Supreme Court must police the constitutional boundaries of "free speech." But that practice, in and of itself, presents an irresolvable contradiction. This is not merely the problem that the First Amendment speaks in absolute terms ("Congress shall make no law . . ."), but the deeper problem of content selection. We have been conditioned, correctly, to regard government punishment of particular messages with the darkest suspicion. When the state suppresses certain ideas *because* of their content—and lets other, "approved" ideas freely circulate—we sense the sinister hand of censorship striking, not merely at our liberties, but at the very sources of self-government, freedom, and personality. And yet the Supreme Court itself not only engages in such a practice, but freely admits it to be the foundation of its Free Speech jurisprudence. When the Court says "this expression is outside First Amendment protection, but *this* is in," it is doing nothing other than selectively allowing the suppression of certain expressive messages. To confirm this impression, let us hear the Court speak for itself:

> The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations. Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation, and for obscenity, but a limited categorical approach has remained an important part of our

First Amendment jurisprudence.[2]

That the absolutist Free Speech Clause turns out to be non-absolute should neither surprise nor disturb. The Court tells us that all "free but civilized societies" allow such adjustments to free speech. It must be so: anyone claiming free rein for malignant speech like defamation or solicitation of murder would brand himself a lunatic (or a tenured law professor). But not all "free but civilized societies" have decreed that such adjustments be made by *courts*. Two centuries ago no less a figure than Alexander Hamilton predicted that attempting to liquidate the precise boundaries of phrases such as "liberty of press" was a fool's errand.[3] In fact, Hamilton suggested heretically (by our modern standards) that the "security" of such expressive liberty, "whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government."[4] The extent of our liberties, therefore, would be sketched out through "legislative discretion, regulated by public opinion."[5] Hamilton had a point about the difficulty of judicially delineating the boundaries of free speech, but we have nonetheless asked modern courts to try. This is an instructive backdrop to understanding the Court's attempts to describe "catego-

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[2] R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992) (citations omitted). Relevant to our purposes here, the Court added, by way of comfort, that "these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government. We recently acknowledged this distinction in *Ferber*, where, in upholding New York's child pornography law, we expressly recognized that there was no 'question here of censoring a particular literary theme . . . .'" *Id.* at 383-84.

[3] In Federalist 84, Hamilton asked derisively, "What is the liberty of the press? Who can give it any definition that would not leave the utmost latitude for evasion? I hold it to be impracticable. . . .]" THE FEDERALIST NO. 84, at 446 (Alexander Hamilton) (George Wescott Carey et al. eds., 2001).

[4] *Id.*

[5] *Id.*

ries" of expression that are outside the central precincts of the First Amendment.

The most celebrated category has been the most difficult of all to nail down. In a series of early-to-mid 20th century decisions made famous by Holmes's and Brandeis's dissents, the Court unconvincingly struggled to define a category of speech that was unprotected because of its propensity to encourage law-breaking.[6] This is a kind of speech that lives in the shadows of vivid metaphors—"clear and present danger," "shouting 'fire' in a crowded theater"—but that eludes categorical definition. The Court finally settled on a highly speech-protective formulation in *Brandenburg v. Ohio*, allowing suppression only when speech incites imminent law-breaking that is also likely to imminently occur.[7] It is, of course, unclear how "imminent" the law-breaking must be, how clear the intent to incite must appear from the speaker's words (or actions), or even whether the threatened law-breaking must be "serious." Further, it is quite alarming to imagine the *Brandenburg* standard applying to the solicitation of murder. In this age of radical Islamist incitement to violence, disguised as religious speech, many harder questions about the scope of *Brandenburg* likely will arise. But beyond the difficulties of definition, it is important for our purposes to recognize the sensible motivation behind regulating this speech. Incitement to immediate law-breaking short circuits the usual remedies for bad speech, because it eliminates the possibility of counter-speech. Such speech does not seek to exchange ideas or further political consensus. Indeed, such speech is the antithesis of political speech because it seeks to subvert the political process altogether.

The specter of violence also led the Court to define two other areas of unprotected speech: "fighting words" and "true threats." These are first cousins to *Brandenburg* speech, but present subtly different dynamics. Fighting words, for instance,

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[6] *See, e.g.*, Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919).

[7] 395 U.S. 444 (1969).

threaten not merely imminent law-breaking but rather violence against the speaker himself. They refer to abusive face-to-face language calculated, or perhaps only likely, to evoke an immediate retaliation against the speaker.[8] The nature and circumstances of the speech make it more like a slap in the face—or as John Hart Ely wrote, an "unambiguous invitation to a brawl"[9]—and less like an invitation to exchange ideas. In other words, fighting words are not looking for counter-speech, but for counter-violence. The Supreme Court has not upheld a conviction based on the fighting words rationale since *Chaplinsky* in 1947, so it is unclear how this doctrinal category has been influenced by the Court's subsequent development of the incitement category, or whether this category is entirely separate.

"True threats" are words that are intended to place, and actually do place, someone in fear that force or violence will be used against them.[10] Such expression is outside the First Amendment because it engenders fear in the recipient, altering his behavior and perhaps promoting retaliation. In *Virginia v. Black*—a case about cross-burning—the Court was willing to disassociate the harm posed by this symbolic threat from the racist ideology historically intertwined with it.[11] On this view, the Court would likely have approved Virginia's singling out of cross-burning as a "virulent" form of symbolic threat, had the Court not struck down the law for other reasons.[12] This should be contrasted with the Court's treatment of virulent fighting words in *R.A.V. v. City of St. Paul*.[13] There, the Court was unwilling to detach the ideology of racist, religious or other epithets from their heightened propensity to cause fights. Unlike in *Black*, the *R.A.V.* Court invalidated the law as a form of viewpoint discrimination against certain ideologies. The difference between *Black* and *R.A.V.* is hard to justify, although it

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[8] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
[9] JOHN HART ELY, DEMOCRACY AND DISTRUST 114 (1980).
[10] *See* Virginia v. Black, 538 U.S. 343, 359-60 (2003).
[11] *See id.* at 361-63.
[12] *See id.* at 363-67 (plurality op.).
[13] 505 U.S. 377, 391-95 (1992).

may turn on the difference between threats and fighting words, or perhaps on the differences between symbols and purely verbal expression.

But looming violence is not the only reason the Court has singled out unprotected areas of speech. The Court's treatment of "obscenity" takes us one step closer to the problem of child pornography, and so it is worth understanding precisely why the Court allows government greater latitude for regulating obscene expression. The Court originally approved the exclusion of obscenity from the First Amendment strictly on the grounds that such limitations were widely embraced by the framing generation.[14] Since then, the Court has had to refine its understanding of what, precisely, constitutes unprotected obscene expression. This has not been easy, evidenced by the fact that, for several years, the Court could not agree on a standard and simply reversed and remanded cases when five justices, applying their own standards, deemed allegedly obscene materials protected.[15] With *Miller v. California*[16] in 1973, however, the Court finally achieved majority consensus. Under the Miller standard, the government may regulate materials as "obscene" only if a trier of fact, under authoritatively interpreted state law, finds that (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically described by the applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[17] Unsurprisingly, this Byzantine definition raises as many questions as it answers. The Court has since clarified that (1) *local* community standards determine prurience and patent offensiveness, as opposed to state or national standards;[18] (2) jury verdicts, however, are subject to

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[14] Roth v. United States, 354 U.S. 476, 482-83 (1957).
[15] *See, e.g.*, Redrup v. New York, 386 U.S. 767 (1967).
[16] 413 U.S. 15 (1973).
[17] *Id.* at 25.
[18] Hamling v. United States, 418 U.S. 87 (1974).

judicial review to guard against "constitutionally aberrant" determinations of local community standards;[19] and (3) the presence *vel non* of serious content is not governed by local community standards, but rather by a reasonable person standard.[20] Finally, in *Miller* itself, the Court provided a rather embarrassing sampling of the activities state law may deem "patently offensive" sexual depictions—confirming the impression that the *Miller* Court had in mind pornography of the "hard core" variety.[21]

Why is obscene expression withdrawn from First Amendment protections? The overriding state interest articulated in *Miller* is avoiding offending the sensibilities of unwilling recipients and exposure to juveniles.[22] But in a companion case, *Paris Adult Theater I v. Slaton*,[23] the Court articulated a wider range of state interests in combating obscenity. The Court recognized the public's interest in "the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."[24] More strikingly, the Court suggested that a state might conclude that "commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior."[25] The Court explicitly rejected the notion that the state's interest was confined to ensuring that the traffic in obscenity was based on the participating adults' consent. It remains to be seen whether

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[19] Jenkins v. Georgia, 418 U.S. 153 (1974).

[20] Pope v. Illinois, 481 U.S. 497 (1987); Smith v. United States, 431 U.S. 291 (1977).

[21] *Miller*, 413 U.S. at 25. A few additional nuances of obscenity law should be noted. Prior to *Miller*, the Court had held that the state may not criminalize the private possession of even legally obscene material. *Stanley v. Georgia*, 394 U.S. 557 (1969). But notwithstanding *Stanley*, the Court allows states to criminalize the importation and interstate transportation of obscene materials, even if destined for purely private use. *See* United States v. Twelve 200-Foot Reels of Super 8mm Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973); United States v. Riedel, 402 U.S. 351 (1971).

[22] *Miller*, 413 U.S. at 18-19.

[23] 413 U.S. 49 (1973).

[24] *Id.* at 58.

[25] *Id.* at 63.

this language from *Paris Adult Theater I* survives more recent decisions of the Court that constitutionalize the notion of consenting adults' privacy in both reproductive and non-reproductive sexual matters.[26]

When turning to the First Amendment law of child pornography, it should be underscored that the Supreme Court has chosen to address this area as doctrinally distinct from the category of obscenity. The Court discerns a conceptually different harm posed by the materials themselves, and consequently recognizes a distinct state interest in regulating the expression. There is much to be said for this approach, but it should be said that there is something artificial about it. Child pornography and hard-core pornography are not distinct categories of expression; they are close neighbors in the same lurid neighborhood. The fact that the Court has elected to treat them as separable doctrinal categories should not obscure the fact that employing children in pornography remains a particularly sickening subgenre of an already diseased field. This becomes relevant later in the paper, for where the doctrinal tools of child pornography law prove inadequate, the government can, and has, turned to the category of obscenity for an alternative mode of attack.

In a 1982 decision, *Ferber v. New York*, the Supreme Court held that a state may criminalize visual depictions of sexual conduct involving minors that would not otherwise meet the *Miller* obscenity standard.[27] The state would, of course, have to adequately define the prohibited conduct. In *Ferber*, the Supreme Court approved a New York law that criminalized the "promotion" of a "sexual performance" by a child less than 16 years old.[28] It is worth underscoring precisely how the *Ferber*

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[26] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992).

[27] 458 U.S. 747 (1982).

[28] *Id.* at 750-51. A *performance* was defined as "any play, motion picture, photograph or dance" or "any other visual representation exhibited before an audience." *Id.* at 751 (quoting N.Y. PENAL LAW § 263.00(4)). A *sexual performance* was defined as "any performance or part thereof which includes sexual conduct by a child less than 16 years of age." *Id.* (quoting § 263.00(1)). In turn, *sexual conduct*

standard departs from the *Miller* obscenity standard. As the Court explained, with regard to child pornography, *Ferber* "adjusts" *Miller* as follows:

> [1] A trier of fact need not find that the material appeals to the prurient interest of the average person; [2] it is not required that the sexual conduct portrayed be done so in a patently offensive manner; and [3] the material at issue need not be considered as a whole.[29]

What are the distinct reasons for which child pornography is unprotected by the First Amendment? First and foremost, the state has a compelling interest in safeguarding the physical and psychological well-being of minors—more precisely, in safeguarding minors from being "subjects of pornographic materials."[30] By contrast, *Miller* had identified no state interest in the adult performers' physical, moral, or psychological welfare. Second, the distribution network for child pornography may be closed, both to prevent further harm to the subject children caused by circulation of the "permanent record of [their] participation," and also to choke off the market for the pornography.[31] Third, the state could strike at the economic drivers—advertising and selling—of the pornography.[32] Finally, the Court asserted that any serious literary, scientific, or educational value from such depictions is virtually non-existent:

> [I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized . . . . Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity. The

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was defined as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Id.* (quoting § 263.00(3)). Under the New York law, *promotion* of a child sexual performance means "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same." *Id.* (quoting § 263.00(5)).

[29] *Id.* at 764.

[30] *Id.* at 757-59.

[31] *Id.* at 759-60.

[32] *Id.* at 761-62.

> First Amendment interest is limited to that of rendering the portrayal somewhat more "realistic" by utilizing or photographing children.[33]

Subsequently, the Court held that, unlike garden-variety obscenity, the state may criminalize the *private possession* of child pornography.[34]

II. VIRTUAL AND SIMULATED CHILD PORN: THE CONVERSATION BETWEEN CONGRESS AND THE COURT

The standard federal definition of child pornography tracks the boundaries set out in *Ferber*.[35] In 1996, however, Congress broadened federal law to strike at the phenomena of so-called "virtual" and "simulated" child porn by passing the Child Pornography Prevention Act of 1996 (the "CPPA").[36] In 2002, the Supreme Court invalidated parts of the CPPA in *Ashcroft v. Free Speech Coalition*.[37] The paper will discuss the CPPA in terms of the *Ashcroft* decision.

A key provision of the CPPA prohibited "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, *or appears to be*, of a minor engaging in sexually explicit conduct."[38] As discussed below, this provision was struck down by *Ashcroft*, and has been rewritten by the 2003 amendments to the CPPA.[39] Another CPPA provision struck down by *Ashcroft* was

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[33] *Id.* at 763 (citation omitted).

[34] Osborne v. Ohio, 495 U.S. 103 (1990).

[35] *See, e.g.*, 18 U.S.C. § 2252(a)(1)(A) (2000) (criminalizing transport of a "visual depiction involv[ing] the use of a minor engaging in sexually explicit conduct"). For an informative summary of the federal government's legal efforts to combat child pornography, see the Eleventh Circuit's discussion in *United States v. Williams*, 444 F.3d 1286 (11th Cir. 2006).

[36] *See generally* Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251-2260 (2000 & Supp. 2003).

[37] 535 U.S. 234 (2002).

[38] 18 U.S.C. § 2256(8)(B) (2000), *amdended by* 18 U.S.C. 2256(8)(B) (Supp. 2003) (emphasis added).

[39] *See* § 2256(8)(B) (now defining "visual depiction" as "a digital image, computer image, or computer-generated image that is, or *is indistinguishable from*, that of a minor engaging in sexually explicit conduct" (emphasis added)). For the

one prohibiting any sexually explicit image that was "advertised, promoted, presented, described, or distributed *in such a manner that conveys the impression*" it depicts "a minor engaging in sexually explicit conduct."[40] This section was dropped from the law in the 2003 revision. The *Ashcroft* Court did not address (because it was not challenged) the CPPA provision prohibiting child pornography through "computer morphing," defined as visual depictions that were "created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct."[41] Why did *Ashcroft* invalidate the "appears to be" and "conveys the impression" provisions of the CPPA? Understanding that will clarify the current limits placed by the First Amendment on child pornography law.

The *Ashcroft* majority (Kennedy, with Stevens, Souter, Ginsburg and Breyer) focused most of its analysis on the "appears to be" provision. In striking it down, the majority emphasized that the CPPA went well beyond the *Miller* obscenity standards because it banned materials without regard to whether they appealed to the prurient interest, whether they depicted sexual activity in a patently offensive manner, whether they had any serious value, and (implicitly) whether the works were considered "as a whole."[42] The majority also reasoned that the provision detached the CPPA from the unique state interests at stake in *Ferber*—which targeted "speech that itself is the record of sexual abuse"—because the CPPA "prohibits speech that records no crime and creates no victims *by its production.*"[43] The majority was concerned that, because the "appears to be" provision was divorced from both *Miller* and *Ferber*, it could sweep into its coverage genuine literary works that depict "an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme

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rationale behind these and other changes to the law, see H.R. REP. NO. 108-66, at 31 (2003) (Conf. Rep.), *as reprinted in* 2003 U.S.C.C.A.N. 683, 695, especially the findings in section 502. These matters are discussed below.

[40] § 2256(8)(D) (repealed 2003) (emphasis added).

[41] § 2256(8)(C).

[42] *Ashcroft*, 535 U.S. at 240

[43] *Id.* at 250 (emphasis added).

in art and literature throughout the ages."[44] The Court was particularly exercised over the prospect of the CPPA criminalizing Baz Luhrmann's film version of *Romeo and Juliet*, and the Academy Award-winning films *Traffic* and *American Beauty*.[45]

The majority was not receptive to the government's arguments that the CPPA properly banned "virtual" child pornography because such material provided tools for pedophiles to seduce children, or because they "whet people's appetite" for actual child pornography. The majority reasoned that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."[46] Exploiting a connection between virtual child pornography and actual child sexual abuse would require, in the majority's view, a much closer link (one presumably on the order of *Brandenburg*-type "incitement").[47] Nor did the majority accept the argument that, because the virtual images were "indistinguishable" from real images, the two kinds of images were part of the same "market" and thus required a blanket ban. The majority called this argument "somewhat implausible" because, it thought, "[i]f virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes."[48] No one would risk producing real child pornography, the majority reasoned, if "fictional, computerized images would suffice."[49]

Finally, the majority rejected the argument that indistinguishable virtual images made prosecution of genuine child pornography difficult because "[e]xperts . . . may have difficulty in saying whether the pictures were made by using real children or by using computer imaging."[50] The majority thought this argument "turn[ed] the First Amendment upside down" by

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[44] *Id.* at 246.
[45] *Id.* at 247-48.
[46] *Id.* at 253.
[47] *Id.*
[48] *Id.* at 254.
[49] *Id.*
[50] *Id.*

calling for the banning of protected speech to further the suppression of unprotected speech.[51] A premise of Free Speech doctrine, said the Court (pointing to the overbreadth doctrine as an example), was that even unprotected speech could not be banned if a substantial amount of protected speech were thereby censored.[52]

Concurring, Justice Thomas was more receptive to this "prosecution thwarting" argument than the majority. Thomas believed the government's fears here were speculative because it had not identified any cases of a defendant successfully raising such a defense, but he allowed that "technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children."[53] Contrary to the majority's overbreadth point, Thomas reasoned that the government "may well have a compelling interest in barring or otherwise regulating some narrow category of 'lawful speech' in order to enforce effectively laws against pornography made through the abuse of real children."[54]

In partial concurrence, Justice O'Connor (joined by Chief Justice Rehnquist and Justice Scalia) also lent support to this rationale. With respect to images that are computer-generated and "virtually indistinguishable" from real images (i.e., "virtual child pornography"), O'Connor had real concern that "defendants indicted for the production, distribution, or possession of actual child pornography may evade liability by claiming that the images attributed to them are in fact computer-generated."[55] She worried that the "rapid pace of advances in computer-graphics technology" could soon make this danger real.[56] O'Connor would therefore have struck down the "appears to be" provision *only* as to "the subset of cases involving youthful adult pornography" (i.e., pornography involving adults who

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[51] *Id.* at 255.
[52] *Id.*
[53] *Id.* at 259 (Thomas, J., concurring).
[54] *Id.* (Thomas, J., concurring).
[55] *Id.* at 263-64 (O'Connor, J., concurring).
[56] *Id.* at 264 (O'Connor, J., concurring).

looked like minors).[57] Rehnquist and Scalia disagreed with her on that last point, finding limiting constructions of the provision as applied to "youthful adult pornography" that would make it applicable only to the "hard core of child pornography" already proscribable under *Ferber* (without explaining, however, how *Ferber* applies to "youthful-looking *adult* actors").[58]

The majority spent very little time in striking down the provision prohibiting material that was "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct."[59] Focused not so much on the content of material as on how it is presented, this provision appeared to be a "pandering" provision.[60] While pandering may have some bearing on whether material is legally obscene, the CPPA provision went well beyond the parameters the Court had marked out in the past, and was therefore, the majority concluded, substantially overbroad.[61] For instance, the provision would have made all possessors of "pandered" material liable for prosecution, whether or not they themselves pandered the materials.

Responding to *Ashcroft*, in 2003 Congress passed the PROTECT Act, amending federal child pornography law. The definition of child pornography in § 2256(8)(B) (the "appears to be" provision invalidated by *Ashcroft*) was changed to "any visual depiction . . . where . . . such visual depiction is a digital image, computer image, or computer-generated image that is, or *is indistinguishable from*, that of a minor engaging in sexually explicit conduct."[62] The House Conference Report explains that

> [t]his section narrows the definition of child pornography under 18 U.S.C. § 2256(8)(B) to depictions that are "digital images" (e.g., picture or video taken with a digital camera),

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[57] *Id.* at 266 (O'Connor, J., concurring).
[58] *Id.* at 269 (Rehnquist, C.J., concurring).
[59] *Id.* at 257-58; *see* 18 U.S.C. § 2256(8)(D) (2000) (repealed 2003).
[60] *See, e.g.*, Ginzburg v. United States, 383 U.S. 463 (1966).
[61] *Ashcroft*, 535 U.S. at 258.
[62] 18 U.S.C. § 2256(8)(B) (Supp. 2003) (emphasis added).

> "computer images" (e.g., pictures scanned into a computer), or "computer-generated images" (e.g., images created or altered with the use of a computer). The Supreme Court was concerned in [*Ashcroft*] that the breadth of the language would prohibit legitimate movies like *Traffic* or plays like *Romeo and Juliet*. Limiting the definition to digital, computer, or computer-generated images will help to exclude ordinary motion pictures from the coverage of "virtual child pornography."[63]

The House commentary further explains that the amended section

> further narrows the definition by replacing the phrase "appears to be" with the phrase "is indistinguishable from." That new phrase addresses the Court's concern that cartoon-sketches would be banned under the statute. "The substitution of 'is indistinguishable from' in lieu of 'appears to be' more precisely reflects what Congress intended to cover in the first instance, and eliminates an ambiguity that infected the current version of the definition and that enabled those challenging the statute to argue that it 'capture[d] even cartoon-sketches and statues of children that were sexually suggestive.'"[64]

Buttressing that line of thought, the amended law now defines "indistinguishable" as "virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct."[65] It also includes the caveat that "[t]his definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults."[66]

Furthermore, the definition of child pornography itself in § 2256(8)(B) (the revised "is, or indistinguishable from" provi-

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[63] H.R. REP. NO. 108-66, at 60 (2003) (Conf. Rep.), *as reprinted in* 2003 U.S.C.C.A.N. 683, 695.

[64] *Id.*

[65] § 2256(11).

[66] *Id.*

sion) was narrowed by clarifying that any "simulated" sexually explicit conduct must be "lascivious," in addition to the other requirements of (8)(B) and (2)(B).[67] The House commentary explains that this narrowing of the definition of child pornography "require[s] a simulated image to be lascivious to constitute child pornography under the new definition in 18 U.S.C. § 2256(8)(B)," and therefore, "child pornography that simulates sexually explicit conduct must be lascivious as well as meet the other requirement of the definition."[68] Under the version struck down by *Ashcroft*, the combination of (2)(A) and (8)(B) would have permitted finding child pornography from a visual depiction that "appeared to be" of a minor engaging in "simulated" sexual intercourse, whether or not the simulated image was "lascivious." Additionally, "sexually explicit conduct" under (2)(B) was redefined, not only as "lascivious simulated sexual intercourse," but also as "*graphic* sexual intercourse."[69] Under the amended law, "graphic" means "that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted."[70] This is intended to clarify further the types of images proscribed as "virtual" child pornography under (8)(B). For reference purposes, the entirety of amended § 2256 appears below.[71]

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[67] § 2256(2)(B).

[68] H.R. REP. NO. 108-66, at 60.

[69] § 2256(2)(B) (emphasis added).

[70] § 2256(10).

[71]

(1) "minor" means any person under the age of eighteen years;

(2)(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated—

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person;

(B) For purposes of subsection 8(B) of this section, "sexually explicit conduct" means—

(i) graphic sexual intercourse, including genital-genital, oral- genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;

(6) "computer" has the meaning given that term in section 1030 of this title;

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

[(D) Repealed. Pub.L. 108-21, Title V, § 502(a)(3), Apr. 30, 2003, 117 Stat. 678]

The 2003 amendments also include a "new and comprehensive" affirmative defense to distribution or possession of child pornography.[72] The amended law provides that subsections (1), (2), (3)(A), (4) and (5) of § 2252 are subject to the affirmative defenses that:

> (1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and (B) each such person was an adult at the time the material was produced; or
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> (2) the alleged child pornography was not produced using any actual minor or minors.[73]

None of the affirmative defenses, however, are available for

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(9) "identifiable minor"—

(A) means a person—

(i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

(10) "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

(11) the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

[72] *See* § 2252A(c).

[73] § 2252A(c)(1)-(2). The affirmative defenses are additionally subject to certain notice requirements.

offenses described under the so-called "morphing" provision.[74] The House commentary explains that the Court in *Ashcroft* seemed to leave open the possibility that a "more complete affirmative defense" provision could have contributed to saving the law's constitutionality.[75] In *Ashcroft*, the Court had read the previous affirmative defense provisions as affording defenses to distributors, but not possessors, of materials, and also as affording no affirmative defense to those who produce materials through computer imaging or other means that "do not involve the use of adult actors who appear to be minors."[76] The expanded affirmative defense provisions are designed to remedy those deficiencies.

A new pandering provision punishes any person who knowingly

> advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.[77]

The House Commentary explains that

> [t]his provision bans the offer to transact in unprotected material, coupled with proof of the offender's specific intent. Thus, for example, this provision prohibits an individual from offering to distribute anything that he specifically intends to cause a recipient to believe would be actual or obscene child pornography. It likewise prohibits an individual from soliciting what he believes to be actual or obscene child pornography. The provision makes clear that no actual materials need exist; the government establishes a violation with proof of the

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[74] *See* § 2256(8)(C).

[75] H.R. REP. NO. 108-66, at 61 (2003) (Conf. Rep.), *as reprinted in* 2003 U.S.C.C.A.N. 683, 695.

[76] *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255-56.

[77] § 2252A(a)(3)(B).

> communication and requisite specific intent. Indeed, even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material.[78]

This new pandering provision seems designed to remedy the overbreadth of the pandering provision struck down in *Ashcroft*.[79] As discussed below, however, this provision has already been invalidated by one federal circuit court as facially overbroad and vague.[80]

Finally, the amended law creates two new offenses related to child pornography but attacking the problem through different avenues. Section 2252A(a)(6) "creates a new offense that criminalizes the act of using any type of real or apparent child pornography to induce a child to commit a crime."[81] Section 1466A creates new offenses that target actual or simulated depictions of minors that meet the obscenity standards of *Miller*.[82] As the House Commentary explains, "[t]his section prohibits any obscene depictions of minors engaged in any form of sexually explicit conduct and prohibits a narrow category of 'hardcore' pornography involving real or apparent minors, where such depictions lack literary, artistic, political, or scientific value."[83]

III. SELECTED ISSUES ADDRESSED BY LOWER COURTS

A. *The Limits of* Ashcroft

Several federal circuit courts have reached the seemingly obvious conclusion that *Ashcroft* was strictly limited to overrul-

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[78] H.R. REP. NO. 108-66, at 61-62.

[79] *See supra* note 62 and accompanying text; *see also* 18 U.S.C. § 2256(8)(D) (repealed 2003).

[80] *See infra* Part III.D.

[81] H.R. REP. NO. 108-66, at 62.

[82] *See id.*

[83] *Id.* The commentary goes on to explain that the offense in § 1466A is "subject to the penalties applicable to child pornography, not the lower penalties that apply to obscenity, and it also contains a directive to the U.S. Sentencing Commission requiring the Commission to ensure that the U.S. Sentencing Guidelines are consistent with this fact." *Id.*

ing the "appears to be" provision of previous § 2256(8)(B) and the expanded "pandering" provision of previous § 2256(8)(D). Consequently, the decision did not touch other provisions in § 2256 or other federal child pornography laws.[84] In a similar vein, federal courts have concluded that a conviction under § 2422(b) (attempting to "coerce and entice" a minor to engage in sexual activity) is not called into question by *Ashcroft*, where a government agent posed as a minor in an internet chat room.[85] Thus, notwithstanding *Ashcroft*, an actual minor is not constitutionally necessary for an attempt conviction under § 2242(b).

In *United States v. Bach*, the Eighth Circuit upheld a conviction under § 2256(8)(C) (the "morphing" provision) where a nude, sexually explicit photo of a 16-year-old boy had been altered to have the face of the actual boy replaced by the face of a "well-known child entertainer." The image still fell within *Ferber* because it involved the image of an actual minor.[86] The *Bach* court seemed to focus on the harm to the "child entertainer" from having the altered image distributed, as opposed to the harm to the unidentified minor from making the photo to begin with. Finally, *Bach* left open the possibility that certain applications of § 2256(8)(C) might be unconstitutional under *Ashcroft*, without specifying what kind of applications.[87]

The *Bach* court also addressed, and rejected, the argument that the right to privacy recognized by the Supreme Court in *Lawrence v. Texas* calls into question this particular conviction under federal child pornography laws.[88] In *Bach*, a 40-year-old

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[84] *See, e.g.*, United States v. Kimler, 335 F.3d 1132 (10th Cir. 2003); *accord* United States v. Deaton, 328 F.3d 454 (8th Cir. 2003); United States v. Kelly, 314 F.3d 908, 911 (7th Cir. 2003); United States v. Richardson, 304 F.3d 1061, 1063-64 (11th Cir. 2002).

[85] United States v. Davis, 2006 WL 226038 (10th Cir. 2006), *cert. denied*, 126 S. Ct. 2918 (2006); *accord* United States v. Thomas, 410 F.3d 1235 (10th Cir. 2005); United States v. Meek, 366 F.3d 705 (9th Cir. 2004); United States v. Root, 296 F.3d 1222 (11th Cir. 2002).

[86] United States v. Bach, 400 F.3d 622 (8th Cir. 2005), cert. denied, 126 S. Ct. 243 (2005).

[87] *See id.* at 631-32.

[88] *See id.* at 628-29; *see also* Lawrence v. Texas, 539 U.S. 558 (2003).

man took and transmitted pictures of a 16-year-old boy masturbating and engaging in oral sex (apparently different photos than the one at issue in the "morphing" discussion, *supra*).[89] Notably, in this case, the relevant state age of consent (Minnesota) was 16, whereas federal law defined "minor" as under 18. The court reasoned that the federal government's definition of "minor" as "under 18" was rationally related to its interest in enforcing child pornography laws, notwithstanding the divergence from the Minnesota age of consent.[90]

B. Ashcroft *and Evidentiary Standards*

Several federal courts have concluded that *Ashcroft* did not establish a categorical rule of evidence requiring expert testimony to prove that an unlawful image is of a real child. In many cases, juries can distinguish between real and virtual images.[91] Under federal child pornography laws, however, the government does bear the burden of proving that children depicted in allegedly unlawful images are real children.[92] Thus, the First Circuit found that the defendant had a right to have a fact-finder (in this case, the trial court) decide whether the depicted children were real.[93] Reversing the conviction, the First Circuit found this was *not* done, even where the trial court had accepted expert testimony that the images satisfied the "Tanner Scale" (which categorizes the physical characteristics of children).[94] The court reasoned that the Tanner Scale findings would have also been consistent with youthful-looking adults.[95] Consistent with this, however, other courts have concluded that the government need not necessarily produce evi-

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[89] *Id.* at 622.

[90] *See id.* at 629.

[91] United States v. Kimler, 335 F.3d 1132 (10th Cir. 2003); *accord* United States v. Irving, 432 F.3d 401 (2d Cir. 2005), *withdrawn & superseded on reh'g*, 432 F.3d 401 (2d Cir. 2006); United States v. Deaton, 328 F.3d 454 (8th Cir. 2003); United States v. Hall, 312 F.3d 1250 (11th Cir. 2003).

[92] *See, e.g.*, United States. v. Hilton, 386 F.3d 13 (1st Cir. 2004).

[93] *Id.* at 18-19.

[94] *Id.*

[95] *Id.*

dence *in addition to* the computer images to prove that real children are depicted in the computer images.[96] The Illinois Supreme Court's reasoning in *People v. Normand* is illustrative:

> If child pornographers had easy access to the technology to produce virtual child images that are indistinguishable from images using real children, no reason would exist to use real children. The risk of prosecution and prison sentences for using real children contrasts sharply with the legality of using virtual child images. Few pornographers would be willing to take that risk if a legal means of producing the same type of images existed. Yet, if virtual child pornography exists, it has not been well publicized. Given the substantial market for child pornography on the Internet, it stands to reason that such a radical development would not go unnoticed, especially in legal and law enforcement circles. Therefore, we are not convinced that this technology is so widely available that the State must be required as a matter of law to produce evidence in addition to the images themselves to carry its burden of proof.[97]

C. "Unit of Prosecution" in Child Pornography Cases

A few courts have addressed the difficult issue of the appropriate "unit of prosecution" in child pornography cases—that is, whether counts against defendants should be grouped by individual images, by websites, or by some other grouping. In *United States v. Reedy*, the Fifth Circuit decided that, given the ambiguity of § 2252 on this question, the "rule of lenity" required that counts against a defendant be grouped by website, as opposed to individual image.[98] Recently, in a case of apparent first impression, *State v. Kujawa*, the Louisiana First Circuit Court of Appeals approved the imposition, under state law,

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[96] *See* People v. Normand, 831 N.E.2d 587 (Ill. 2005); *accord* United States v. Slanina, 359 F.3d 356 (5th Cir.), *cert. denied*, 543 U.S. 845 (2004); *Kimler*, 335 F.3d 1132; *Hall*, 312 F.3d 1250.

[97] *Normand*, 831 N.E.2d at 595.

[98] 304 F.3d 358 (5th Cir. 2002).

of fifteen counts of child porn possession for fifteen separate images.[99] The *Kujawa* court reasoned that the question was essentially one of statutory construction, concluding that "[a] careful reading of the entire statute reveals that the legislative intent was to proscribe possession of any single image. The use of the plural form was clearly a matter of grammatical style and not suggestive of an intent to establish a unit of prosecution based upon a broad course of conduct involving multiple contraband images."[100] The relevant Louisiana law defined child pornography as "[t]he photographing, videotaping, filming, or otherwise reproducing visually of any sexual performance involving a child under the age of seventeen," and in turn defined "sexual performance" as "any performance or part thereof that includes sexual conduct involving a child under the age of seventeen."[101]

D. Review of the 2003 Amendments

No federal or state appellate decisions have yet addressed the constitutionality of the new "indistinguishable from" provision in § 2256(8)(B).[102] One is thus left to speculate whether the change from "appears to be" to "indistinguishable from" will really make a difference to the amended law's adherence to First Amendment standards. Congress seems to be betting on the strength of the "prosecution thwarting" rationale of Justices like Thomas and O'Connor (who partially concurred in *Ashcroft*). But the five-justice majority that rather forcefully repudiated that rationale is still on the Court. The replacement

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[99] State v. Kujawa, 929 So.2d 99 (La. Ct. App. 2006). *Kujawa* has a good general discussion of the unit of prosecution issue, referencing *Reedy*, as well as decisions in United States v. Esch, 832 F.2d 531 (10th Cir. 1987); Vineyard v. State, 958 S.W.2d 834 (Tex. Crim. App. 1998) (en banc); State v. Mather, 646 N.W.2d 605 (Neb. 2002); State v. Multaler, 643 N.W.2d 437 (Wis. 2002); State v. Schaefer, 668 N.W.2d 760 (Wis. Ct. App. 2003); Commonwealth v. Davidson, 860 A.2d 575 (Pa. Super. Ct. 2004); and State v. Howell, 609 S.E.2d 417 (N.C. Ct. App. 2005).

[100] *Kujawa*, 929 So.2d at 111 .

[101] La. Rev. Stat. Ann. § 14:81.1(A)(1), (B)(1) (2006).

[102] *See supra* notes 62, 64-66 and accompanying text.

of Chief Justice Rehnquist by John Roberts, and Justice O'Connor by Samuel Alito, does not disturb that balance. While doctrinal alteration is certainly possible in this area, it seems unlikely that the "indistinguishable from" provision will be upheld under *Ashcroft*.

One federal circuit court has recently addressed the amended pandering provision in § 2252A(a)(3)(B), which was intended to remedy the pandering provision struck down by *Ashcroft*.[103] In a thorough opinion, the Eleventh Circuit in *United States v. Williams* said essentially that Congress had provided a partial and inadequate fix to the former provision's defects. *Williams* struck down the new pandering provision as both unconstitutionally overbroad and vague.[104] William's possession of child pornography under § 2252A(a)(5)(B) was upheld, but an additional pandering conviction was overturned. In an internet chat room, Williams had told an undercover federal agent that he had sexually explicit photos of his own four-year-old daughter. A subsequent search of Williams' computer revealed at least twenty-two images of actual child pornography. Williams was convicted, not only of possession of child pornography, but also with "promoting . . . material 'in a manner that reflects the belief, or that is intended to cause another to believe,' that the material contains illegal child pornography."[105]

The court provided a detailed and helpful summary both of the problem of child pornography and of Congress's efforts to combat it. The court was refreshingly candid about how the online world exacerbates the problem of stamping out the disease:

> The anonymity and availability of the online world draws those who view children in sexually deviant ways to websites and chat rooms where they may communicate and exchange images with other like-minded individuals. The result has been the development of a dangerous cottage industry for the production of child pornography as well as the accretion of

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[103] *See supra* note 40 and accompanying text.

[104] United States v. Williams, 444 F.3d 1286 (11th Cir. 2006).

[105] *Id.* at 1288-89; *see also* 18 U.S.C. § 2252A(a)(3)(B) (Supp. 2003).

> ever-widening child pornography distribution rings. Our concern is not confined to the immediate abuse of the children depicted in these images, but is also to enlargement of the market and the universe of this deviant conduct that, in turn, results in more exploitation and abuse of children. Regulation is made difficult, not only by the vast and sheltering landscape of cyberspace, but also by the fact that mainstream and otherwise innocuous images of children are viewed and traded by pedophiles as sexually stimulating.[106]

Unhappily for the government's case, however, the court was equally clear-eyed about the limits on its efforts imposed by the First Amendment and the Supreme Court's approach in *Ashcroft*.

The *Williams* court did recognize that the amended pandering provision had cleared up some of the prior law's defects. The law no longer criminalized pandered materials "for all purposes in the hands of any possessor based on how they were originally pandered."[107] Instead, the focus now shifted from "regulation of the underlying material to regulation of the speech related to the material."[108] Furthermore, Congress had evidently abandoned the "secondary effects and market deterrence justifications" disapproved in *Ashcroft*, in favor of a renewed emphasis on the "prosecution thwarting" problem posed by computer generated child porn.[109] But these improvements to the law were insufficient to overcome the problems of overbreadth and vagueness.

The court focused on the amended provision's de-coupling of pandering words from the nature of the material pandered. No actual or even simulated child pornography need exist, since the provision embraces "purported" material. According to the court, this means that pandering speech is "criminalized even when the touted materials are clean or non-existent."[110]

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[106] *Williams*, 444 F.3d at 1290 (footnote omitted).

[107] *Id.* at 1295.

[108] *Id.*

[109] *Id.*

[110] *Id.* at 1298. The court explained that "any promoter—be they a braggart, exaggerator, or outright liar—who claims to have illegal child pornography mate-

Essentially, since there was no requirement of any illegal or potentially illegal materials associated with the pandering, the amended provision would criminalize speech amounting to the advocacy of *future* illegal conduct. The law, of course, may not constitutionally forbid even speech advocating illegal conduct unless it rises to the level of *Brandenburg*-type incitement or other unprotected categories.[111] Furthermore, the law's criminalization of speech that merely "reflects the belief" that material is real or simulated child porn—when the material may not actually be anything of the kind—raises the specter that the law could penalize the "deluded" pandering of innocuous materials or, worse, "the thoughts conjured up by . . . legal materials."[112] The court simply rejected additional congressional findings that the pandering provision was necessary to drying up the market for child porn, observing that "Congress has again failed to articulate specifically how the pandering and solicitation of legal images, even if they are promoted or believed to be otherwise, fuels the market for illegal images of real children engaging in sexually explicit conduct."[113] Finally, the court also found that the "purported" and "reflects the belief" aspects of the amended provision were unconstitutionally vague, "fail[ing] to convey the contours of its restriction with sufficient clarity to permit law-abiding persons to conform to its requirements."[114]

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rials is a criminal punishable by up to twenty years in prison, even if what he or she actually has is a video of 'Our Gang,' a dirty handkerchief, or an empty pocket." *Id.*

[111] *Id.*; *see supra* notes 7-9 and accompanying text.

[112] *Williams*, 444 F.3d at 1299-1300. The court also found inapposite the government's attempt to categorize the amended provision as the kind of pandering law approved by the Supreme Court in *Ginzburg v. United States*: that case had merely allowed evidence of pandering as probative of the *Miller* obscenity standard. *Id.* at 1300-1302; *see* Ginzburg v.United States, 383 U.S. 463 (1966). The court also suggested that *Ginzburg* may also no longer be good law after the Supreme Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, that afforded commercial speech greater First Amendment protection. *See* 425 U:S. 748 (1976); *Williams*, 444 U.S. at 1301-02.

[113] *Williams*, 444 F.3d at 1303-04.

[114] *Id.* at 1305-07.

Wrong Turn: *The Purpose-Driven Life* Gives Bad Directions

by Ronald J. Rychlak

Descriptive Title

Wrong Turn: The Purpose-Driven Life Gives Bad Directions

Description

The Purpose-Driven Life phenomenon is sweeping the country, including some of our parishes, and the program promises that you can find God's purpose for your life in forty days. But what do Catholics need to know about *Purpose?* Ronald J. Rychlak and Kyle Duncan warn Catholics that although the book's author, Rick Warren, has established a program that might have a real impact, we should aware that there are dangers on the Purpose-Driven road. They explain why "Catholics who follow the Purpose-Driven template are driving blind, and the road they follow is more likely to lead away from the Church than to a deeper practice of their faith."

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The Purpose-Driven Life has sold over 7 million copies and was named Christian "Book of the Year" in 2003. "Purpose-Driven" is now a registered trademark, and "Purpose-Driven" programs have been offered everywhere from schools and prisons to corporate headquarters, including Coca Cola, Sparrow Records, NASCAR, the LPGA, and the Oakland Raiders.

The book's promise for those who follow its forty-day journey is that "you will know God's purpose for your life." The book is being promoted and studied in some Catholic parishes, especially as a Lenten exercise, so it is worth examining whether it can deliver on its exaggerated promise.

The book's author, Rick Warren, was labeled as "America's most influential pastor" by *Christianity Today.* He is the pastor of Saddleback Church, which is situated on a 120-acre campus in southern California that was designed by theme park experts. Every weekend nearly 20,000 people attend services at one of nine "venues," including a 3,000-seat main sanctuary, a religious coffee bar, and a "beach hut" for high school students. Sculpted into the landscape are settings for forty Bible reenactments, including a stream that can part like the Red Sea.

Saddleback is associated with the Southern Baptist Convention, but Warren's teachings have spread widely. Thousands of pastors from more than 100 countries have attended Warren's Purpose-Driven seminars and subscribe to his free weekly e-mail newsletter, *Ministry Toolbox.* Warren's web site claims that he is starting a new Reformation. That claim alone should put Catholics on guard about the "Purpose-Driven" approach to Christian faith. Yet Warren is no anti-Catholic bigot. He accepts that Catholics are true believers, and he cites monks and nuns (including Mother Teresa) as Christian examples.

Warren is also doing praiseworthy work in Rwanda. After he and his wife observed the poverty and AIDS epidemic ravaging that nation, they set up foundations to distribute 90 percent of the proceeds from Warren's book to alleviate poverty and combat AIDS in that country. Unlike so many other programs, Warren's seems to be focused on abstinence and monogamy rather than simple condom distribution. Of course, because of this morality-based approach, Warren has already been severely criticized in the secular press. It also means, though, that his program might have a real impact.

Nevertheless, Catholics should be aware that there are dangers on the Purpose-Driven road.

Purpose-Driven Scripture

Adhering to the Protestant doctrine of *sola scriptura,* Warren writes that the Bible is "our *Owner's Manual,* explaining why we are alive, how life works, what to avoid, and what to expect in the future. It explains what no self-help or philosophy book could know." Thus, *The Purpose-Driven Life* begins from the premise that we can reliably discern God's purposes for our lives from the text of written Scripture alone.

But Scripture is not a catechism. Rather, it is the inspired written testimony to the faith that had already been given to a living community, the Church. In a striking passage, John Henry Newman described this "self-evident" proposition:

> The sacred text was never intended to teach doctrine but only to prove it and that, if we would learn doctrine, we must have recourse to the formularies of the Church, for instance, to the Catechism and to the Creeds *(Apologia Pro Vita Sua* , 1).

Sola scriptura, on the other hand, abstracts Christian doctrine — and Scripture itself — from 2,000 years of the Church's faith, worship, and life, effectively cutting off the Christian from "the living memory" of the Church, the Holy Spirit.

No faithful Catholic can accept the "Purpose-Driven" approach to Scripture. Catholics already possess "the full and living gospel" *(Catechism of the Catholic Church* 77; see also CCC 76–83). To begin with, at every Mass, Catholics hear the living, authoritative, and *complete* word of God proclaimed by Christ's body, the Church. With access to the inseparable triad of Sacred Scripture, Sacred Tradition, and the Church's magisterium, the faithful Catholic stands firmly on the *full* gospel — all that Christ wanted us to believe and do — and escapes being blown around by private interpretations of Scripture, politically correct doctrines, and theological fads.

Purpose-Driven Salvation

Warren assures his readers that "God won't ask about your religious background or doctrinal views. The only thing that will matter is, did you accept what Jesus did for you and did you learn to love and trust him?" For salvation, "all you need to do is receive and believe." He encourages his audiences to join God's family as follows: "I invite you to bow your head and quietly whisper the prayer that will change your eternity, 'Jesus, I believe in you and I receive you.'" Then, "if you sincerely meant that prayer congratulations! Welcome to the family of God!"

Entry into eternal life? "If you learn to love and trust God's Son, Jesus, you will be invited to spend the rest of eternity with him. On the other hand, if you reject his love, forgiveness, and salvation, you will spend eternity apart from God forever."

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All of this can sound plausible to a Catholic who doesn't have a firm grasp of the faith. Surely God doesn't care about "religious background or doctrinal views"! But Warren's assertions are themselves "doctrinal views," unstated and undefended. More urgently, is Warren talking about the same "eternal life" as Jesus did, the Jesus who taught that "the gate is narrow and the way is hard, that leads to life, and those who find it are few" (Matt. 7:14)?

Warren is right that we must love and trust Jesus, but Jesus himself told us what that really meant. For starters, Jesus said: "The time is fulfilled, and the kingdom of God is at hand; repent, and believe in the gospel" (Mark 1:15). He also said, "Not every one who says to me 'Lord, Lord,' shall enter the kingdom of heaven, but he who does the will of my Father who is in heaven" (Matt. 7:21). And to those who say "Lord, Lord," Jesus warned that God may reply, "Depart from me, you cursed, into the eternal fire prepared for the devil and his angels" (Matt. 25:41). But Warren makes little if any mention of sin, damnation, repentance, or the cross.

Purpose-Driven Liturgy

Warren proclaims: "There is no 'one-size-fits-all' approach to worship and friendship with God. God wants you to be yourself." In Warren's view, all that matters is what the individual believer brings to worship — not the objective reality of worship itself. This is not the historical Christianity given to us by the apostles.

When Jesus meets the Samaritan woman at the well, he promises her that "true worshipers will worship the Father in spirit and truth" (John 4:23). Warren interprets this verse as Jesus' condemnation of "external" or "ritual" worship. But Jesus was referring to the pure worship that he would inaugurate at the Last Supper (see John 4:8-9; Luke 22:14-20). In John 4, Jesus is looking forward to the Eucharist.

Compare Warren's views about worship to those of Pope Benedict XIV, who as a cardinal wrote:

> Liturgy presupposes . . . that the heavens have been opened . . . If the heavens are not open, then whatever liturgy was is reduced to role playing and, in the end, to a trivial pursuit of congregational self-fulfillment in which nothing really happens" (Joseph Ratzinger, *In the Presence of the Angels I W*ill *Sing Your Praise* [www.adoremus.org/10-12-96-Ratzi.html]).

Warren says, "There is no such thing as 'Christian' music; there are only Christian lyrics. It is the words that make a song sacred, not the tune. There are no spiritual tunes." Warren derives the following conclusion about God's musical preferences from the Bible:

> God loves all kinds of music because he invented it all — fast and slow, loud and soft, old and new. You probably don't like it all, but God does! If it is offered to God in spirit and truth, it is an act of worship . . . There is no biblical style!

Warren describes his church as "the flock that likes to rock." Some songs are performed with a nightclub effect, complete with swirling lights and dancing background singers. Unfortunately, we have seen the effects of this kind of approach to music in Catholic liturgies. Nevertheless, the Church has always made a distinction between sacred and profane music. Quoting Vatican II's Sacr*osanctum Concilium,* the *Catechism* says:

> "The musical tradition of the universal Church is a treasure of inestimable value, greater even than that of any other art. The main reason for this pre-eminence is that, as a combination of sacred music and words, it forms a necessary or integral part of solemn liturgy." The composition and singing of inspired psalms, often accompanied by musical instruments, were already closely linked to the liturgical celebrations of the Old Covenant. The Church continues and develops this tradition (CCC 1156; cf. SC 112).

Purpose-Driven Sacraments

While Warren affirms that baptism "is not an optional ritual, to be delayed or postponed," he goes on to say that it "signifies" and "symbolizes" but doesn't actually do anything. As he says, "Baptism doesn't *make* you a

member of God's family; only faith in Christ does that. Baptism *shows* you are part of God's family." That assertion directly contradicts Church teaching.

- "The sacraments of the New Covenant are *necessary for salvation"* (CCC 1129, emphasis in original) because they are instituted by Christ himself (CCC 1114).
- "Holy Baptism is the basis of the whole Christian life, the gateway to life in the Spirit" (CCC 1213). "By following the gestures and words of this celebration with attentive participation, the faithful are initiated into the riches this sacrament signifies and *actually brings about* in each newly baptized person" (CCC 1234, emphasis added).
- "The Lord himself affirms that baptism is necessary for salvation . . . The Church does not know of any means other than baptism that assures entry in eternal beatitude" (CCC 1257).

The *Catechism* faithfully reflects what Jesus taught in John's Gospel: "Truly, truly, I say to you, unless one is born of water and the Spirit, he cannot enter the kingdom of God" (John 3:5). Warren is not teaching what Jesus taught.

Purpose-Driven Ecclesiology

Not surprisingly, Warren's understanding of ecclesiology does not go beyond the local congregation:

> Except for a few important instances referring to all believers throughout history, almost every time the word chur*ch* is used in the Bible it refers to a local visible congregation . . . It is your job to protect the unity of your church. Unity in the church is so important that the New Testament gives more attention to it than to either heaven or hell.

Unity is crucial, but the unity Jesus calls us to is considerably more challenging than what Warren is calling for here. His call is not to unity within "your" church or "my" church, but unity in his body, the Catholic Church.

Don't Go There

Whatever helpful personal encouragement Warren's teaching might offer, the use of his books in any catechetical setting is a serious mistake. They are misleading and potentially profoundly confusing to poorly catechized Catholics. Moreover, while seeming to be ecumenical in approach, they actually undermine true ecumenism because they gloss over serious theological problems. The Second Vatican Council taught:

> Nothing is so foreign to the spirit of ecumenism as a false irenicism, in which the purity of Catholic doctrine suffers loss and its genuine and certain meaning is clouded *(Unitatis Redintegratio* 11).

The idea of all Christians joining together in harmony is a hopeful one, and we as Catholics must take the lead in pursuing it. But unity must be based on truth. Rather than Catholic truth, Warren is purveying spiritualized pop-psychology. The "Purpose-Driven" church looks less like the one mystical body of Christ than a loose conglomeration of inspirational social clubs. That is why Catholics who follow the Purpose-Driven template are driving blind, and the road they follow is more likely to lead away from the Church than to a deeper practice of their faith.

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ARTICLES

SECULARISM'S LAWS: STATE BLAINE AMENDMENTS AND RELIGIOUS PERSECUTION

*Kyle Duncan**

State Blaine Amendments are provisions in thirty-seven state constitutions that restrict persons' and organizations' access to public benefits on religious grounds. They arose largely in the mid to late 1800s in response to bitter strife between an established Protestant majority and a growing Catholic minority that sought equal access to public funding for Catholic schools. After the failure to pass a federal constitutional amendment—the "Blaine Amendment"—that would have sealed off public school funds from "sectarian" institutions, similar provisions proliferated in state constitutions. These "State Blaines" have often been interpreted, under their plain terms, as erecting religion-sensitive barriers to the flow of public benefits that exceed the church-state separation demanded by the Establishment Clause. Today, the State Blaines are becoming increasingly relevant as the Supreme Court has progressively softened federal constitutional barriers to religious access to public funds. This Article examines the history, language, and general operation of the State Blaines. It concludes that the State Blaines generally raise explicit, religion-sensitive barriers to the allocation of otherwise available public benefits and, consequently, that the operation of the State Blaines would typically violate the religious non-persecution principle of the First Amendment.

I. INTRODUCTION

Larry Witters was a blind man who wanted to attend college. In 1979, he applied for vocational funds that Washington State provided for the visually handicapped. Witters was eligible for the funds, and he intended to use them to study to be a minister at a Christian college. But his plans met resistance. In 1984, the Washington

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Supreme Court ruled that the federal Establishment Clause barred Witters' use of the funds for religious training.[1] Witters sought review in the U.S. Supreme Court and won. In 1986, the Court ruled that the Establishment Clause presented no impediment to his private decision to apply the funds to religious education.[2] But Witters would never use those funds for that purpose. Three years later, the Washington Supreme Court decided on remand that Witters' plans violated a clause of the Washington *State* Constitution that prohibited "public money" from being "applied to any religious . . . instruction."[3] The U.S. Supreme Court, over one dissent, declined to hear Witters' subsequent claim that Washington's constitution effectively punished him for pursuing his faith and therefore violated his right to free exercise of religion.[4]

Thus, at the end of a decade-long odyssey that included a unanimous *victory* in the Supreme Court, Witters was left with nothing. Had Witters planned to use the scholarship funds to study chemistry, American history, international law, or—interestingly—religion from a purely secular viewpoint, he would have enjoyed Washington's financial assistance. But precisely because Witters wanted to use the funds to prepare for the ministry—i.e., to lay the theological and pastoral groundwork for a career inspired by and in service of his religious faith—he was denied that assistance.

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1. *See* Witters v. Comm'n for the Blind, 689 P.2d 53, 54-56 (Wash. 1984) [hereinafter *Witters I*]. The religion clauses of the First Amendment—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—textually restrain the federal Congress only, but have been applied against the states through the Fourteenth Amendment. U.S. Const. amend. I; *see* Everson v. Bd. of Educ., 330 U.S. 1 (1947) (applying the Establishment Clause to the states); Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause); *see also generally* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 163-214 (1998). In *Witters I*, the Washington Supreme Court applied the Supreme Court's *Lemon* test—at that time the doctrinal framework for evaluating Establishment Clause cases—and found that Witters' use of the state aid for ministry training would have the "primary effect of advancing religion" and was therefore unconstitutional. *See Witters I*, 689 P.2d at 56 (applying Lemon v. Kurtzman, 403 U.S. 602 (1971)).

2. *See* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986) [hereinafter *Witters II*].

3. *See* Witters v. State Comm'n for the Blind, 771 P.2d 1119 (Wash. 1989) [hereinafter *Witters III*]. The court relied on the Washington Constitution which in pertinent part states: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." Wash. Const. art. I, § 11 (1889); *see infra* note 116.

4. *See* McMonagle v. N.E. Women's Ctr., Inc., 493 U.S. 901, 903-04 (1989) (White, J., dissenting from denials of petitions for certiorari in several cases). In dissent, Justice White argued that the Washington Supreme Court's interpretation of its state constitution "presents important federal questions regarding the free exercise rights of citizens who participate in state aid programs that permit recipients a private choice in using funds received and regarding the extent to which state involvement with religion that does not violate the Establishment Clause is required by the Free Exercise Clause." *Id.* at 904.

The provision that ultimately blocked Witters' claim belongs to a class of state constitutional provisions that appear in over thirty-five state constitutions and are known collectively as "State Blaine Amendments." Most State Blaines arose in the mid to late 1800s, in response to a widespread controversy over whether Roman Catholics could obtain access to public funding for their schools.[5] At that time, American public schools were overwhelmingly and explicitly Protestant, and private schools were predominantly Catholic. Many people wanted to keep public funds as far from Catholic schools as possible, a project zealously pursued and realized in its most concrete form in the State Blaines. While collectively aimed at this object, the language of individual State Blaines takes various forms.[6] Almost all, however, can be fairly read to thwart plans like Witters'—i.e., to bar the use of generally available public benefits precisely because the recipient is a person who wants to put them to a religious use or is a religiously affiliated organization.[7] These provisions have slumbered in state constitutions for over a century,[8] but they are awakening now that the Supreme Court has relaxed federal constitutional barriers to public funding of religious activities. This Article will explore the question the Supreme Court declined to take up in *Witters* and has never squarely addressed: If a state interprets its Blaine Amendment to erect a religion-sensitive barrier to public funding—funding that is permissible under the Establishment Clause—does the state violate any principle in the federal Constitution?[9]

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5. I discuss this controversy in detail *infra*, Part II.A.

6. *See generally* Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 Educ. L. Rep. 1 (1997) (canvassing the various State Blaine Amendments); Linda S. Wendtland, Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 Va. L. Rev. 625 (1985) (discussing state courts' interpretations of State Blaine Amendments).

7. A representative State Blaine—this one from the 1885 Florida Declaration of Rights—reads thus: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." Fla. Declaration of Rights § 6 (1885); Fla. Const. art. I, § 3.

8. *But see, e.g.*, Walter Gellhorn & R. Kent Greenawalt, The Sectarian College and the Public Purse (1970) (analyzing Fordham University's compliance with the New York Blaine Amendment).

9. *See* Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 Nev. L.J. 551, 574 (2002) (noting that "the U.S. Supreme Court has never had before it a challenge to the constitutionality of a Little Blaine Amendment"); *see also* Rebecca G. Rees, *"If We Recant, Would We Qualify?": Exclusion of Religious Providers from State Social Service Voucher Programs*, 56 Wash. & Lee L. Rev. 1291, 1296 (1999) (observing that "[t]he United States Supreme Court . . . has never addressed the possibility of a conflict between First Amendment principles and a State Blaine provision that excludes a religious group or individual from a general government program or benefit"). This may change soon, however. On May 19, 2003, the Supreme Court granted certiorari in *Davey v. Locke*, a Ninth Circuit decision that rejected Washington's Blaine Amendment as justification for a state scholarship program that excludes students seeking theology degrees. *See* Davey v.

The tale of the State Blaines seems unfinished, because over the last century state courts have applied them infrequently. The reason is not neglect but superfluity: States have not had to rely on State Blaines to achieve a rigorous separation between public funds and religious institutions because the Supreme Court has interpreted the *federal* religion clauses to achieve largely that result. As late as the 1980s, only a trickle of public funds could flow to religious students or religious schools (especially elementary and secondary schools) through the sieve of a rigidly separationist interpretation of the federal Constitution.[10] The State Blaines have simply lacked occasion for robust application. But their moment may have arrived.[11] Over the last two decades, the Supreme Court has eased constitutional restrictions on religious access to public funds,[12] and, as happened on remand in *Witters III*, this will force state courts to ask whether State Blaines place stricter limitations on public funding for the religious.[13]

Locke, 299 F.3d 748 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2075 (2003). The Court will hear arguments in *Davey* on December 2, 2003. I discuss *Davey infra,* Part V.A.

10. *See, e.g.*, Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 Vill. L. Rev. 37, 56 (2002) ("American Separationism reached its high water mark in the early 1970s, when the United States Supreme Court laid down rules that essentially precluded any direct government assistance to the educational program of religiously affiliated elementary and secondary schools.").

11. *See* Bybee & Newton, *supra* note 9, at 574 (observing that "[t]he time may have arrived when state and federal courts will have to reexamine the application and constitutionality of the Little Blaine Amendments").

12. *See, e.g.*, Lupu & Tuttle, *supra* note 10, at 57 ("Over the past fifteen years, the prophylactic character of strict Separationism has been under siege."); Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 Loy. U. Chi. L.J. 121, 122-23 (2001) (explaining that, while "[c]hurch-state separation reached its height in the 1960s and 1970s decisions forbidding public school prayers and aid to private religious schools . . . in the 1980s and 1990s, this strain of separationism lost ground, particularly with respect to school aid").

13. The Supreme Court's recent validation of a school voucher program allowing substantial participation of religious schools should accelerate this process. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002). Charles Fried has noted that, whether or not the five-Justice majority in *Zelman* endures, "opponents of school choice are increasingly turning to state constitutions that contain a so-called 'Blaine Amendment'—a provision that insists on a more stringent and clear-cut separation between church and state than the Supreme Court requires under its First Amendment jurisprudence—to support their legal strategy." Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 Harv. L. Rev. 163, 174-75 & n.55 (2002). Consequently, the issue of the State Blaines' constitutionality has generated its share of recent attention from the media. *See, e.g.*, Tony Mauro, *Voucher War Heads to States that Ban Funding of Religious Schools*, Legal Times, Aug. 5, 2002, at 1; Rob Boston, *The Blaine Game*, Church & St., Sept. 2002, at 4; Mark Walsh, *Latest Front for Fight on Choice: Washington State*, Educ. Wk., Oct. 2, 2002, at 17; George F. Will, *School Choice: The Ugly Opposition*, Wash. Post, Nov. 12, 2002, at A25; *see also* Adam Liptak, *Courts Weighing Rights of States To Curb Aid for Religion Majors*, N.Y. Times, Aug. 10, 2003, at A1 (discussing the *Davey* case). The Becket Fund—an ardent opponent of the State Blaines—catalogues much of this media attention on its website. *See* www.becketfund.org.

Inevitably, courts will have to say whether the nature of those limitations can withstand scrutiny under the federal Constitution.

That latter inquiry is the subject of this Article. Beyond what likely motivated the passage of the State Blaines, the more significant foundational question is what they purport to do and whether that operation is consonant with a longstanding tradition of protecting religious liberties under the Constitution. In answering these questions, it is not enough to bring an indictment of anti-Catholicism against the State Blaines. Few would doubt that many, if not most, State Blaines were driven by legislators' desires to penalize a disfavored religious group. But, for my purposes, the key question will be how those motives translated into legal form in the language and operation of the State Blaine Amendments. The history of State Blaines, consequently, provides a useful context for understanding their operation, but it is only the beginning of the constitutional inquiry.

The religious dynamics of the State Blaines are different today than in the nineteenth century. Public schools are no longer Protestant or indeed traditionally religious at all—the Supreme Court's religion jurisprudence since the mid-1960s has scoured public schools of all formal religious practice.[14] Private schools, while significantly religious, are no longer overwhelmingly Catholic.[15] Anti-Catholic bias may no longer be ascendant,[16] but our public institutions have embraced, in Justice Goldberg's memorable phrase, a "brooding and pervasive devotion to the secular" that instinctively confines serious religion to the private sphere and recoils from its intrusion into the public sphere.[17] Against this reshuffled social and religious backdrop,

14. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (banning school prayer); Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (prohibiting the Lord's Prayer and Bible reading in a public school); Stone v. Graham, 449 U.S. 39 (1980) (barring posting the Ten Commandments in a public school); Wallace v. Jaffree, 472 U.S. 38 (1985) (striking certain moment of silence laws); Lee v. Weisman, 505 U.S. 577 (1992) (denouncing prayers at high school graduation as unconstitutional); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (ending prayer at high school football game).

15. *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 337-39 (2001).

16. *See generally* Berg, *supra* note 12, at 122-23, 163-72. At the same time, Berg explains that "[a]lthough negative attitudes toward Catholicism certainly remain significant, they are less widely held, are less focused on Catholic schools as such, and are only part of a broader distrust of politically active social conservatives, including evangelical Protestants." *Id.* at 123. *See also* Lupu & Tuttle, *supra* note 10, at 67. Lupu and Tuttle comment that a traditional "no-aid" position on government assistance to religious schools "in practice, meant but one thing—no state assistance to Catholic elementary and secondary schools. Most happily, such sentiment is, for a variety of reasons, no longer intellectually respectable in the United States." *Id.*

17. *Schempp*, 374 U.S. at 306 (1963) (Goldberg, J., concurring); *see, e.g.*, Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 120 (1992) (criticizing the Warren and Burger Courts' "tendency to press relentlessly in the direction of a more secular society" and "to view religion as an unreasoned, aggressive, exclusionary, and divisive force that must be confined to the private

the non-specific textual references to "religion," "sects," or "sectarian" in the State Blaines will operate to restrict, not only Catholic schools or Catholic organizations, but religious schools and organizations generally.[18] Thus, the most obvious function of the State Blaines will be to separate the religious from the secular in the allocation of public funds, raising explicit barriers against the use of public assistance for a variety of, if not all, religious ends and religiously affiliated organizations.[19]

If that is how the State Blaines operate, then they violate the religious freedom guarantees of the First Amendment. Laws may not

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sphere"); Berg, *supra* note 12, at 151-52 (arguing that "[b]y invalidating officially sponsored prayers in state schools in 1962 and Bible readings the next year, the Warren Court questioned the generalized civil religion that the 1950s had affirmed" and that "the Burger Court, in a series of decisions in the 1970s . . . severely limited government aid to religious elementary and secondary schools and their students" (citations omitted)); *see also* Richard John Neuhaus, The Naked Public Square: Religion and Democracy in America 79-82 (1984) (discussing the secularizing drift of the Supreme Court's jurisprudence).

18. I do not, of course, mean to suggest that the State Blaines' language could ever have been correctly interpreted to apply only to Catholic schools or organizations. I know of no commentator or court having advocated that interpretation, nor—given the general references in the State Blaines to "religions," "denominations," and "sects"—does such an interpretation seem plausible. In any event, interpreting them that way would open the State Blaines to a charge of plain denominational discrimination under the Free Exercise Clause. *See, e.g.*, Larson v. Valente, 456 U.S. 228 (1982). That said, I do think the history that I recount in this Article strongly suggests that there was a hope or expectation behind the enactment of State Blaines that their operation would disproportionately impact Catholic organizations. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion) (linking the term "sectarian" with the anti-Catholic hostility surrounding the attempted passage of the federal Blaine Amendment, and noting that "it was an open secret that 'sectarian' was code for 'Catholic'" (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992))); Gerard V. Bradley, *An Unconstitutional Stereotype: Catholic Schools as "Pervasively Sectarian,"* 7 Tex. Rev. L. & Pol. 1, 5 (2002) (observing that "Justice Thomas noted in *Mitchell* that the term was 'coined' when it 'could be applied almost exclusively to Catholic parochial schools'" (citations omitted)); *see also* Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J.L. & Pol. 449, 456-60 (1990) (discussing the provenance of term "sectarian"). In any case, as I explain throughout this Article, the question of subjective legislative *motive* for the State Blaines is legally distinct from the question of whether their objective *operation* is unconstitutional. My argument for the State Blaines' unconstitutionality does not depend on the anti-Catholic animus that brooded over their births.

19. My observation here accords with a broader point made by Ira Lupu and Robert Tuttle (commenting on Justice Breyer's dissent in *Zelman*) in a recent piece. *See* Ira C. Lupu & Robert W. Tuttle, Zelman*'s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 Notre Dame L. Rev. 917 (2003). Dismissing Justice Breyer's anachronistic concerns about "social strife," Lupu and Tuttle observe that "[t]he religious wars in the United States in the early twenty-first century are not Protestant vs. Catholic, or Christian vs. Jew, or even the more plausible Islam vs. all others. They are instead the wars of the deeply religious against the forces of a relentlessly secular commercial culture." *Id.* at 954-55. For Justice Breyer's dissent, see Zelman v. Simmons-Harris, 536 U.S. 639, 717-29 (Breyer, J., dissenting).

attach a civil disability to lawful behavior, status, or association because, and *only* because, they are motivated by religious impulses or connected to religious belief or observance. On this account, State Blaines are "laws that *by their terms* impose disabilities on the basis of religion."[20] The State Blaines unconstitutionally "punish" religious status, behavior, and association by selectively disqualifying them from generally available public assistance. That conclusion goes to the deepest roots of American religious freedom: as Michael McConnell has observed, "[f]rom the outset [of the United States], the prevention of persecution, penalties, or incapacities on account of religion has served as a common ground among all the various interpretations of religious liberty."[21] The State Blaines break faith with that tradition.

This Article focuses on the Free Exercise Clause as a primary, but not exclusive, source of principles that prohibit the discriminatory operation of the State Blaine Amendments.[22] The free exercise violation reaches deeply to the historical and normative roots of that clause—as originally conceived, the clause would have applied most vigorously to federal laws aimed at religious exercise.[23] Moreover, even laboring under the inconsistency of its religion jurisprudence, the Supreme Court has consistently (and unanimously) held that laws

20. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 557 (1993) (Scalia, J., concurring) (citing McDaniel v. Paty, 435 U.S. 618 (1978)). For a recent article reaching a similar conclusion about the operation of most State Blaines, see Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 556 (2003) (arguing that "many, if not most, State Blaine Amendments violate the First Amendment's provisions regarding religious liberty and free speech because they unlawfully discriminate against religious believers").

21. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1474 (1990).

22. There are other plausible approaches to attacking the State Blaines. *See, e.g.*, DeForrest, *supra* note 20, at 617-25 (arguing that State Blaines violate freedom of speech); Toby J. Heytens, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 140-52 (2000) (arguing that Blaines violate equal protection); Lupu & Tuttle, *supra* note 19, at 962 n.204, 967-71 (suggesting certain State Blaines could be vulnerable under free speech principles, because of motivating anti-Catholic animus, or through congressional legislation under Section 5 of the Fourteenth Amendment); Rees, *supra* note 9, at 1313-28 (stating Blaine amendments impermissibly restrict free speech). But my approach finds that the Free Exercise Clause is the most apt locus, both historically and doctrinally, of principles condemning the State Blaines.

23. *See, e.g.*, McConnell, *supra* note 21, at 1474; *see also* Amar, *supra* note 1, at 42 (arguing that "[i]f the phrase 'Congress shall make no law' really meant that Congress simply lacked enumerated power to intrude into religious freedom in the several states, the kind of intrusion prohibited must have been a congressional law that sought to abridge religious exercise *as such*—a congressional law *targeted at* the free exercise of religion"); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1108, 1114 (1994) (explaining that the original Free Exercise Clause "[a]t most . . . prevented the federal government from passing laws targeting religion *qua* religion" and that "even if the original Free Exercise Clause could be read as an expression of individual rights, it would prohibit only those laws that directly targeted religion").

targeting religiously motivated behavior, status, or association because of their religious content or connection are presumptively unconstitutional. Beyond free exercise, aspects of the Court's non-establishment and free speech jurisprudence reinforce the constitutional prohibition against invidious government classification of religion and the religious.

Thus, a major theme in this Article is non-discrimination. The First Amendment forbids government from selectively demoting those who act on religious conviction to second-class citizenship in the distribution of public benefits.[24] A second theme is federalism. The Free Exercise, Establishment and Free Speech Clauses apply to the states because they are "incorporated" into the Fourteenth Amendment.[25] Before incorporation of the religion clauses, the states

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24. *See, e.g.*, DeForrest, *supra* note 20, at 609-10 (arguing that, with reference to State Blaines, "the fundamental principle of equality of citizenship found at the heart of liberal democracy" implies "a right not to be treated as a 'second-class' citizen, not only in regard to politics, but in 'society's common project'" (quoting Paul Weithman, *Religious Reasons and the Duties of Membership*, 36 Wake Forest L. Rev. 511, 512 (2001))).

25. I will explore below some of the cognitive problems presented by "applying" the Establishment Clause "against" the states, and how those might impact an analysis of the State Blaines. *See infra* Part IV. Michael McConnell argues that application of either religion clause to the states is "somewhat anachronistic" given that the First Amendment explicitly applies only to Congress, but he allows that, "[b]ecause the free exercise clause at the federal level was itself modeled on free exercise provisions in the various state constitutions, . . . no structural distortions arise from assuming that, for modern purposes (after 'incorporation'), the free exercise clause means the same thing for states that it has always meant for the federal government." McConnell, *supra* note 21, at 1485. Not so with the Establishment Clause. Its incorporation against the states, argues McConnell, "presents far more serious interpretive difficulties, since there existed no national consensus on the question of governmental aid to religion, other than to leave the question to the states." *Id.* at 1485 n.384. Akhil Amar has demonstrated what many commentators have long maintained: the Establishment Clause was originally understood only as a structural limitation on the power of the federal Congress to prevent it from meddling with, or *disestablishing*, state establishments. Amar, *supra* note 1, at 32-42; *accord* William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DePaul L. Rev. 1191 (1990). Mechanistic incorporation of the Establishment Clause against the states, consequently, is incoherent. *See* Amar, *supra* note 1, at 33-34, 41, 251-54 (criticizing mechanistic incorporation, but advocating "refined" incorporation of the Establishment Clause); *see also* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 Ariz. St. L.J. 1085, 1135-36, 1151-53 (1995) (describing difficulties with incorporating the original Establishment Clause, but proposing a "reconstructed" clause more amenable to incorporation).

Of the current Justices, only Justice Thomas has expressed a willingness to revisit the establishment-incorporation issue. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 677-81 (2002) (Thomas, J., concurring). Thomas has suggested that the Establishment Clause, even if incorporated, should bind the states "on different terms than . . . the Federal Government." *Id.* at 678. Picking up on arguments made by the second Justice Harlan and more recently by Amar, Thomas suggests that states should be freer to pass laws "that include or touch on religious matters" provided they "do not impede free exercise rights or any other individual religious liberty interest." *Id.* (citing, *inter alia*, Walz v. Tax Comm'n, 397 U.S. 664, 699 (1970) (Harlan,

presumably could discriminate against religion generally, or against certain faiths, as much as they liked.[26] But incorporation of the First Amendment has taken religious discrimination at *any* level of government off the table.[27]

The effects of incorporating the religion clauses foreclose a general conceptual objection to my argument. This objection, addressed below in Part V.A., is posited on a federalism rationale that states may, through their more restrictive Blaine Amendments, legitimately "define[] [a] vision of religious freedom as one completely free of governmental interference."[28] In the course of my argument, I will demonstrate that the settled application of the Free Exercise, Establishment, and Free Speech Clauses to the states significantly restrains states in how they pursue this elusive vision of a society where religion and government are "completely free" from one another. Specifically, states cannot further such a goal by erecting, on the basis of their Blaine Amendments, "secular" or "non-religious" as motivational, behavioral or associational requirements for access to generally available public benefits. If the origins and operation of the State Blaines are properly understood, then the principle of non-persecution embedded in the First Amendment will strictly

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J., concurring); *see* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1159 (1991); *see also* Lupu & Tuttle, *supra* note 19, at 948 (observing that Justice Thomas has "urged that the Court limit its intervention into religious liberty issues arising under state law to those properly cognizable under the Free Exercise Clause"). These arguments will be relevant to my discussion of incorporation's impact on the State Blaines. *See infra* Part IV.

26. In 1845, the Supreme Court first held explicitly that "[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: Nor is there any inhibition imposed by the Constitution of the United States in this respect on the states." Permoli v. First Municipality, 44 U.S. (3 How.) 589, 609 (1845). For a general discussion of *Permoli*, see, for example, Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539, 1571-73 (1995) [hereinafter Bybee, *Liberties*]; Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion:* Meyer, Pierce *and the Origins of* Wisconsin v. Yoder, 25 Cap. U. L. Rev. 887, 912-13 (1996) [hereinafter Bybee, *Origins*]. As Bybee observes, "[t]he Court had reaffirmed this position, both prior and subsequent to ratification of the Fourteenth Amendment." *Id.* at 913 (citations omitted).

27. *See, e.g.*, Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 Tul. L. Rev. 251, 327 (2000).

> Although the First Amendment applies, by its terms, to Congress alone, the Court's jot-for-jot incorporation has brought the First Amendment to the states on precisely the same terms. The First Amendment, applied to the states through the Due Process Clause of the Fourteenth Amendment, has become a subject matter disability to the states as well. Incorporation has blurred both the federalism and separation of powers aspects of the original First Amendment.

Id.

28. *See* Davey v. Locke, 299 F.3d 748, 761 (9th Cir. 2002) (McKeown, J., dissenting), *cert. granted*, 123 S. Ct. 2075 (2003) (discussed *infra* Part V.A.).

circumscribe, if not completely nullify, their impact on the freedom of religious persons and organizations to participate equally in public benefits.

II. HISTORY

America's collective obsession with public schooling began in the early 1800s, when a fever of enthusiasm in the form of the "common school" movement swept the nation. The idea of public education was closely linked to the idea of moral education—and that in turn was linked with religious training. Unsurprisingly, American public schools had a distinctively religious flavor marked by the majority Protestant ethos of the day. This dismayed the growing number of American Catholics, who, with increasing volume and intermittent success, began asking for public money for their own private schools. But the Protestant majority was alarmed in turn, fearing its tax dollars would be siphoned off for "dark Catholic purposes," and so cries went up for laws to prevent public money going to "sectarian" organizations.[29] The movement culminated, disappointingly for Protestants, in the narrow defeat of a federal constitutional amendment—the Blaine Amendment—in 1875. But rising from the ashes of the federal attempt, a host of like-minded state constitutional provisions flourished over the next quarter-century. Thus were the State Blaines born.[30]

A. *Common Schools*

Before the middle third of the 1800s, there was no public education in America to speak of. Education was largely administered by churches and clergy and was intertwined with religious instruction.[31] But in the 1830s, riding the tide of a "massive evangelical resurgence,"

29. *See, e.g.*, Berg, *supra* note 12, at 130 ("The Protestant majority was always particularly intense and united in opposing state aid to religious schools, which were historically primarily Catholic.").

30. Another recent retelling of the State Blaines' genesis can be found in DeForrest, *supra* note 20, at 556-76; *see also* Joseph P. Viteritti, *Reading* Zelman*: The Triumph of Pluralism, and Its Effects on Liberty, Equality, and Choice*, 76 S. Cal. L. Rev. 1105, 1121-22 (2003) (discussing Protestant-Catholic conflicts presaging passage of the State Blaines).

31. *See, e.g.*, Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 663 (1998) (citing Bernard Bailyn, Education in the Forming of American Society (1960); Richard J. Gabel, Public Funds for Church and Private Schools (1937)). Viteritti notes Tocqueville's statement that, in America, "[a]lmost all education is entrusted to the clergy." *Id.* at 663 (quoting Alexis de Tocqueville, 1 Democracy in America 320 n.4 (Phillips Bradley ed., Random House 1945) (1839)). Philip Hamburger clarifies that Tocqueville's observation was likely suggested by his American editor, John C. Spencer, and referred to Protestant clergy. *See* Philip Hamburger, Separation of Church and State 220 n.75 (2002).

the common-school movement took hold.[32] Its leading figure was Horace Mann, Massachusetts' secretary of education from 1837-49, who championed the infusion of common schools with explicitly religious moral instruction—a curriculum whose theological content evidenced a "pan-Protestant compromise, a vague and inclusive Protestantism" designed to tranquilize conflict among Protestant denominations.[33] Daily reading, without divisive commentary, of the King James Bible—along with recitation of the Lord's Prayer and the singing of hymns—thus became the foundation of religious instruction in the common schools.[34] So entrenched was this vague Protestant ethos that educators like Mann could claim that the common schools' religious content was not "sectarian," insofar as the curriculum excluded doctrines "peculiar to specific denominations but not common to all."[35] Only in this narrow liberal Protestant sense could

32. *See* Jeffries & Ryan, *supra* note 15, at 297 n.83 (citing 1 Anson Phelps Stokes, Church and State in the United States 242 (1950); David B. Tyack, *Onward Christian Soldiers: Religion in the American Common School*, *in* History and Education: The Educational Uses of the Past 212, 217 (Paul Nash ed., 1970)).

33. *See* Jeffries & Ryan, *supra* note 15, at 299 (citing Robert Michaelsen, Piety in the Public School 78-79 (1970)). Jeffries and Ryan explain that the architects of the common school, Mann chief among them, kept religion in the schools and controversy out by "promoting least-common-denominator Protestantism and rejecting particularistic influences." *Id.* at 298; *see also* Berg, *supra* note 12, at 144 (explaining that "the state-operated, or 'common,' schools had been created to overcome the division between Protestant denominations during the first nineteenth-century wave of Catholic immigration—to educate those various Protestant children (and ultimately, it was hoped, their Catholic counterparts) in 'common'" (citing Joseph P. Viteritti, Choosing Equality: School Choice, The Constitution, and Civil Society 147-56 (1999))).

34. *See* Jeffries & Ryan, *supra* note 15, at 298 ("Mann insisted on Bible reading, *without commentary*, as the foundation of moral education."); *id.* at 298 n.86 (noting that "the first textbook used in the United States, the *Hornbook*" contained only the alphabet and the Lord's Prayer); *see also* Bybee, *Origins*, *supra* note 26, at 894 ("The public schools had long been the domain of Protestant Americans. Bible readings and prayers in school reflected Protestant beliefs. Both Protestants and Catholics regarded each other with the suspicion that their respective school systems were tools for propaganda and evangelization."); Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 41 (1992) (noting the "obvious evangelical Protestant overtones to public education"); Hamburger, *supra* note 31, at 220 (describing the Protestant character of instruction in New York City public schools of this period); Viteritti, *supra* note 31, at 666-67 (noting that "Mann's schools required daily reading from the King James version of the Bible . . . [t]he recital of prayers and the singing of hymns").

35. *See* Jeffries & Ryan, *supra* note 15, at 298 (quoting David B. Tyack, *Onward Christian Soldier: Religion in the American Common School*, *in* History and Education: The Educational Uses of the Past 212, 217 (Paul Nash ed., 1970)). Mann, a theologically liberal Unitarian, clashed with more conservative Massachusetts denominations, such as orthodox Congregationalists, Baptists, and Methodists. He dismissed criticism of the common-schools' watered-down Protestant theology, and demands for more substantive religious content, as "sectarian." *Id.* Viteritti highlights the essentially intolerant character of this kind of universalism: "The common-school curriculum promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism and was intolerant of those who were non-

American public schools in the mid-1800s be fairly characterized as "religious but nonsectarian."[36] But the common consensus supporting the common schools' religious and moral foundations plainly excluded Catholics, other non-mainstream believers (Mormons, Jehovah's Witnesses, and the like), and non-believers.[37]

B. *Growing Catholic Population and Influence*

At this time, American Catholics were increasing in numbers and political influence. Through immigration mostly from Ireland and Germany, the Catholic population in the United States increased sharply from a mere 1% of the population during the Revolution to about 3.3% in 1840, 10% in 1866, and 12.9% by 1891.[38] These Catholic immigrants, poor and unfamiliar with American society, flooded into major northern cities such as New York, Chicago, Philadelphia, Boston, and Cincinnati.[39] They were easy targets for discrimination by the "nativist" Protestant population, and such sentiments readily blended with religious hatred. As Philip Hamburger writes:

> Fearful of the foreigners, many native-born Protestants self-consciously identified themselves with America and its native population and, on this basis, these 'nativists' opposed foreign immigration, especially by Irish Catholics. Yet even this sort of secular ethnic and class animosity often blended into the religious prejudice that would do so much to popularize the separation of church and state.[40]

Nonetheless, through sheer numbers, ethnic cohesion and religious identity, American Catholics gained increasing political influence.[41]

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believers." Viteritti, *supra* note 31, at 666.

36. Jeffries & Ryan, *supra* note 15, at 299 (observing that "[f]rom its inception . . . American public education was religious but nonsectarian").

37. *Id.*; *see also* Viteritti, *supra* note 31, at 666 (observing that, while "[t]he American common school was founded on the pretense that religion has no legitimate place in public education . . . [i]n reality it was a particular kind of religion that its proponents sought to isolate from public support").

38. *See* Heytens, *supra* note 22, at 135 & nn.101-10 (providing statistical overview of U.S. Catholic population from 1789 through 1921, relying primarily on U.S. Dep't of Commerce, Historical Statistics of the United States (1975), and James Hennesey, American Catholics: A History of the Roman Catholic Church Community in the United States (1981)); *see also* Bybee & Newton, *supra* note 9, at 555 (explaining the same statistics); Jeffries & Ryan, *supra* note 15, at 299-300 & nn.98-103 (using similar statistical sources).

39. *See, e.g.*, Hamburger, *supra* note 31, at 202; Viteritti, *supra* note 31, at 669.

40. Hamburger, *supra* note 31, at 202; *see also* Berg, *supra* note 12, at 130 (discussing the "long history" of American anti-Catholicism).

41. *See, e.g.*, Bybee & Newton, *supra* note 9, at 555; Green, *supra* note 34, at 42-43; Viteritti, *supra* note 31, at 669. Bybee and Newton observe that "by 1876, it was generally assumed that the Catholic vote had 'determined the results of elections since 1870.'" Bybee & Newton, *supra* note 9, at 555 (quoting Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Political Action*, 42

The Protestant-dominated public school system would furnish the inevitable political battleground, pitting Catholics' desires for educational and societal equality against nativist Protestants' fears of Catholic influence.

C. *Conflict over School Funding*

The explicit religious practices widespread in American public schools of this period were a direct affront to Catholics' religious beliefs.[42] Not only did the Catholic Church not recognize the King James translation of the Bible—the only officially approved English translation of the Bible was the Douay version—but daily "[u]naccompanied Bible reading, which was the cornerstone of the Protestant consensus," violated Catholic conviction that scripture should be read only in the context of the Church's authoritative doctrinal tradition.[43] Textbooks, moreover, often denigrated Catholics and their faith.[44] Catholics responded by exercising their growing political power to oppose Protestant religious practices in public schools and, beyond that, to request public funds for their own schools.[45] This provoked from the Protestant establishment "a display

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Cath. Hist. Rev. 15, 32 (1957)).

42. *See, e.g.*, Viteritti, *supra* note 31, at 667 (noting that although Massachusetts was the only state to mandate Bible reading in public schools by law, "between seventy-five and eighty percent of the schools in the country voluntarily followed the practice"). Viteritti discusses the 1854 decision in *Donahue v. Richards*, in which the highest court in Maine ruled that requiring students to read the King James Bible in public schools was "not an infringement of religious freedom," thereby upholding the expulsion of a Catholic teenager for refusing to read the Bible in class. *Id.* at 667-68 (discussing *Donohue v. Richards*, 38 Me. 376 (1854)).

43. *See, e.g.*, Jeffries & Ryan, *supra* note 15, at 300 (observing that "the very fact of a direct and unmediated approach to God contradicted Catholic doctrine," that the Douay Bible—aside from being the Church's approved translation—"also [provided] authoritative annotation and comment," and that, according to Church teaching, "[r]eading the unadorned text invited the error of private interpretation").

44. *See, e.g.*, Hamburger, *supra* note 31, at 220 (observing that the New York City "Public School Society," which received public funds, operated ostensibly nondenominational schools that "required children to read the King James Bible and to use textbooks in which Catholics were condemned as deceitful, bigoted, and intolerant"); *id.* at 223 (noting that the Public School Society later attempted to bolster the claim that its schools were nonsectarian "by offering to black out the most bigoted anti-Catholic references in its textbooks"); *id.* at 223 n.83 (discussing the report of a special school committee that, while generally defending the nonsectarian character of New York City public schools, nonetheless reported as "not wholly unfounded" charges that "the books used in the public schools contain passages that are calculated to prejudice the minds of children against the Catholic faith").

45. *See, e.g.*, Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 Yale L. & Pol'y Rev. 113, 145 (1996) ("Church leaders in Philadelphia, Boston, Baltimore, and New York City resisted the blatant Protestantism that had dominated the public school curriculum in the form of prayers, hymns, and bible reading (the King James version, of course) and eventually began to set up their own schools."); *see also* Bradley, *supra* note 18, at 9 (stating that "a separate Catholic school system was started in this

of majoritarian politics of unprecedented brutality."[46] Catholics' request for school funds inflamed latent Protestant fears of Catholic domination. For instance, the Board of Assistants of New York City—a focal point for the school funding controversy—issued an influential report that invoked fears of "[r]eligious zeal, degenerating into fanaticism and bigotry, [that] has covered many battle-fields with its victims" as well as macabre images of "the stake, the gibbet, and the prison."[47] Such rhetoric provoked mob violence against Catholics, as, for example, when the residence of the Catholic Bishop of New York City, John Hughes, was destroyed and the militia were enlisted to defend St. Patrick's Cathedral.[48]

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country to protect Catholic children from the scandal of aggressive Protestantism in the public schools" (citations omitted)).

46. *See* Viteritti, *supra* note 31, at 669.

47. *See* Hamburger, *supra* note 31, at 222 (reproducing the New York City Board of Assistants' report rejecting the Catholics' petition for school funding); *see generally id.* at 219-29 (discussing the New York City school funding controversy). Partly fueling Protestant fears was the belief that Catholic doctrines were incompatible with American ideals of freedom and individual conscience: This belief was understandable in light of Papal statements of the period criticizing the separation of church and state and religious liberty. *See, e.g.*, Stephen Macedo, Diversity and Distrust: Civic Education in a Multicultural Democracy 61 (2000) (observing that America's "core principles of individual freedom and democratic equality" were seen to be threatened by the Catholic Church's "authoritarian institutional structure, its long-standing association with feudal or monarchical governments, its insistence on close ties between church and state, its endorsement of censorship, and its rejection of individual rights to freedom of conscience and worship"); *see also* Jeffries & Ryan, *supra* note 15, at 302-03 (stating that "Rome hampered attempts by American Catholics to abandon the Church's legacy by issuing reactionary pronouncements ideally suited to confirm the rankest prejudice," and discussing attacks by Pope Gregory XVI and Pius IX on secular education and freedom of conscience); Bybee & Newton, *supra* note 9, at 555 (noting that "[t]he Vatican Decree of Papal Infallibility of 1870 added to the anti-Catholic sentiment during this time" (citing Anson Phelps Stokes & Leo Pfeffer, Church and State in the United States 329 (1964))); *see also generally* Hamburger, *supra* note 31, at 229-34 (discussing American Protestant reactions to Papal condemnation of separationism, especially Gregory XVI's 1832 encyclical *Mirari Vos*). Indeed, as Thomas Berg explains, as late as the 1950s, Protestants continued to be plausibly threatened by the Vatican's official position that "religious freedom was not a moral ideal in itself, but at most a prudential accommodation to the fact of diversity in religious beliefs," and that the ideal was "a Catholic confessional state with support for the Church and at least some restrictions on the educational and evangelistic activities of other faiths." Berg, *supra* note 12, at 133. With the Second Vatican Council of the 1960s, however, the Vatican clearly recognized religious freedom as a human right in its Declaration on Religious Freedom, which was strongly influenced by the work of John Courtney Murray. *Id.* at 135-36 (citing John Courtney Murray, Governmental Repression of Heresy (1948), and John Courtney Murray, The Problem of Religious Freedom (1965)); *see also* John T. Noonan, Jr., The Lustre of Our Country: The American Experience of Religious Freedom 333 (1998) (discussing Murray's conflicts with the Vatican over the question of religious freedom).

48. *See* Viteritti, *supra* note 31, at 669; *see also* Hamburger, *supra* note 31, at 216-17 ("Aroused by religious prejudice, fears about political and mental liberty, and fantasies about sexual violation, American mobs violently attacked Catholics."). Hamburger points to the Protestant practice in the 1830s of "burning down Catholic

A more systematic reaction arose in the form of legislation forbidding "sectarian control" over public schools and blocking any diversion of public money to religious institutions.[49] Roughly by the time of the attempted federal Blaine Amendment in 1875, fourteen states had passed state laws—some in the form of constitutional amendments—to seal off public funds from sectarian control.[50] Emblematic was the 1840s New York law (a direct precursor of an 1894 provision in the New York Constitution) that prohibited public funding of any school where "'any religious sectarian doctrine or tenet shall be taught, inculcated, or practiced.'"[51]

D. *The Federal Blaine Amendment*

The bitter fight over school funding eventually began to have national reverberations. On September 30, 1875, President Ulysses S. Grant gave an important speech in which he capitalized on Protestant alarm at perceived Catholic incursions into American education. Delivered in Des Moines, Iowa, to a convention of the Society of the Army of the Tennessee, Grant's address palpitated with anti-Catholic implications:

> If we are to have another contest in the near future of our national existence, I predict that the dividing line will not be Mason and Dixon's, but it will be between patriotism and intelligence on one side, and superstition, ambition and ignorance on the other. In this centennial year, the work of strengthening the foundation of the structure laid by our forefathers one hundred years ago, should be begun. Let us all labor for the security of free thought, free speech, and pure morals, unfettered religious sentiments, and equal rights and privileges for all men, irrespective of nationality, color or religion. *Encourage free schools, and resolve that not one dollar appropriated to them shall be applied to the support of any sectarian school.* Resolve that neither the State or nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child in the land the opportunity of a good common school education, *unmixed with atheistic, pagan, or sectarian tenets.*

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churches, their most notorious achievement being the destruction in 1834 of the Ursuline convent in Charlestown, Massachusetts." *Id.* at 216. Thomas Berg notes that "[a]nti-Catholicism has had a long history in America, from outbreaks of mob violence in the mid-1800s against Catholic immigrants in Philadelphia and New York to the nativist, anti-immigrant campaign in the 1920s to make private schools illegal." Berg, *supra* note 12, at 130 (citing Lloyd Jorgensen, The State and the Nonpublic School, 1825-1925, at 69-110 (1987), and Viteritti, *supra* note 45, at 151).

49. *See* Green, *supra* note 34, at 43; *see also* Viteritti, *supra* note 31, at 669 (describing the drafting, in the 1854 Massachusetts legislature controlled by the anti-Catholic "Know-Nothing" Party, of "the first state laws to prohibit aid to sectarian schools").

50. *See* Green, *supra* note 34, at 43; Berg, *supra* note 12, at 130.

51. *See* Jeffries & Ryan, *supra* note 15, at 301 (citation omitted); *see also* Viteritti, *supra* note 45, at 146 n.176 (dating New York law from 1844); 1844 N.Y. Laws ch. 320, § 12.

> Leave the matter of religion to the family altar, the church, and the private schools, supported entirely by private contribution. Keep the Church and State forever separate.[52]

Grant's speech was an obvious partisan move to shore up his Republican party, which had been wounded by corruption and had lost significant political capital in the last national election.[53] The speech effectively allied the Republicans with mainstream Protestants and with a popular, anti-Catholic form of church-state separation.[54] Less than three months later, in his annual message to Congress on December 7, 1875, Grant proposed a constitutional amendment

> making it the duty of each of the several States to establish and forever maintain free public schools . . . forbidding the teaching in said schools of religious, atheistic, or pagan tenets; and prohibiting the granting of any school funds or taxes, or any part thereof, either by the legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination, or in aid or for the benefit of any other object of any nature or kind whatever.[55]

Grant ornamented his proposal with warnings that, lacking adequate intelligence and education, "ignorant men [may] sink into acquiescence to the will of intelligence, whether directed by the demagogue or by priestcraft."[56] Grant's proposal was hailed by the *New York Times* and *Tribune*, by *Harper's Weekly*, and by the *Chicago Tribune*.[57] But, as Philip Hamburger describes, not everyone was so sanguine about the amendment's assault on federalism: "The proposed amendment's intrusion into traditional state powers provoked astonishment among such Americans as were not utterly blinded by anti-Catholicism."[58]

Unfazed by such subtleties, Congressman James G. Blaine of Maine

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52. *See* Hamburger, *supra* note 31, at 322 (reproducing the text of Grant's speech) (emphasis added); *see also* Green, *supra* note 34, at 47-48 (discussing Grant's speech); Viteritti, *supra* note 31, at 670 (discussing the same speech).

53. *See* Green, *supra* note 34, at 48-49.

54. Green, *supra* note 34, at 48; *see also* Hamburger, *supra* note 31, at 322 (observing that in the speech, Grant "made separation part of the Republicans' agenda"); Viteritti, *supra* note 31, at 670 (Grant's speech, followed by his proposal for a constitutional amendment, "would align the Republican party with the anti-Catholic wing of the public-school lobby").

55. Green, *supra* note 34, at 52; Viteritti, *supra* note 31, at 670.

56. Bybee & Newton, *supra* note 9, at 551 (quoting Grant's proposal to Congress); *see also* 4 Cong. Rec. 175 (1876). A less remarked part of the proposal advocated the taxation of church property—Grant provided an exaggerated estimate of expected revenues—hinting darkly that "[t]he contemplation of so vast a property as here alluded to, without taxation, may lead to sequestration without constitutional authority and through blood." Hamburger, *supra* note 31, at 323-24; *see also* Green, *supra* note 34, at 53 n.95 (noting that only the *Catholic World* criticized the taxation proposal).

57. Green, *supra* note 34, at 52-53.

58. Hamburger, *supra* note 31, at 323 n.93.

eagerly picked up Grant's gauntlet when, one week later on December 14, 1875, Blaine proposed a constitutional amendment embodying the most popular of Grant's ideas.[59] Having lost the House Speaker's chair in the Republican congressional reversals of 1874, Blaine had set his sights on the Republican presidential nomination for the 1876 election.[60] The substance of Blaine's proposed amendment met with widespread approval (except, of course, from Catholics), but most people saw, beneath the veneer of fashionable anti-Catholicism, a transparent attempt to garner political support.[61] Blaine himself—whose own mother was Catholic and whose daughters went to Catholic boarding schools—denied any anti-Catholic motivations and explained in an open letter that his proposal was merely designed to suppress religious conflict by definitively settling the school funding controversy.[62] Blaine was more likely engaged in rank political opportunism. Once it was clear that Blaine had lost the presidential nomination to Rutherford B. Hayes, he lost all interest in the amendment, participated in none of the congressional debates, and—strikingly, as Blaine had assumed a seat in the Senate by the time that body considered the amendment—did not even show up for the Senate vote on the proposal, which failed to pass by only four votes.[63]

Blaine's proposed amendment "rewrote the First Amendment to apply it to the states and to specify a single logical consequence of separation—the one most popular with anti-Catholic voters":[64]

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.[65]

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59. *See id.* at 324.

60. *See* Green, *supra* note 34, at 49.

61. *Id.* at 53-54 ("[F]ew people were fooled by Blaine's motives. Blaine was running for President, and the school amendment was recognized as a means of garnering support." (citation omitted)); *see also* Viteritti, *supra* note 31, at 671 (noting that "Blaine's transparent political gesture against the Catholic Church provoked considerable press commentary," including denunciations from the *Catholic World*). Even the *Nation*, sympathetic to Blaine's cause, conceded that the "anti-Catholic excitement was, as everyone knows now, a mere flurry" and that "all that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes." Viteritti, *supra* note 31, at 672 (citation omitted); *see also* Green, *supra* note 34, at 54.

62. Green, *supra* note 34, at 49-50, 54 & n.103.

63. *See id.* at 54 & n.107, 67-68; Bybee & Newton, *supra* note 9, at 557 n.31.

64. *See* Hamburger, *supra* note 31, at 297.

65. *Id.* at 297-98; *see* 4 Cong. Rec. 205 (1875); *see also* Bybee & Newton, *supra* note 9, at 551-52, 557 & n.31 (summarizing and quoting the text of the amendment); Green, *supra* note 34, at 53 n.96 (quoting the text of the amendment).

The proposed amendment passed the House, with an addendum specifying that it did not "vest, enlarge, or diminish legislative power in the Congress," by a vote of 180 to 7.[66] During the more extensive Senate debate on the proposal, some senators expressed confusion about the scope and application of its language.[67] The Senate subsequently proposed a more absolutist version that would have categorically prohibited any "public property," "public revenue" or "loan of credit" from being "appropriated to or made or used for the support of any school or other institution under the control of any religious or anti-religious sect, organization, or denomination" or where the "creed or tenets" of such groups were taught.[68] Notably, the Senate proposal provided that its language "shall not be construed to prohibit the reading of the Bible in any school or institution."[69] The Senate version failed to garner the required two-thirds majority by a mere four votes—twenty-eight to sixteen (with twenty-seven members not present, including Blaine himself)—and failed.[70]

A final political wrinkle, developed in detail in Philip Hamburger's recent work, deserves mention.[71] Whereas the 1830s-50s surge in anti-Catholicism was almost exclusively fueled by nativist Protestants, the 1860s-70s surge that culminated with the failed Blaine Amendment included a significant additional motivating force: the "secularists" or "Liberals." This diverse group united a wide variety of atheists, theists, and spiritualists in a common resentment and mistrust of Christianity's influence on government.[72] They were best exemplified by the Free Religious Association, in its central publication, *The Index*, and by the founder of *The Index*, Francis Ellingwood Abbot.[73] The Liberals were fueled in part by the misguided efforts of some Protestants under the banner of the National Reform Association, to pass a "Christian Amendment" to the U.S. Constitution. Abbot formed the National Liberal League—devoted to "the absolute separation of church and state"—to fight the Christian Amendment

66. *See* 4 Cong. Rec. 5189-92 (1876); Bybee & Newton, *supra* note 9, at 557 & n.32; Green, *supra* note 34, at 58-59.

67. *See* Bybee & Newton, *supra* note 9, at 557-58. There appeared to be confusion over whether the language prohibited only certain sources of public funds from being applied to sectarian education, and also whether public funds might still be used for other sectarian activities besides education. *Id.*

68. *See* 4 Cong. Rec. 5453 (1876); Bybee & Newton, *supra* note 9, at 558 & n.37 (discussing the text of the Senate proposal); *see also* Jeffries & Ryan, *supra* note 15, at 302 (stating that "[t]he [Senate's] final version laboriously attempted to close every possible loophole through which public money might flow to religious schools").

69. *See* Bybee & Newton, *supra* note 9, at 558 n.37.

70. 4 Cong. Rec. 5595 (1876); *see* Bybee & Newton, *supra* note 9, at 558; *see also* Green, *supra* note 34, at 67; Viteritti, *supra* note 31, at 672 & n.72 (citing Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 Harv. L. Rev. 939, 942, 944 (1951)).

71. *See generally* Hamburger, *supra* note 31, at 287-334.

72. *See id.* at 288-90.

73. *Id.*

with secularizing counter-proposals.[74] He distilled Liberal philosophy into the 1872 publication, *The Demands of Liberalism*, which presciently tracked many of the most difficult church-state issues that the Supreme Court would face in the twentieth century, including church tax-exemptions, legislative chaplains, Sunday laws, and Bible reading in public schools.[75] Significantly, Abbot included in his *Demands* that "all public appropriations for sectarian educational and charitable institutions shall cease," and that in both the federal and state constitutions "no privilege or advantage shall be conceded to Christianity or any other special religion" and that "our entire political system shall be founded and administered on a purely secular basis."[76]

Liberals did not think the Blaine Amendment went nearly far enough in extirpating all vestiges of religion from government. They viewed it merely as an anti-Catholic measure that explicitly preserved a generalized, non-divisive Protestantism in public schools.[77] The competing amendment proposed by Liberals in 1876 contained more explicit and comprehensive safeguards than the Blaine Amendment (particularly the House version). For instance, the Liberal amendment would have prohibited "taxing the people of any State, either directly or indirectly, for the support of any sect of religious body or of any number of sects or religious bodies;" it would have protected a person's right not to be "required by law to contribute directly or indirectly to the support of any religious society or body of which he or she is not a voluntary member;" and, reminiscent of the absolutist language that would appear sixty years later in the seminal *Everson* decision,[78] it would have prevented any governmental unit from "levy[ing] any tax, or mak[ing] any gift, grant or appropriation, for the support, or in aid of, any church, religious sect, or denomination," or any religious school or charity.[79]

As such proposals show, the Liberal ethos took separationism to its logical extreme. "Liberals," writes Philip Hamburger, "viewed all Christians with the same fear and horror Protestants reserved for Catholics."[80] All government connections to religion had to be uprooted. Significantly, Liberals asserted that religious groups should be barred from participating even in public benefits distributed on

74. *Id.* at 290-93.
75. *See id.* at 294-95 n.21.
76. *Id.*
77. *Id.* at 298.
78. *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (claiming that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion").
79. Hamburger, *supra* note 31, at 294 n.21.
80. *Id.* at 302.

secular grounds.[81] This principle would have excluded all neutrally available public appropriations for religious education or religious charities. Interestingly, the Liberals seemed to make an exception for appropriations to individuals who were religious, but not for religious groups.[82]

But the Liberals' radically secular project was a political failure.[83] It was the traditionally Protestant, anti-Catholic version of separationism that proved to be more politically viable, even if it, too, did not achieve ultimate national success in the federal Blaine Amendment. The narrower House version of the amendment in particular, as well as the Bible-reading proviso of the more rigorous Senate version, plainly departed from Liberal secularist dogma.[84] Consequently, in the wake of the federal Blaine Amendment's defeat, the nativist Protestants were more successful at securing passage of local versions in state constitutions.[85] The Liberals, who had made themselves distasteful to mainstream Americans through their rigid, fundamentalist attachment to separation and secularism, were reduced to "piecemeal lobbying and cultural agitation" to spread their cause.[86] Yet, it will be useful to keep in mind the Liberals' radical secularist agenda when considering some of the similarly absolutist approaches in many of the State Blaine Amendments.

E. *The Spread of State Blaines*

Charles Russell, one of James Blaine's biographers, provided this bleak summary of Blaine's accomplishments: "No man in our annals has filled so large a space and left it so empty."[87] But from the perspective of actual laws passed, Blaine's real legacy lay in the numerous state constitutional amendments spawned after the failure of his federal amendment.[88] The nativist Protestant version of separationism had gradually become part of the Republican agenda and thus, while many states adopted Blaine-like provisions voluntarily, many others were required to incorporate some form of a

81. *Id.* at 304-05 n.43 (explaining the Liberal view that "[e]ven government benefits distributed on purely secular grounds could not be given to religious organizations").

82. *Id.* at 305.

83. *See generally id.* at 321-28.

84. *See supra* notes 65-76 and accompanying text.

85. *See* Hamburger, *supra* note 31, at 335, 338.

86. *Id.* at 338.

87. *See* Marvin Olasky, *Breaking Through Blaine's Roadblock*, World, Aug. 24, 2002, at 1 (quoting Charles Russell's 1933 biography of Blaine).

88. *See, e.g.*, Viteritti, *supra* note 45, at 146; *see also* Bybee & Newton, *supra* note 9, at 559 ("What Congress failed to adopt for the nation, most of the states enacted for themselves.").

"non-sectarian" provision into their state constitutions as a price for entering the union.[89]

The general rise and spread of State Blaines can be charted as follows. The school funding controversy beginning in the 1830s gave rise to increasing state legislation restricting religious school funding, sometimes in the form of state constitutional amendments. The failed attempt in the 1870s to pass the federal Blaine Amendment lent momentum to this anti-funding movement, resulting in a proliferation of state constitutional amendments in the closing years of the nineteenth century. As discussed above, New York adopted a restrictive funding law in the 1840s, and, by 1876, fourteen other states had "joined New York in passing measures prohibiting the division of public school funds, often in the form of constitutional amendments."[90]

During the 1870s alone, twelve states—Illinois, Pennsylvania, Missouri, Alabama, Nebraska, Colorado, Texas, Georgia, New Hampshire, Minnesota, California and Louisiana—adopted provisions similar to the federal Blaine Amendment.[91] Following the defeat of the federal Blaine Amendment, Congress also began to require newly admitted states to adopt some form of an anti-sectarian amendment in their own constitutions.[92] For example, the 1889 Enabling Act that

89. *See* Bybee & Newton, *supra* note 9, at 559 (noting that "Congress began requiring new states, as a condition of their entering the union, to include some kind of Little Blaine Amendment in their constitution"); Hamburger, *supra* note 31, at 322 (observing that Grant's 1875 speech "made separation part of the Republicans' agenda"); Viteritti, *supra* note 31, at 672-73 (documenting the Republican agenda to force new states to enact Blaine Amendments focused primarily on new western states). The actual substance of the various state provisions will be discussed *infra*, Part III.

90. Green, *supra* note 34, at 43; *see supra* note 51 and accompanying text.

91. My primary source for the texts of State Blaine Amendments from 1848-1909 is the 1909 edition of the Thorpe treatise. *See generally* 1-7 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws (Francis Newton Thorpe ed., 1909) [hereinafter Federal and State Constitutions]; *see also* Bybee & Newton, *supra* note 9, at 559 n.44; Green, *supra* note 34, at 43 n.33 (citing W. Blakey, American State Papers 237-66 (1890)). Other commentators have estimated that only eight or nine states enacted anti-funding provisions in the 1870s. *See, e.g.*, Bybee & Newton, *supra* note 9, at 559 n.44; Viteritti, *supra* note 31, at 673 n.78 (citing Lloyd P. Jorgenson, The State and the Non-Public School, 1825-1925, at 114 (1987)). My count—which, as explained below, takes the view that a relevant provision is one that explicitly bars access to public funds on religious grounds—shows twelve states. I do not find that any anti-funding provision was added to the New Jersey Constitution in the 1870s, as other commentators have stated. *See* 7 Federal and State Constitutions, *supra*, at 4186-4204; Viteritti, *supra* note 31, at 673 n.78. Also, I would mention the Alabama provision of 1875, the Georgia and New Hampshire provisions of 1877, and the Louisiana provision of 1879, which seem to often escape notice. Finally, I do not include Nevada's anti-funding provision in the 1870s because it was not finally approved until the Nevada general election of 1880. Bybee & Newton, *supra* note 9, at 566.

92. *See* Bybee & Newton, *supra* note 9, at 559 n.46; Viteritti, *supra* note 31, at 673 & n.76; *see also* Hamburger, *supra* note 31, at 335 (observing that "[n]ativist

ushered North Dakota, South Dakota, Montana and Washington into the union required that those states' constitutional conventions "'provide, by ordinances irrevocable without the consent of the United States and the people of said States . . . for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control."[93] The same requirement was contained in the Enabling Acts authorizing the statehood of Utah, Oklahoma, New Mexico, Arizona and Wyoming.[94]

By 1890, twenty-nine states in all had incorporated into their constitutions explicit prohibitions against the allocation of public funds to sectarian schools and other institutions.[95] The next section

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Protestants . . . because of the strength of anti-Catholic feeling, managed to secure local versions of the Blaine amendment in a vast majority of the states"); *id.* at 338 ("Not only did [nativist Protestants] renew their efforts to obtain state constitutional prohibitions on the distribution of benefits to sectarian-controlled schools, but they also demanded that Congress require such clauses in the constitutions of territories seeking admission to the Union.").

93. *See* McCollum v. Bd. of Educ., 333 U.S. 203, 220 n.9 (1948) (Frankfurter, J., concurring). One should be cautious in making too much of congressional "compulsion." As the language of the Enabling Acts indicates, Congress did not specify that the newly-admitted states must adopt Blaine-type formulations in their constitutions. *But see* DeForrest, *supra* note 20, at 573 (stating that "Congress did compel the inclusion of Blaine Amendment language in some state constitutions," and referring to the 1889 Enabling Act (citing Viteritti, *supra* note 31, at 673)). But the heightened national sensitivity to Catholic incursion into education, was, I think, evidenced by Congress' requirement that public school systems be "free from sectarian control." *See McCollum*, 333 U.S. at 220 n.9 (Frankfurter, J., concurring). The states presumably could have complied with such a directive through a variety of constitutional formulations—most obviously, by providing that state public schools would be "free from sectarian control." But, as detailed below, in response to the Enabling Acts, the states went further, adopting explicit religion-sensitive restrictions in their constitutions that either tracked or went beyond the federal Blaine Amendment. *See infra* Part III.

94. *See McCollum*, 333 U.S. at 220 n.9 (citing 28 Stat. 107, 108 (Utah); 34 Stat. 267, 270 (Oklahoma); 36 Stat. 557, 559, 570 (New Mexico and Arizona); Wyo. Const., 1889, Ordinances, § 5); *see also* Viteritti, *supra* note 31, at 673 (discussing requirement for inclusion of State Blaine Amendment in the New Mexico Constitution); *cf.* Bybee & Newton, *supra* note 9, at 560 (discussing earlier Nevada Enabling Act, which required Nevada to secure in its constitution "'perfect toleration of religious sentiment'" and that "'no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship'" (quoting 13 Stat. 31, § 4 (1864))). Bybee and Newton note that "Congress placed similar restrictions in the enabling acts for the constitutions of Arizona, Idaho, New Mexico, North Dakota, South Dakota, Utah, Washington, and Wyoming." *Id.* at 560 n.51 (citing Anson Phelps Stokes & Leo Pfeffer, Church and State in the United States 158 (1964)).

95. *See, e.g.*, Green, *supra* note 34, at 43; Viteritti, *supra* note 31, at 673; Viteritti, *supra* note 45, at 146-47; *see also* Bybee & Newton, *supra* note 9, at 559 & n.46 (noting some counting inconsistencies among commentators); Heytens, *supra* note 38, at 123 n.32 (stating that approximately thirty state constitutions currently contain some form of Blaine Amendment, but that commentators often report numbers varying from twenty-four to thirty-three). My own canvass confirms that, by 1890, twenty-nine states had incorporated Blaine provisions into their constitutions. As the following section will demonstrate, I find thirty-six State Blaine Amendments by 1911 and thirty-eight after Alaska and Hawaii entered the union in 1959. Because Louisiana

will examine the various linguistic formulas in which the State Blaine Amendments concretized those objectives, and how that language may operate today. While the State Blaines arose out of a specific historical context—as described in this section, they are the legal offspring of the Protestant-Catholic school funding crisis and the political opportunism of Grant and Blaine[96] —today the State Blaines have a far more generalized operation in American public life. They are a widespread mechanism for separating public benefits from all religious institutions and religious individuals.

III. STATE BLAINES: LANGUAGE AND INTERPRETATION

The categorization of a particular state constitutional provision as a "Blaine Amendment" can be plausibly approached from various perspectives—e.g., when the provision was adopted, whether it is directly traceable to the aftermath of the failed attempt to amend the federal constitution, how state courts have interpreted it, etc.—and this probably explains why different treatments of the subject find different numbers of existing State Blaines.[97] Given the parameters of my legal analysis, I propose a straightforward method of characterizing a constitutional provision as a State Blaine Amendment, focusing principally on language. For my purposes, a State Blaine means a state constitutional provision that bars persons' and organizations' access to public benefits explicitly because they are religious persons or organizations.

This is a broad definition and, consequently, the parameters of individual State Blaines will vary. For instance, some bar equal participation in public aid only to religious schools; others bar religious organizations or institutions; yet others bar non-public institutions generally, while explicitly including religious institutions in that category. State Blaines also vary in the language used to describe the bar on equal participation. But, whatever range of disabilities or disqualifications exists in the various State Blaines, all of them turn on the religious affiliation of the disabled or disqualified person, status,

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deleted its Blaine Amendment in 1974, I find that the present number of State Blaine Amendments is thirty-seven.

96. *See, e.g.*, Bybee & Newton, *supra* note 9, at 560 (explaining that "[a]lthough the states adopted various . . . Blaine Amendments, it is at least clear that the states generally intended to forbid the use of public funds in sectarian schools; and in some cases, it appears that the amendments extended to other sectarian institutions as well"); *see also* DeForrest, *supra* note 20, at 555 (arguing that the State Blaines "were motivated by a desire to preserve an unofficial Protestant establishment in public education, and to ensure that minority religions—Catholicism, in particular—would be unable to officially challenge that unofficial establishment").

97. *See, e.g.*, Heytens, *supra* note 38, at 123 & n.32 (discussing counting discrepancies); *see also supra* notes 91, 95.

or organization. The plain object of disabling religion is what unifies the State Blaines.[98]

State courts' interpretation of the nuances of how a particular State Blaine applies will not be exhaustively explored, but two aspects of state court interpretation will be emphasized. First, I will point out when a state court has explicitly recognized that a State Blaine creates a greater separation between church and state than the federal Establishment Clause. Second, I will point out when a state court has done the reverse, interpreting a plainly separationist State Blaine Amendment as doing nothing more than mimicking the parameters of the federal religion clauses. In either case, focusing on these state court interpretations will highlight the federalism aspects of the State Blaine Amendments—i.e., whether they have been interpreted simply to reinforce at the state level the separation the federal clauses already achieve, or whether they have been read to further a distinctive form of church-state separation that exceeds the separation between religion and public funds imposed by the federal religion clauses.

A. *Language*

As discussed before, by 1876—just after the failure of the federal Blaine Amendment—fifteen states had adopted some kind of law that explicitly prohibited public funding of religious organizations.[99] These anti-funding measures often found their way into state constitutions. As early as 1848, the Wisconsin Constitution provided: "nor shall any money be drawn from the treasury for the benefit of religious societies, or religious, or theological seminaries."[100] In the 1850s, five states incorporated similar provisions into their constitutions. The Michigan Constitution of 1850 provided that "[n]o money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the State be appropriated for any such

98. My treatment of the State Blaines does not foreclose an analysis that categorizes them along a "continuum" according to how restrictively or expansively a particular provision bars public funding of religion. *See, e.g.*, DeForrest, *supra* note 20, at 576-601 (categorizing State Blaines generally as "less restrictive," "moderate," or "most restrictive"). My argument does suggest, however, that in whatever context a State Blaine operates (for instance, whether it bars "direct" funding only or also "indirect" funding, or whether it applies only to education or to a broader range of persons and institutions), State Blaines generally impose disabilities on the basis of religion and, to that extent, are unconstitutional. For instance, even though Mark DeForrest distinguishes among the State Blaines according to the severity of their funding restrictions, *id.*, he concludes that "[w]ith some notable exceptions, State Blaine provisions specifically target religious institutions for disparate treatment from other private organizations and individuals," *id.* at 607.

99. *See supra* note 90 and accompanying text.

100. Wis. Const. art. I, § 18 (added 1848).

purposes."[101] In 1851, Indiana added a similar prohibition to its Constitution.[102] Taking an obverse approach, the Ohio Constitution of 1851 required that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state."[103] In 1855, Massachusetts provided in its constitution that funds raised for "public" or "common" schools "shall never be appropriated to any religious sect for the maintenance exclusively of its own schools."[104] Both Kansas[105] and Oregon[106] followed suit in 1859.

The end of the 1860s and the first half of the 1870s saw similar provisions adopted by South Carolina, Illinois, Pennsylvania, Missouri, Alabama and Nebraska.[107] Illinois adopted an unusually detailed provision barring any payments "in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever" and also forbidding any grant of "land, money, or other personal

101. Mich. Const. art. IV, § 40 (1850); *see* Mich. Const. art. VIII, § 2 (amended 1970).

102. Ind. Const. art I, § 6 (added 1851) (providing that "[n]o money shall be drawn from the treasury, for the benefit of any religious or theological institution").

103. Ohio Const. art. VI, § 2 (added 1851).

104. Mass. Const. art. XVIII (1855).

105. Kan. Const. art. VI, § 8 (1859) (providing that "[n]o religious sect or sects shall ever control any part of the common-school or University funds of the State"). This language was amended and moved to art. VI, § 6 in 1966. *See* Kan. Const. art. VI, § 6 (amended 1966).

106. Or. Const. art. I, § 5 (providing that "[n]o money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution" and forbidding that "any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly").

107. *See* Ala. Const. art. XIII, § 8 (1875) (forbidding educational funds being "appropriated to, or used for, the support of any sectarian or denominational school"); *id.* art. XIV, § 263 (amended 1901); Ill. Const. art. VIII, § 3 (1870) (forbidding, *inter alia*, appropriation of public funds for "anything in aid of any church or sectarian purpose") (renumbered art. X, § 3 (1970)); Mo. Const. art. XI, § 11 (1875) (forbidding any payment of public funds "in aid of any religious creed, church or sectarian purpose" and to any school "controlled by any religious creed, church or sectarian denomination whatever") (renumbered art. IX, § 8); Neb. Const. art. VIII, § 11 (1875) (forbidding "sectarian instruction . . . in any school or institution supported in whole or in part by [public school funds]" and state acceptance of any grant of property "to be used for sectarian purposes"); *id.* art. VII, § 11 (amended 1976); Pa. Const. art. III, § 18 (1874) (forbidding appropriations "for charitable, educational or benevolent purposes . . . to any denominational or sectarian institution, corporation or association"); *id.* art. III, § 29 (1967); S.C. Const. art. X, § 5 (1868) (providing that "[n]o religious sect or sects shall have exclusive right to or control of any part of the school-funds of the State"), *renumbered and amended by* S.C. Const. art. XI, § 4 (1973). The Pennsylvania and Nebraska Constitutions were further amended in 1963 and 1976, respectively, to impose more specific restrictions against the use of public funds for religious purposes. *See* Neb. Const. art. VII, § 11 (amended 1976); Pa. Const. art. III, § 29 (added 1963); *see also infra* notes 127, 129 and accompanying text.

property . . . to any church or for any sectarian purpose."[108] In the latter half of the 1870s—the period directly coinciding with the failure of the federal Blaine Amendment—Colorado, Texas, Georgia, New Hampshire, Minnesota, California, and Louisiana also adopted anti-funding provisions.[109] Georgia[110] and Minnesota's[111] 1877 provisions were notably explicit about the range and character of excluded institutions.

New Hampshire was an instructive and ironic case in point. Since 1784, New Hampshire's constitution had eloquently charged its legislature with promoting the educational flourishing of New Hampshire citizens:

> Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades,

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108. Ill. Const. art. VIII, § 3 (1870) (renumbered art. X, § 3 (1970)).

109. *See* Cal. Const. art. IV, § 30 (1879) (providing that no governmental body "shall ever . . . grant anything to or in aid of any religious sect, church, creed, or sectarian purpose"); Cal. Const. art. XVI, § 5, art. IX, § 8 (amended 1966); Colo. Const. art. IX, § 7 (adopting an anti-funding provision identical to article VIII, §3 of the 1870 Illinois Constitution, article 8, section 33 (1874)); *id.* art. V, § 34 (1876) (prohibiting "charitable, industrial, educational or benevolent" appropriations to any "denominational or sectarian institution or association," much like article III, section 18 of the 1874 Pennsylvania Constitution (1874)); Ga. Const. art. I, §1, ¶ XIV (1877) (including a similar prohibition); Minn. Const. art. XIII, § 2 (enacting the same provision); N.H. Const. pt. 2, art. LXXXIII (1877) (enacting the same type of provision); Tex. Const. art. I, § 7 (providing that "[n]o money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary"); *id.* art. VII, § 5(a) (barring school funds from "ever be[ing] appropriated to or used for the support of any sectarian school"); *see also* La. Const. art. LI (1879) (providing that "[n]o money shall ever be taken from the public treasury, directly or indirectly in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof"); *id.* art. CCXXVIII (providing that no school funds "shall be appropriated to or used for the support of any sectarian schools"); *cf.* La. Const. art. CXL (1868) (prohibiting appropriation to "any private school or any private institution of learning whatever" but lacking any reference to "sectarian" schools). Louisiana's anti-funding provisions were deleted from its constitution in the 1974 revision. *See* La. Const. art. I, § 8 (paralleling federal religion clauses).

110. *See* Ga. Const. art. I, § 1, ¶ 14 (1877) (stating that "[n]o money shall ever be taken from the public Treasury, directly or indirectly, in aid of any church, sect, cult, or denomination of religionists, or of any sectarian institution"); Ga. Const. art. I, § 2, ¶ 7.

111. *See* Minn. Const. art. XIII, § 2 ("In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets or any particular Christian or other religious sect are promulgated or taught.") (amended and restructured in 1974).

> manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people . . . .[112]

Somewhat marring the harmony and inclusiveness of these sentiments, New Hampshire added this exception in 1877: "*Provided, nevertheless*, that no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination."[113]

In the 1880s and 1890s another thirteen states added their numbers to this growing trend of religiously sensitive anti-funding provisions.[114] As discussed above, during this period Congress began requiring newly admitted states to provide in their constitutions for a system of public schools "free from sectarian control."[115] Consequently, Montana, North Dakota, South Dakota, Washington and Wyoming all placed some form of anti-funding provision in their constitutions in 1889.[116] Idaho and Mississippi added similar provisions in 1890; Kentucky, in 1891.[117] New York added its anti-funding provision in 1894 after a long and bitter fight, previously discussed, over parochial

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112. N.H. Const. pt. 2, art. LXXXIII.

113. *Id.* (added 1877).

114. For instance, in 1880 Nevada ratified the addition of article XI, section 10 to its constitution, providing that "[n]o public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose." Nev. Const. art. XI, § 10 (added 1877); *see generally* Bybee & Newton, *supra* note 9, at 565-67. In 1885, Florida provided in its Declaration of Rights that no public revenue "shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution." Fla. Declaration of Rights § 6 (1885), *amended by* Fla. Const. art. I, § 3.

115. *See supra* notes 92-94 and accompanying text; *see also* 25 Stat. 676, 677 (1889).

116. *See* Mont. Const. art. XI, § 8 (1889) (forbidding any direct or indirect appropriation from public funds "for any sectarian purpose" or "to aid" any learning institution "controlled in whole or in part by any church, sect, or denomination") (renumbered art. X, § 6); N.D. Const. art. VIII, § 152 (1889) (providing that no public funds "shall be appropriated to or used for the support of any sectarian school"); S.D. Const. art. VIII, § 16 (added 1889); Wash. Const. art. I, § 11 (added 1889) (providing that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment"); Wyo. Const. art. VII, § 8 (providing that no portion of public school funds may be used to "support or assist" any institution of learning "controlled by any church or sectarian organization or religious denomination whatsoever"); *id.* art. III, § 36 (forbidding "charitable, industrial, educational or benevolent" appropriations to any "denominational or sectarian institution or association").

117. *See* Idaho Const. art. IX, § 5 (prohibiting aid to sectarian schools via a broad anti-funding provision); Ky. Const. § 189 (providing that "[n]o portion" of any educational fund "shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school"); Miss. Const. art. VIII, § 208 (added 1890) (providing that "[n]o religious or other sect" should ever control any part of the public school funds, and that no funds should be "appropriated toward the support of any sectarian school").

school funding.[118] Rounding out the nineteenth century, Utah and Delaware added anti-funding provisions in 1896 and 1897, respectively.[119]

This era of proliferating anti-funding amendments seemed to wind down in the first decade of the twentieth century. Virginia first included an explicit anti-funding provision in article IV, section 67 of its constitution in 1902.[120] Oklahoma (1907),[121] Arizona (1910),[122] and New Mexico (1911)[123] each included anti-funding provisions in their new constitutions. With these four constitutions, a long period of lawmaking—stretching back over sixty years to the Wisconsin Constitution of 1848—seemed to pause for breath. When it did, the American state constitutional landscape could boast of some thirty-six states that explicitly barred a wide range of religious schools and institutions from access to an impressive array of public benefits. The constitutional landscape was not significantly altered until the admission of Hawaii and Alaska into the union in 1959, each new state

118. *Supra* notes 47-48, 51 and accompanying text; *see* N.Y. Const. art. IX, § 4 (1894) (prohibiting public funds from being used "directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught") (renumbered art. XI, § 3).

119. *See* Del. Const. art. X, § 3 (prohibiting any part of educational funds from being "appropriated to, or used by, or in aid of any sectarian, church or denominational school"); Utah Const. art. I, § 4 (providing that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment").

120. *See* Va. Const. art. IV, § 67 (1902) (prohibiting the General Assembly from making "any appropriation" of public funds "to any church, or sectarian society, association, or institution of any kind whatever, which is entirely or partly, directly or indirectly, controlled by any church or sectarian society"). Interestingly, that same section also authorized the General Assembly to, in its discretion, "make appropriations to non-sectarian institutions for the reform of youthful criminals." *Id.* Article IX, section 141 of the 1902 Virginia Constitution generally forbade appropriation of public funds to "any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof," but it specifically empowered counties, cities, towns and districts to "make appropriations to non-sectarian schools of manual, industrial, or technical training." *Id.* art. IX, § 141 (1902).

121. Okla. Const. art. II, § 5 (providing that "[n]o public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such").

122. Ariz. Const. art. II, § 12 (forbidding public funds from being "appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment"); *id.* art. IX, § 10 (1910) (prohibiting taxes or appropriations "in aid of any church, or private or sectarian school").

123. N.M. Const. art. XII, § 3 (added 1911) (barring the use of any educational funds "for the support of any sectarian, denominational or private school, college or university").

with anti-funding constitutional provisions.[124] That brought the total of such provisions at that time to thirty-eight.

The remaining developments in relevant state constitutional language are piecemeal but reflect a preoccupation with singling out religiously affiliated organizations. For instance, both in 1956 and in 1971, Virginia amended its anti-funding provisions to create more pointed religion-based exclusions. In 1956, Virginia amended article VIII, section 10 of its constitution to allow the expenditure of public education funds for "Virginia students in public and *nonsectarian* private schools and institutions of learning."[125] In 1971, Virginia added article VIII, section 11, allowing its General Assembly to provide loans or grants to "students attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education *and not to provide religious training or theological education.*"[126] Pennsylvania had made a similar adjustment to its constitution in 1963 when it allowed for the provision of scholarship grants or loans for higher education "except that no [such] scholarship, grants or loans... shall be given to persons enrolled in a theological seminary or school of theology."[127] In 1970, Michigan amended its constitution with the apparent purpose of specifically barring any kind of school voucher program.[128] Finally, in 1976, Nebraska made perhaps the most pointed adjustment in any state constitution by providing that its legislature could allow government contracts with non-public institutions to provide "educational or other services" to handicapped persons under twenty-one years old, but only "if such services are nonsectarian in nature."[129]

In this section, I have taken care to acquaint the reader with the specific linguistic formulas by which the State Blaines erect religion-sensitive barriers to the allocation of public benefits. I have done this to allow the State Blaines, in a sense, to speak for themselves. State Blaines are undeniably multi-faceted, which makes it tricky to treat

124. Alaska Const. art. VII, § 1 (enacted 1959) (providing that "[n]o money shall be paid from public funds for the direct benefit of any religious or other private educational institution"); Haw. Const. art. X, § 1 (1959) (forbidding public funds from being "appropriated for the support or benefit of any sectarian or private educational institution").

125. Va. Const. art. VIII, § 10 (amended 1956) (emphasis added). The former provision had been interpreted to limit the expenditure of public educational funds to public schools only, thus excluding private schools altogether.

126. Va. Const. art. VIII, § 11 (added 1971) (emphasis added).

127. Pa. Const. art. III, § 29 (added 1963).

128. *See* Mich. Const. art. VIII, § 2 (amended 1970) (providing that "[n]o payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any [private, denominational or other nonpublic, pre-elementary, elementary, or secondary] school"); Kemerer, *supra* note 6, at 4-6 (observing that this amendment was specifically designed to bar vouchers).

129. *See* Neb. Const. art. VII, § 11 (amended 1976).

them generally. I will nonetheless offer four interrelated observations about the nature of the State Blaines' common objectives, as reflected in their language.

First, the State Blaines apply their prohibitions to a wide spectrum of public benefits. Restrictions are sometimes limited to particular sources of public funds—e.g., to a "public school fund" or to "educational funds"—but more commonly they apply broadly to, for instance, "public funds" or "state property," to "money raised by taxation" or "money drawn from the treasury," or simply to "money," categorically forbidding "appropriations" or "payments" from these generic public sources. Second, the State Blaines restrict the application of public benefits to religious institutions in terms that not only circumscribe the destination of the benefits but, separately, their purpose and effect. So, for instance, public funds may not be applied "in aid of," "for the benefit of," or to "support or sustain" any religious organization, and, additionally, these forbidden applications may not be achieved "directly or indirectly." Another way of effecting this kind of restriction is to forbid the appropriation of funds for religious "purposes," or to prohibit religious groups from having any "control" over public funds. Third, some State Blaines limit their prohibitions to religious "schools," while many strike more broadly at religious "institutions," "associations," "establishments," and "societies." Others dictate the tenor of instruction offered at institutions "supported" by public funds, prohibiting "sectarian instruction" at such places.

But the most significant and overarching quality that links State Blaines is that all explicitly tailor their restrictions to religion. They target institutions that are "religious," "sectarian," "theological," "ecclesiastical," "denominational," or affiliated with a "church." They prohibit appropriations to places where the "doctrines," "creeds," or "tenets" of religion are practiced or taught, or where religious "worship," "exercise," or "instruction" occurs. They delimit the "purposes" for which public benefits may be applied, removing "religious" purposes from the universe of other purposes. They single out individuals who, because of their religious affiliation, cannot be included in the distribution of public benefits—people such as "priests," "preachers," "ministers" and "teachers" of religious doctrine.[130]

Recall that the State Blaine Amendments arose largely in response to widespread Protestant fears of Catholic influence on society, politics and education. Yet, it is perhaps stating the obvious to observe that the words "Roman Catholic" appear nowhere in any of

130. *See, e.g.*, DeForrest, *supra* note 20, at 602 (observing that "[t]he overall effect of these Blaine-style provisions, by their express wording or through later judicial interpretations, was usually to preclude both the direct or indirect transfer of state funds to religious or sectarian schools and institutions").

the provisions. The State Blaines survive today in thirty-seven state constitutions as broad, explicit, and generic prohibitions on public funding of all religion. Their historical antecedents can help us contextualize the amendments but they should not control their application or our assessment of their constitutionality. The social and religious contexts in which the State Blaines operate today are far different from those of their origins and, consequently, faithful applications of the language of the State Blaines no longer divides, for purposes of public funding, the Protestant public schools from the Catholic private schools. Instead, they divide the thoroughly secularized public schools and other public institutions from a growing array of private religious schools and other private religious entities. They divide persons with religious affiliations or religious purposes from persons with non-religious affiliation and purposes. This operation is fully consonant with the changing dynamic of religious conflicts in modern American society. As Ira Lupu and Robert Tuttle have observed, "[t]he religious wars in the United States in the early twenty-first century are not Protestant vs. Catholic, or Christian vs. Jew, or even the more plausible Islam vs. all others. They are instead the wars of the deeply religious against the forces of a relentlessly secular commercial culture."[131] One hopes that such modern conflicts are fairly described as something more benign than "wars," but, regardless, there is little doubt what side the State Blaines are fighting for: The State Blaines are, today, a widespread legal obstacle separating the secular from the religious in the allocation of public benefits. It will be that operation that I will measure against the requirements of the First Amendment.

B. *Interpretation*

There is no doubt room for nuanced interpretation of the various linguistic formulas that appear in State Blaines. For instance, a court might decide that a provision banning funds "in aid of" a religious school has a broader prohibitory scope than a provision simply banning direct funding.[132] This section will take a broader approach to interpretation. I will discuss state court decisions that explicitly recognize that a State Blaine Amendment has created a greater separation between public benefits and religious organizations than the federal religion clauses require. Conversely, I will note other state court decisions that do the opposite—i.e., despite a State Blaine's restrictive language, decide that the provision imposes no greater obstacles than the federal Constitution to religious groups' access to

131. *See* Lupu & Tuttle, *supra* note 19, at 954-55.

132. *See, e.g.*, Lenstrom v. Thone, 311 N.W.2d 884 (Neb. 1981); *see also* Kemerer, *supra* note 6, at 16 (discussing the impact of this specific language on courts' application in terms of Nebraska's State Blaine Amendment).

public funds. My purpose is to demonstrate that state courts have often—but not always—interpreted the State Blaine Amendments both as going beyond the federal Establishment Clause and also as creating an explicitly religion-sensitive barrier to the allocation of public funds and other benefits.

A prime example of the first kind of interpretation—one recognizing greater state separation—was provided by the Idaho Supreme Court in 1971. In *Epeldi v. Engelking*, the court considered a provision that provided a neutral transportation reimbursement to public and non-public schoolchildren alike, including children attending religious schools.[133] The reimbursement would have passed muster under the federal Establishment Clause, as interpreted by the Supreme Court years before in *Everson* and again in *Allen*.[134] But the Idaho Supreme Court observed that, "unlike the provisions of the Federal Constitution, the Idaho Constitution contains provisions specifically focusing on private schools controlled by sectarian, religious authorities."[135] Referring to Idaho's Blaine Amendment—article IX, section 5 of the Idaho Constitution—the court confessed that "one cannot help but first be impressed by the restrictive language contained therein."[136] Based on that language, the court reasoned that "the framers of our constitution intended to more positively enunciate the separation between church and state than did

133. Epeldi v. Engelking, 488 P.2d 860, 861-62 & n.1 (Idaho 1971) (discussing Idaho Code § 33-1501 (Michie 1970)).

134. *See id.* at 865. *Everson*, the seminal establishment decision, concluded that a neutral transportation reimbursement did not violate the Establishment Clause merely because it incidentally helped some children attend religious schools by paying for their bus transportation. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947). In *Allen*, the Supreme Court applied *Everson* to conclude that the neutral provision of free secular textbooks to public and nonpublic schools—including religious schools—also did not constitute a forbidden "establishment" of religion. *See* Bd. of Educ. v. Allen, 392 U.S. 236 (1968). In going beyond *Everson*, *Epeldi* was not an aberration, but was merely one example of a mode of interpretation that had prevailed in state courts for many years since *Everson*. Thomas Berg notes that "[t]his stricter anti-aid position prevailed in many other forums; between 1949 and 1963, seven of the eight state supreme courts to consider bus reimbursement for Catholic students ruled it invalid under state constitutional provisions." Berg, *supra* note 12, at 128. Berg cites several cases striking down bus aid, including: Bd. of Educ. v. Antone, 384 P.2d 911 (Okla. 1963); State *ex rel.* Reynolds v. Nusbaum, 115 N.W.2d 761 (Wis. 1962); Matthews v. Quinton, 362 P.2d 932 (Alaska 1961); McVey v. Hawkins, 258 S.W.2d 927 (Mo. 1953); Zellers v. Huff, 236 P.2d 949 (N.M. 1951); Visser v. Nooksack Valley Sch. Dist., 207 P.2d 198 (Wash. 1949); Silver Lake Consol. Sch. Dist. v. Parker, 29 N.W.2d 214 (Iowa 1947); *see also* Anson Phelps Stokes & Leo Pfeffer, Church and State in the United States 431 (1964). *But see* Snyder v. Newtown, 161 A.2d 770 (Conn. 1961) (upholding aid).

135. *Epeldi*, 488 P.2d at 865.

136. *Id.* Idaho's State Blaine Amendment is discussed *supra* note 117. It broadly prohibits appropriation of public funds, *inter alia*, "to help support or sustain any school . . . controlled by any church, sectarian or religious denomination whatsoever." Idaho Const. art. IX, § 5.

the framers of the United States Constitution."[137] The court then struck down the transportation reimbursement provision under the Idaho Blaine Amendment.[138] It remarked, logically enough, that its disposition under the state constitution rendered irrelevant the federal Establishment Clause standards used by the Supreme Court in *Everson* and *Allen*.[139]

The Washington Supreme Court followed a similar rationale in *Witters III*, already alluded to in Part I, when in 1989 it barred a blind student's use of generally available public funds for religious training—a use which the U.S. Supreme Court had already, in the same case, allowed under the federal Establishment Clause.[140] The Washington Supreme Court relied on what it called the "sweeping and comprehensive" language of the Washington Blaine Amendment—article I, section 11 of the Washington Constitution—"which prohibits not only the *appropriation* of public money for religious instruction, but also the *application* of public funds to religious instruction."[141] The court reasoned that in this restrictive language "lies a major difference between our state constitution and the establishment clause of the first amendment to the United States Constitution," thereby making application of federal constitutional standards superfluous.[142] Significantly, the court referred to prior decisions construing the phrase "religious instruction" in article I, section 11, and concluded that the kind of instruction constitutionally barred from funding was "devotional in nature and designed to induce faith and belief in the student," as opposed to the "open, free, critical, and scholarly examination of the literature, experiences, and knowledge of mankind" that would occur, for instance, in a "Bible as Literature" course.[143]

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137. *Epeldi*, 488 P.2d at 865.

138. *Id.* at 868.

139. *Id.* at 867-68. This expansive reading of the Idaho Constitution was reiterated in 1996 by the Idaho Supreme Court, when, citing *Epeldi*, it remarked that "[t]he Idaho Constitution has been held to provide greater restrictions on the state's involvement in parochial activities than the Establishment Clause of the First Amendment." *See* Doolittle v. Meridian Joint Sch. Dist., 919 P.2d 334, 342 (Idaho 1996). Interestingly, in that case the court additionally held that the Idaho Constitution's anti-funding provision was preempted by the reimbursement provisions of the IDEA, a federal disability law. *Id.*

140. *See supra* note 3 and accompanying text; Witters v. State Comm'n for the Blind, 771 P.2d 1119 (Wash. 1989) (en banc) (*Witters III*).

141. *Witters III*, 771 P.2d at 1122 (citations omitted). The Washington Blaine Amendment, dating from 1889, is discussed in *supra* note 116. For a general discussion of the origins of the Washington Blaine, see DeForrest, *supra* note 20, at 574-76.

142. *Witters III*, 771 P.2d at 1122.

143. *Id.* (quoting Calvary Bible Presbyterian Church v. Bd. of Regents, 436 P.2d 189, 193 (Wash. 1967) (en banc)); *see generally* State v. Gunwall, 720 P.2d 808, 811-13 (Wash. 1986) (containing an extensive discussion of general analysis for determining whether the Washington Constitution provides broader civil liberties than the federal Constitution). For a detailed discussion of Washington's "uniquely developed body

Further examples of this kind of expansive (i.e., resulting in greater separation than federal constitutional standards) interpretation are easy to find. For instance, in 1963, the Oklahoma Supreme Court concluded that the Blaine Amendment in article II, section 5 of its constitution created a more rigorous funding restriction than the federal Constitution and therefore prohibited the kind of busing reimbursement allowed by *Everson*.[144] The court reasoned that the construction of the Establishment Clause in *Everson* had no bearing on the effect of state constitutional provisions.[145] The court was frank and unapologetic about the practical inequity of its decision. It flatly stated that if a parent exercises his right to "provide for the religious instruction and training of his own children" and consequently places them in religious schools, then, as a matter of law, the parent must "assum[e] the financial burden which that choice entails."[146] The court thus left no doubt that the Oklahoma Blaine Amendment explicitly allocated that financial burden based purely and simply on the religious nature of the parents' choice.

Moreover, when state courts interpret their own constitutions as more restrictive than the federal Establishment Clause, often they also purport to "reject" the reasoning underlying the Supreme Court's Establishment Clause decisions. For instance, the California and South Dakota Supreme Courts have both explicitly rejected the "child benefit" theory relied on by the U.S. Supreme Court in *Everson* and other cases.[147] Joseph Viteritti observes that "[a]t one time or another courts in nearly half the states have issued pronouncements indicating that they do not consider the Court's [school aid] decisions to be binding in interpreting their own constitutions," and that "several have specifically rejected the 'child benefit theory.'"[148] Finally, states sometimes reach beyond weaker or even non-existent anti-funding provisions to create rigid barriers against religious funding. For instance, in 1979 the Alaska Supreme Court interpreted its fairly narrow Blaine Amendment—prohibiting only the payment of public

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of Blaine Amendment jurisprudence," see DeForrest, *supra* note 20, at 590-601.

144. *See* Bd. of Educ. v. Antone, 384 P.2d 911, 912-13 (Okla. 1963). Oklahoma's Blaine Amendment, discussed *supra* note 121, provides that no public money "shall ever be appropriated . . . directly or indirectly, for the use, benefit, or support of any . . . sectarian institution." Okla. Const. art. II, § 5.

145. *Antone*, 384 P.2d at 912-13.

146. *Id.* at 913; *accord* Meyer v. Oklahoma City, 496 P.2d 789, 790-92 (Okla. 1972).

147. *See, e.g.*, Elbe v. Yankton Indep. Sch. Dist., 372 N.W.2d 113, 117 (S.D. 1985) (noting that it had "clearly rejected the child benefit doctrine" in an earlier case and deeming that doctrine irrelevant in applying the South Dakota Blaine Amendment); Cal. Teachers' Ass'n v. Riles, 632 P.2d 953, 960-64 (Cal. 1981) (criticizing and refusing to follow child benefit doctrine in applying stricter provisions of the California Blaine Amendment). For a general discussion of the child benefit doctrine, see, for example, Viteritti, *supra* note 30, at 1123-25.

148. Viteritti, *supra* note 45, at 149, nn.194-98 (citing Chester James Antieu et al., Religion Under the State Constitutions (1965), G. Alan Tarr, *Church and State in the States*, 64 Wash. L. Rev. 73 (1989), and Wendtland, *supra* note 6).

funds for "the *direct* benefit" of any religious school—to achieve a strict funding prohibition.[149] Vermont has no explicit anti-funding provision in its constitution, but in 1999, the Vermont Supreme Court decided that the provision in chapter 1, article III (protecting persons from being "compelled to . . . support any place of worship") erected a stronger barrier against a neutral voucher program than the Establishment Clause.[150]

On the other hand, several state courts have interpreted the plainly restrictive language in their Blaine Amendments as creating no greater separation than the federal Establishment Clause. In one significant recent decision, *Kotterman v. Killian*, the Arizona Supreme Court refused to interpret Arizona's anti-funding provision in a rigidly absolutist manner, while at the same time criticizing the discriminatory motives behind the federal Blaine Amendment.[151] Other states have chosen either simply to ignore the separationist language in their own constitutions or to interpret it in a manner coextensive with the federal religion clauses.[152] For instance, in approving the loaning of free textbooks to religious schools, the Mississippi Supreme Court leniently interpreted the language in its constitution prohibiting any public funds from being "appropriated toward the support of any sectarian school," and added that "[t]here is no requirement that the church should be a liability to those of its citizenship who are at the same time citizens of the state, and entitled to privileges and benefits as such."[153] Similarly, the Ohio Supreme Court has suggested that its state constitution provides greater free exercise rights than the federal Free Exercise Clause, while indicating that its religious anti-funding provision—although phrased in absolutist terms—is merely coextensive with the federal Establishment Clause.[154]

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149. Sheldon Jackson Coll. v. State, 599 P.2d 127, 129-32 (Alaska 1979) (interpreting Alaska Const. art. VII, § 1 (emphasis added)).

150. *See* Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539, 562-63 (Vt. 1999); Vt. Const. Ch. I, art. III (1777).

151. *See* Kotterman v. Killian, 972 P.2d 606, 623-24 (Ariz. 1999) (en banc); *see also* DeForrest, *supra* note 20, at 583 (discussing *Kotterman*).

152. *See, e.g.*, Americans United for Separation of Church & State v. State, 648 P.2d 1072 (Colo. 1982) (en banc) (interpreting art. IX, § 7 and art. V, § 34 of the Colorado Constitution); People *ex rel.* Klinger v. Howlett, 305 N.E.2d 129 (Ill. 1973) (interpreting art. X, § 3 of the Illinois Constitution); Chance v. Miss. State Textbook Rating & Purch. Bd., 200 So. 706 (Miss. 1941); Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) (interpreting art. VI, § 2 of the Ohio Constitution); Durham v. McLeod, 192 S.E.2d 202 (S.C. 1972) (interpreting former art. XI, § 9 of the South Carolina Constitution); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) (interpreting art. I, § 18 of the Wisconsin Constitution); Soc'y of Separationists, Inc. v. Whitehead, 870 P.2d 916 (Utah. 1993) (interpreting art. I, § 4 of the Utah Constitution).

153. *Chance*, 200 So. at 707, 710 (interpreting Miss. Const. art. VIII, § 208).

154. *See* Humphrey v. Lane, 728 N.E.2d 1039, 1044-45 (Ohio 2000) (stating that the "rights of conscience" provision in art. I, § 7 of the Ohio Constitution provides broader free exercise rights than the federal Constitution); *Simmons-Harris*, 711

This section simply highlights expansive state court decisions which are significant for two reasons. First, state courts have interpreted State Blaines in a manner that explicitly goes beyond the church-state separation mandated by the federal Establishment Clause, specifically in the area of public aid to religious schools. This expansive interpretation has been occurring for as long as the Supreme Court has been interpreting the boundaries of the Establishment Clause; indeed, such state court decisions tend to cluster around instances in which the Supreme Court has allowed some form of public benefit (as with free transportation in *Everson* and free textbooks in *Allen*) to be shared equally between public and religious schools.[155] Second, state courts have frankly recognized that, under their application of the State Blaine Amendments, religiously motivated behavior pays a special price. Those burdens on religion are not incidental but rather are targeted disabilities, the predictable and intended result of a policy of self-consciously distancing the public sphere from religious persons and institutions.

More lenient interpretations of State Blaines are possible, of course, but it is fair to say that such decisions must work hard to hurdle the plainly separationist implications of the language of State Blaines. The more expansive decisions are not aberrations, however. Rather, they faithfully cleave to what the State Blaines say and to the separationist objectives that their language plainly aims to achieve. It will be the remaining task of this Article to say whether those objectives violate the First Amendment.

IV. THE JURSIPRUDENTIAL ROOTS OF NON-PERSECUTION

The foregoing cross-section of the State Blaines reveals that a preference for separating public benefits from religious persons and organizations persists in over two-thirds of our state constitutions. Broadly speaking, the State Blaines are the residue of the second great historical controversy to raise profound questions about the shape of American religious liberties—the rise of public schools and the withdrawal of public funds from private religious schools.[156] Those

N.E.2d at 212 (interpreting the Ohio Blaine Amendment in art. VI, § 2 in a non-separationist manner and as generally coextensive with federal Establishment Clause).

155. *See, e.g.*, Viteritti, *supra* note 45, at 149 (observing that "[f]ederal rulings to the contrary, many state courts have, from time to time, invalidated public assistance to private or parochial school students in the form of transportation or textbooks" (footnotes omitted)).

156. *See* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 48-53 (1997). The first great historical controversy, as Laycock explains, was the 1780s dispute over church financing that gave rise to Madison's *Memorial and Remonstrance*. *Id.* at 48-49; *see also* McConnell, *supra* note 17, at 183 ("One of the most important eighteenth-century abuses against which the no-establishment principle was directed was mandatory support for churches and

amendments "arguably represent[ed] a political judgment on the constitutional questions raised by such funding."[157] But we should be skeptical about accepting the judgments of State Blaines as the last constitutional word on those questions. As we have seen, the anti-funding advocates of that era failed to amend the federal Constitution, naturally raising the question whether the State Blaines themselves conflict with federal norms of religious liberty. More importantly, as Douglas Laycock observes, "the nineteenth century movement was based in part on premises that were utterly inconsistent with the First Amendment," given that "opposition to funding religious schools drew heavily on anti-Catholicism."[158] Anti-Catholic motives alone may not, in the final analysis, be enough to invalidate the State Blaines under the First Amendment, but their presence should at least raise some red flags. And, raising further suspicions, the plain terms of most State Blaines go well beyond the narrower questions raised by the school funding controversy.

The movement spawning the State Blaines only lapped at the shores of the federal Constitution, but failed to alter it. Thus, the federal constitutional standards governing public aid to religion have charted their own jurisprudential course. The stark kind of strict separationism between all public benefits and religion required by most State Blaines has never been regnant in Supreme Court jurisprudence. Even the first major non-establishment decision, *Everson*, allowed indirect state aid to religious schools, notwithstanding Justice Black's strict separationist dicta.[159] Some of

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ministers. This system was support for religion *qua* religion; it singled out religion as such for financial benefit.").

157. Laycock, *supra* note 156, at 50.

158. *Id.* Laycock contrasts the nineteenth-century resolution of the school funding problem (i.e., the proliferation of State Blaines) with the eighteenth-century resolution of the church funding problem. He argues that Madison's solution to the latter problem was a principled one that virtually everyone today still accepts, and that itself is firmly embedded in federal religion clause jurisprudence: Government cannot directly fund religious teaching and it certainly cannot exclusively fund teachers of only one kind of religion. *See id.* at 49 (explaining that the General Assessment was "a tax solely for the support of clergy in the performance of their religious functions," that only Christian teachers were subsidized, and that "[t]he essence of the general assessment was massive discrimination in favor of religious viewpoints"). In sharp contrast, the school funding crisis "did not produce a principled resolution to a difficult problem" but "produced instead a nativist Protestant victory over Catholic immigrants" that was "only a pretense of neutrality." *Id.* at 52.

159. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947) (stating that "[n]either a state nor the Federal Government can . . . aid one religion, [or] aid all religions . . . [and] [n]o tax in any amount, large or small, can be levied to support any religious activities or institutions"). At the same time, as I discuss below, *Everson* contains an equally strong condemnation of discrimination *against* religion. *See id.* ("On the other hand . . . [a state] cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the

the Court's non-establishment decisions may skirt the borders of Blaine-like separationism—Charles Fried recently referred to the Court's mostly-defunct decision in *Committee for Public Education and Religious Liberty v. Nyquist*[160] as "a kind of Court-imposed Blaine Amendment"[161]—but the Court has generally proceeded in a non-absolutist (if sometimes counterintuitive) manner in sketching the boundaries between permissible and impermissible government aid to religious persons and entities. Furthermore, the direction the Court has been taking over the last two decades highlights the gulf between federal standards of non-establishment and the rigid barriers thrown up by the State Blaines over a century ago.

For instance, it is becoming increasingly evident that the government acts within the bounds of the federal Establishment Clause when it provides secular benefits to a broad range of public and private recipients, including religiously affiliated private recipients, based on criteria that are "neutral"—in the sense that the benefits are not distributed on the basis of any religious quality, or lack thereof, in the recipient.[162] Relatedly, when those secular benefits, neutrally distributed, end up in the hands of religious organizations because of the private choices of individuals—and not because of any deliberate government design to nudge the benefits toward religious ends—government has not impermissibly "subsidized" religion.[163] Generally, the Court has emphasized that the

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members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."). Douglas Laycock observes that "the essence of both the no-aid and the nondiscrimination theories is succinctly laid out in [these] two paragraphs." Laycock, *supra* note 156, at 53.

160. 413 U.S. 756 (1973).

161. *See* Fried, *supra* note 13, at 196. In *Nyquist*, the Court invalidated a New York program that gave grants to nonpublic schools and tax credits to parents whose children attended those schools, which included religious schools. 413 U.S. 756, 798 (1973). The scope of *Nyquist* seems to have been sharply limited by *Zelman*. *See infra* note 360.

162. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662-63 (2002) (finding a program of generally available school vouchers, neutral with respect to religion, does not violate the Establishment Clause); Mitchell v. Helms, 530 U.S. 793, 807-10 (2000) (Thomas, J., plurality opinion) (finding that a program of secular governmental aid, neutrally offered to a wide range of private groups without reference to religion, does not violate Establishment Clause).

163. *See, e.g.*, *Zelman*, 536 U.S. at 649 (distinguishing between provision of government aid "directly to religious schools" and "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals"); *Mitchell*, 530 U.S. at 810 (observing that the Court has, "[a]s a way of assuring neutrality," considered whether government aid is channeled to religious schools only because of private choice); *see also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993) (arguing that because a government-provided sign-language interpreter was present in a religious school "only as a result of the private decision of individual parents," the aid did not violate the Establishment Clause); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488-89 (1986) (determining that a blind student's private decision to use neutral, generally available scholarship funds for ministry training did not violate the

Establishment Clause does not require a wholesale exclusion of religious entities from participation in government programs and government funding. In other words, the argument is steadily evaporating that selective discrimination against religion finds its justification in the Establishment Clause itself. To be sure, the clause "singles out" religion for a kind of disability, as Michael McConnell explains: "The disestablishment principle prevents the government from using its power to promote, advocate, or endorse any particular religious position."[164] But this principle stands diametrically opposed to a posture of hostility toward religion that is required, or even justified, by the Establishment Clause. Again, to quote McConnell:

> [T]he suggestion that religious organizations must categorically be barred from participation in all government-funded programs must be rejected. Although favored by the so-called "strict separationists," this has never been the rule in establishment clause cases and has been rejected by the Supreme Court in every case in which it has been seriously advanced.[165]

Indeed, McConnell argues that, in both the abortion and religion contexts, "denying federal money for activities that would otherwise be funded would amount to a substantial penalty for exercising one's constitutional rights."[166]

Doubtless, there is clarifying work left to do at the federal level, but for present purposes one may observe, uncontroversially, that federal constitutional barriers to public funding of religious institutions have demonstrably softened, that "the [Supreme] Court has become more solicitous of innovative partnerships between governments and religious institutions,"[167] and that both states and Congress will likely respond—and have already responded—by enacting laws allowing

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Establishment Clause).

164. *See* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 43 (2000); *see also* Laycock, *supra* note 156, at 70-71 (explaining that sometimes even a substantively neutral view of the religion clauses "requires that religion be treated in ways that are arguably worse than the treatment available to similar secular activities," such as prohibiting the government from "celebrat[ing] religion or lead[ing] religious exercises").

165. Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv. L. Rev. 989, 1027 (1991) (citing cases).

166. *Id.* at 1028; *see also* Berg, *supra* note 12, at 163.

> Since about 1980, we have been in a third period of modern church-state relations. The last two decades have seen the decline of strong separationism as the dominant church-state ideal—a slow, partial, but continuing decline—and the corresponding rise of the principle that religion can be an equal participant with other ideas and activities in public life, including in government benefit programs.

Id. I will say more below about "selective" funding of "non-religious" persons and entities, about whether that is a plausible way of defending some operations of State Blaines, and about the relationship of that issue to selective funding of childbirth over abortion. *See infra* notes 397-412.

167. Bybee & Newton, *supra* note 9, at 574.

religious groups to enjoy generally available public benefits.[168] Enter the State Blaine Amendments.

If I may indulge in metaphor for a moment, the role of the State Blaines will become clearer. The federal constitutional standards for permissible aid to religion were, for many years, murky water in a lake—one illustrative example was the distinction, supposedly of constitutional magnitude, between giving secular textbooks to religious schools (constitutional) and giving them maps, globes, and film-strip projectors (unconstitutional).[169] Over the last few decades, that water has gradually been clearing until we can better see what principles govern which kinds of aid the federal Constitution allows and disallows.[170] But simultaneously, we are now beginning to discern another layer of murk representing the State Blaines. As we have seen, the State Blaines are far more stringent than the federal Constitution about the barriers raised against public funding of religious persons, schools and other organizations. The real question now is whether the State Blaines are the bottom of the lake.

If they are the bottom of the lake—if, so to speak, there is nothing "beneath" them to temper or annul what they plainly do—then the resulting legal landscape among the states is fairly predictable.

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168. Bybee and Newton discuss several federal and state initiatives that take advantage of a more flexible approach to government involvement with religious organizations. *See id.* at 552-53. For instance, they discuss the 1996 Charitable Choice Act, a federal law allowing states that participate in certain federally funded programs "to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement [under these programs]." *Id.* at 552 (quoting Charitable Choice Act of 1996, Pub. L. No. 104-193, tit. 1, § 104, 110 Stat. 2161 (1996) (codified at 42 U.S.C. §604(b) (1996)). They also point to President Bush's announced policy of "encouraging faith-based solutions in partnership with the federal government" and the extensive media coverage of that initiative. *Id.* at 552-53 & n.10. Finally, they mention the increasing number of states that have begun experiments with school vouchers. *Id.* at 552-53 & n.11; *see also* Lupu & Tuttle, *supra* note 10, at 45-47 (commenting on the increasing role of religious organizations in Charitable Choice).

169. *Compare* Bd. of Educ. v. Allen, 392 U.S. 236, 238 (1968) (finding that the Establishment Clause was not violated by lending of secular textbooks to students attending religious schools), *with* Meek v. Pittenger, 421 U.S. 349, 362-66 (1975) (determining the Establishment Clause was violated by providing secular instructional materials to religious schools), *and* Wolman v. Walter, 433 U.S. 229, 248-51 (1977) (finding the same). *See also* Viteritti, *supra* note 30, at 1130 (discussing the "disarray" and "inconsistency" in the Court's non-establishment and school aid jurisprudence of the 1970s).

170. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 849-52 (2000) (O'Connor, J., concurring) (explaining why distinctions made in *Meek* and *Wolman* "created an inexplicable rift within our Establishment Clause jurisprudence concerning government aid to schools"); Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (observing that the Court's non-establishment jurisprudence, at the time, meant that "a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class"); *see also* Viteritti, *supra* note 30, at 1132-41 (charting gradual clarification of school aid aspects of the Court's non-establishment jurisprudence, from *Mueller* through *Zelman*).

Depending on how each state constitution is framed and interpreted, we will have in this country a kaleidoscope of separationism: One state will hermetically seal off all public benefits from religious schools; another might do the same for all religious organizations generally; another might focus on individuals who plan to put the benefits to faith-oriented uses; and still another might decide to erect no separationist barriers at all. My canvass of the State Blaines suggests that the balance will be tilted significantly in the direction of shutting off religion from public funds. The ability of religious persons and institutions to enjoy public benefits on an equal basis will be—quite apart from how permissively the federal Establishment Clause is interpreted—refracted through the anti-funding provisions of fifty state constitutions.

But this will only be true if there exists no principle in the federal Constitution that can restrain the process. In this part, I will demonstrate that there is. That principle consists of three conceptually related strands found in Free Exercise, Establishment, and Free Speech jurisprudence. But they combine in one overarching rule—what the Supreme Court has referred to as the "fundamental nonpersecution principle of the First Amendment."[171] Simply stated, the non-persecution rule means, among other things, that neither state nor federal governments may, consistently with the First Amendment, restrict access to generally available public benefits based on persons' or organizations' religious status, purpose, affiliation, or identity.

A. *Free Exercise and Non-Persecution*

Prohibiting religious discrimination lies at the heart of the free exercise clause, but it is important to carefully define "discrimination" by reference to the Supreme Court's long history of balancing the conflicting claims of religion and government. Paradoxically, the principle condemning religious discrimination—or "fundamental nonpersecution principle," as the Court has most recently called it—is best understood against the backdrop of another important free exercise principle, one that restricts religious freedom. That background rule is the "non-exemption" rule, which was best articulated in the 1990 *Smith* decision but which goes back over 125 years to the Court's earliest religion clause cases.[172] Non-exemption means that the Free Exercise Clause does not require courts to grant religion-based exemptions from the burdens of genuinely neutral laws. The mere statement of the rule suggests that it interacts significantly with the narrower rule that laws may not target religious behavior or affiliation for special disabilities.

171. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1993); *see infra* Part IV.A.2.

172. Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

The non-exemption rule (which has been the subject of sharp scholarly debate)[173] illuminates the parameters and continuing force of the non-persecution rule, particularly as it applies to the State Blaine Amendments. As Michael McConnell has explained, whether the Free Exercise Clause requires religious exemptions (as he argues), or whether *Smith* correctly decided that such exemptions lie only within the province of the legislature, it is clear that the Free Exercise Clause unambiguously forbids laws that directly target religious conduct for penalties or disabilities:

> Under both conceptions, it is unconstitutional . . . to inflict penalties on religious practices as such. For example, zoning ordinances disallowing churches while allowing meeting halls and other uses with comparable effects are unconstitutional, as are "anti-cult" legislation, laws barring clergy from public office, and charitable solicitation regulations crafted to disadvantage a particular religious sect.[174]

The non-exemption rule has jurisprudential roots in the nineteenth century conflict between the Mormon Church and the territorial laws of the United States prohibiting polygamy. In its first significant religion clause decision, *Reynolds v. United States*, the Supreme Court held that the Mormons' religious tenets—which at the time commanded polygamy as a religious duty for male members—did not exempt them, under the Free Exercise Clause, from obedience to a generally applicable criminal prohibition against polygamy.[175] Twelve years later in *Davis v. Beason*, the Court explained (again with reference to Mormon polygamy) that the Free Exercise Clause permitted no interference with "man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, . . . provided always the laws of society, designed to secure its peace and

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173. *Compare, e.g.*, Kent Greenawalt, *Should the Religion Clauses of the Constitution Be Amended?*, 32 Loy. L.A. L. Rev. 9 (1998), *and* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990), *with* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245 (1991); Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 Tul. L. Rev. 251 (2000); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. Ark. Little Rock L. Rev. 555 (1998); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992).

174. McConnell, *supra* note 21, at 1418 (citing cases); *see also* Lash, *supra* note 23, at 1113 (agreeing with McConnell that "[e]ven if the original Free Exercise Clause was intended to express norms of individual freedom, the scope of the Clause appears to be limited to a prohibition of laws that abridge religion *qua* religion").

175. Reynolds v. United States, 98 U.S. 145 (1878). The Court drew a basic distinction between "mere opinion," which the Free Exercise Clause clearly protected, and "actions . . . in violation of social duties or subversive of good order," which Congress could proscribe. *See id.* at 164.

prosperity, and the morals of its people, are not interfered with."[176] Free exercise, then, "must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."[177]

Since 1940, when it recognized that the Free Exercise Clause applied to the states,[178] the Court has had more opportunities to develop the non-exemption rule. In *Minersville School District v. Gobitis*, the Court gave a more nuanced description of the rule's scope, even as it denied that Jehovah's Witnesses merited a religious exemption from compulsory flag-salute laws: "The religious liberty which the Constitution protects has never excluded legislation *of general scope not directed against doctrinal loyalties of particular sects.*"[179] Again, in *Braunfeld v. Brown*, the Court rejected an

176. Davis v. Beason, 133 U.S. 333, 342 (1890).

177. *Id.* at 343. Provocatively, the Court glossed this statement by including examples both of sects with tenets requiring "the necessity of human sacrifices, on special occasions," as well as of "sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the passions of its members." *Id.* at 343.

Another "pre-incorporation" instance of the non-exemption principle was *Hamilton v. Regents of the University of California*, which concluded that the University did not violate Methodist conscientious objectors' "liberty" under the Fourteenth Amendment, when it refused to exempt them from mandatory military science instruction. *See* 293 U.S. 245, 263-65 (1934). Concurring, Justice Cardozo assumed that the Free Exercise Clause applied to the states through the Fourteenth Amendment. Relying on *Davis*, 133 U.S. at 333, Cardozo concluded that the objectors' religious scruples did not entitle them to an automatic exemption from the required military instruction. *See id.* at 265-66 (Cardozo, J., concurring). Cardozo broadly observed that "[t]he right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government," and concluded in vintage oracular style that "[o]ne who is martyr to a principle . . . does not prove by his martyrdom that he has kept within the law." *Id.* at 268 (Cardozo, J., concurring).

178. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

179. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 (1940) (emphasis added). The Court also explained that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a *general law not aimed at the promotion or restriction of religious beliefs*." *Id.* (emphasis added). Only three years later, *Gobitis* was overruled by *West Virginia State Board of Education v. Barnette*, but in a way that left intact *Gobitis*' reasoning about the tempered scope of the non-exemption rule. *See* 319 U.S. 624, 639-42 (1943). The *Barnette* majority opinion relied on the principle that laws may not compel speech under the First Amendment. *Id.*; *but cf. id.* at 643-44 (Black, J., concurring) (relying, by contrast, on a free exercise rationale); *id.* at 645 (Murphy, J., concurring) (relying on the same rationale). Much later in *Smith*, the Supreme Court explicitly relied on *Gobitis* for its discussion of the non-exemption rule. Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990) (quoting *Gobitis*, 310 U.S. at 594-95); *see infra* Part IV.A.1. Jay Bybee's explanation of the dynamic between *Gobitis* and *Barnette* accords with my reading of *Gobitis*. Justice Jackson, the author of *Barnette*, "broadened the [*Gobitis*] inquiry to take the focus off of the religious aspects of the conflict between the Witnesses and the Board of Education. The issue was compelled speech, not infringement of religious beliefs." Bybee, *supra* note 27, at 279. Indeed, as Bybee explains it, Justice Jackson's general approach to the First Amendment accords with the later non-exemption/non-persecution rationale illuminated by *Smith* and *Lukumi*: "In large measure, the First Amendment applied principally when

Orthodox Jew's claim that a generally applicable Sunday-closing law violated his free exercise rights by imposing an "indirect" burden on his religious beliefs, which honored Saturday and not Sunday as a day of rest.[180] But, in doing so, *Braunfeld* observed that, unlike a truly general law, "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[181] Most strikingly, in the seminal *Everson* decision the Court stated in dicta that, as a consequence of free exercise, a state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[182]

Thus, the Court's gradual refinement of the non-exemption rule seemed to reveal a corollary condemning laws that were not general but were instead targeted at particular faiths or at religion generally. So, in *Cantwell v. Connecticut*, the Court could affirm the state's power to regulate, by general and non-discriminatory legislation, the time, place and manner of door-to-door solicitation, while, at the same time, striking down the discriminatory application of that rule to Jehovah's Witnesses on free speech and free exercise grounds.[183] The

governments attempted to regulate religion qua religion or speech qua speech, but not religion or speech qua something else." *Id.* at 290 (citations omitted).

180. Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

181. *Id.*

182. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947). *Everson*, of course, was an Establishment Clause decision and thus did not actually resolve any dispute about the scope of the Free Exercise Clause. The Court had made an equally striking statement condemning religious discrimination—one, moreover, in the context of school funding—almost forty years before in *Quick Bear v. Leupp*, 210 U.S. 50 (1908). That case principally involved the construction of a treaty with the Sioux tribe regarding whether the treaty terms permitted contracts with and payments to religious schools for tribe members' education. *Id.* But, in dicta, the Court rejected the notion that the Constitution would forbid such payments. *Id.* at 81-82. The Court adopted the statement of the Court of Appeals that:

> [I]t seems inconceivable that Congress should have intended to prohibit [the Sioux] from receiving religious education at their own cost if they so desire it; such an intent would be one 'to prohibit the free exercise of religion' amongst the Indians, and such would be the effect of the construction for which the complainants contend.

Id. at 82 (quoting the Court of Appeals). It should be noted, however, that the Court specifically characterized the treaty funds as the Sioux's "own money" and "the only moneys that [they] can lay claim to as matter of right; the only sums on which they are entitled to rely as theirs for education." *Id.* at 81-82. It should also be noted that the Supreme Court has recently referred to *Quick Bear* as only "indirectly" addressing the free exercise issue. Mitchell v. Helms, 530 U.S. 793, 807 n.4 (2000) (plurality opinion).

183. Cantwell v. Connecticut, 310 U.S. 296, 305-10 (1940); *see also* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002) (striking down solicitation licensing requirement as applied to Jehovah's Witnesses under the

licensing scheme struck down in *Cantwell* effectively empowered local officials to clamp down on religious solicitation that the officials deemed did not "conform[] to reasonable standards of efficiency and integrity."[184] It is easy to see how such an unbounded power could be used, as it was in *Cantwell*, in the service of discriminating against unpopular or marginal faiths.

Similarly, in *Torcaso v. Watkins*, the Court took a non-discrimination approach to Maryland's requirement that state officeholders make a "declaration of belief in the existence of God" or forfeit their right to office.[185] In the Court's view, the oath requirement placed "[t]he power and authority of the State of Maryland . . . on the side of one particular sort of believers [sic]—those who are willing to say they believe in 'the existence of God.'"[186] The Court struck down the requirement under free exercise, explaining that "neither a State nor the Federal Government . . . . can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[187] There is but a small step—no step at all, really—from this reasoning to the notion that government also cannot express raw preferences for the non-religious over the religious in marking off political categories.

It comes as no surprise, then, that non-discrimination based on

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First Amendment).

184. *Cantwell*, 310 U.S. at 302. Solicitation was allowed only after case-by-case review, under which the secretary of public welfare determined whether the promoted cause met the requirements quoted above. *Id.* The Court concluded that this licensing scheme amounted to "the exercise of a determination by state authority as to what is a religious cause . . . lay[ing] a forbidden burden upon the exercise of liberty protected by the Constitution." *Id.* at 307. *Cantwell* may be more about religious speech than about religious conduct. *See, e.g.*, Bybee, *supra* note 27, at 266-67. I agree with Bybee that *Cantwell* "concerned religious liberty only because the Connecticut statute specifically regulated religious canvassing." *Id.* at 267. But, again, I think that very point is what makes *Cantwell* relevant to the issue of religious non-persecution. Douglas Laycock, for instance, has observed that the "religious free speech cases from the Jehovah's Witness era" are an important aspect of the foundation of the Court's religious "nondiscrimination theory." Laycock, *supra* note 156, at 63 & n.124 (citations omitted).

185. *See* Torcaso v. Watkins, 367 U.S. 488, 489 (1961) (quoting Md. Const. art. XXXVII).

186. *Id.* at 490.

187. *Id.* at 495 (footnotes omitted). The Court quoted James Iredell, later a Supreme Court Justice, during the North Carolina Convention ratification debates. Discussing the prohibition of religious tests for federal officers in proposed Article VI, see U.S. Const. art. VI, § 3, and responding to the fear that the people may consequently "choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices," Iredell asked: "But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?" *Torcaso*, 367 U.S. at 495 n.10 (quoting 4 Jonathan Elliot, Debates in the Several States Conventions on the Adoption of the Federal Constitution 194, 200).

religious affiliation or status was the controlling factor in *McDaniel v. Paty*, unanimously striking down Tennessee's practice of excluding ministers from public office.[188] The Tennessee Constitution embodied the last hold-out of that discredited practice, which dated back to the early republic.[189] The dispute in *McDaniel* arose when Tennessee tied eligibility to be a delegate at its 1977 constitutional convention to eligibility to be a state representative, by implication excluding ministers from the constitutional convention.[190]

The Supreme Court unanimously invalidated Tennessee's clergy-disqualification provision. Chief Justice Burger's opinion, for a four-Justice plurality, struck down the provision under the Free Exercise Clause alone. Burger found that right to free exercise encompassed the right "to be a minister," and he reasoned that the clergy-exclusion wrongly forced a minister to choose between that free exercise right and his right to hold state office recognized by the Tennessee Constitution.[191] Additionally, while Burger did not find that the

188. *See* McDaniel v. Paty, 435 U.S. 618, 622-25 (1978). Article IX, section 1 of the Tennessee Constitution provided: "Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature." *Id.* at 621 & n.1. The provision dated from article VIII, section 1 of the 1796 Tennessee Constitution. *Id.* In 1978, Tennessee remained the only state in the union that excluded ministers from some public offices. *Id.* at 625. Maryland's clergy-disqualification provision had been struck down by a federal district court in 1974. *Id.*

189. *See id.* at 622-25. The Court noted Madison's condemnation of the practice, underscoring the equality notions inherent in his view of religious liberty:

> Does not The exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by *punishing a religious profession with the privation of a civil right?* does it [not] violate another article of the plan itself which exempts religion from the cognizance of Civil power? does it not violate justice by at once taking away a right and prohibiting a compensation for it? does it not in fine *violate impartiality* by shutting the door [against] the Ministers of one Religion and leaving it open for those of every other.

Id. at 624 (quoting 5 Writings of James Madison 288 (G. Hunt ed., 1904)) (emphasis added). The Court remarked that Madison's view "accurately reflects the spirit and purpose of the Religion Clauses of the First Amendment." *Id.* In a recent essay on Madison's *Memorial and Remonstrance*, Vincent Blasi underscores Madison's linkage of equality with religious liberty: "There can be no dispute that considerations of equal treatment lay at the core of Madison's conception of religious liberty, both his aversion to any form of religious establishment and his emphasis on the notion of 'free exercise.'" Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions From Madison's* Memorial and Remonstrance, 87 Cornell L. Rev. 783, 802 (2002); *see also* DeForrest, *supra* note 20, at 614-15 (discussing Madison's *Memorial* in relation to State Blaines).

190. *McDaniel*, 435 U.S. at 618. The justifications for the minister's disqualification put forward by the Tennessee Supreme Court were not novel—they were the same reasons that proponents of such measures had long relied on. *See* Hamburger, *supra* note 31, at 79-83.

191. *McDaniel*, 435 U.S. at 626. Burger relied on the "balancing" approach of *Sherbert v. Verner* in this part of his opinion. *Id.*; *see infra* note 414 (discussing *Sherbert*). *Sherbert* has been limited by *Smith*, but *Smith* independently emphasized

exclusion targeted beliefs as such—in which case the law would have been absolutely prohibited[192]—he did conclude that it targeted "status as a 'minister' or 'priest,'" a status defined by religiously affiliated and motivated conduct.[193] Burger then explained that the disqualification, targeted as it was at a religiously defined status, could only escape invalidation if it were justified by compelling interests.[194] Significantly, Burger rejected Tennessee's asserted interest in "preventing the establishment of a state religion," a goal Tennessee sought to shelter under the federal Establishment Clause.[195] While Tennessee's fears about the influence of clergy on politics were once "held in the 18th century by many, including enlightened statesmen of that day," Burger reasoned that those fears had been overwhelmingly found baseless and provided no justification for continuing to burden ministers' free exercise rights today.[196]

Concurring, Justice Brennan, joined by Justice Marshall, would have gone beyond the plurality opinion and found the clergy disqualification absolutely prohibited under *Torcaso* as a "religious classification . . . governing the eligibility for office."[197] Brennan's opinion was strongly influenced by his perception that the ministerial exclusion was essentially a religious discrimination, "impos[ing] a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity."[198]

McDaniel's continuing force. *See* Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990).

192. *See McDaniel*, 435 U.S. at 626-27 (emphasis omitted). Burger was referring principally to *Torcaso v. Watkins*, see *supra* note 185, in which Maryland conditioned access to public office on the willingness to swear to the existence of God.

193. *McDaniel*, 435 U.S. at 626-27. The Court relied in part on the language of the Tennessee Constitution, which "inferentially defines the ministerial profession in terms of its 'duties,' which include the 'care of souls,'" and also on its construction by the Tennessee Supreme Court, which reasoned that the exclusion reaches, e.g., "those filling a 'leadership role in religion.'" *Id.* at 627 n.6.

194. *See id.* at 627-28. Burger relied principally on *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a case that invalidated on free exercise grounds Wisconsin's attempt to force the parents of Amish children to attend public schools after the age of 14. Like *Sherbert, Yoder* has also been limited by *Smith. See infra* notes 199-202 and accompanying text. But, again, *Smith* itself confirms that *McDaniel* still has significant impact for analyzing laws that target religiously affiliated statuses or behavior. *See supra* note 179.

195. *McDaniel*, 435 U.S. at 628.

196. *Id.* at 629. The Court's earlier quotation of Madison, as well as its observation that even in the founding era "many clergymen vigorously *opposed* any established church," both suggest that the discriminatory exclusion of ministers from public office was *never* justified under the Free Exercise Clause. *Id.* at 629 n.9 (emphasis added).

197. *Id.* at 632 (Brennan, J., concurring). Brennan would have also invalidated the exclusion under the Establishment Clause. *Id.* at 636-42.

198. *Id.* at 632 (Brennan, J., concurring). That this was Brennan's perception of the law is reinforced by his citation to the language in *Everson* condemning laws that disabled various denominations "because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Id.* at 633 n.7 (emphasis omitted) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)); *see also McDaniel*, 435 U.S. at 635 n.8

McDaniel remains a vital precedent that forbids government from "impos[ing] special disabilities on the basis of religious views or religious status."[199] The decision is strong evidence of the non-persecution principle in that it particularly disfavors laws that impose disabilities on religious status—and more precisely on the behavior that is associated with the status—specifically because of its connection to religion. Significantly, *McDaniel* also treats with skepticism any justification for targeting religious affiliation based on discarded historical attitudes about religion that are incompatible with properly understood principles of religious freedom, or that are themselves of doubtful historical lineage. Finally, notice what little separated the plurality and concurring Justices—four subjected the law to strict scrutiny as "religious conduct discrimination," while Brennan, Marshall and Stewart would have summarily invalidated the law as a "religious belief discrimination."

The foregoing jurisprudential foundations for the non-exemption and non-persecution rules set the stage for the clearest interaction of those rules in two decisions from the 1990s. Those were *Employment Division Department of Human Resources v. Smith*—reaffirming and

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(Brennan, J., concurring) (arguing that, because the clergy disqualification "[b]y its terms . . . operates against McDaniel because of his *status* as a 'minister' or 'priest,' it runs afoul of the Free Exercise Clause simply as establishing a religious classification as a basis for qualification for a political office" (citation omitted)).

In a separate concurrence, Justice Stewart agreed with Brennan that the clergy exclusion implicated the absolute prohibition against laws targeting beliefs, a principle supported by "the judgment that . . . government has no business prying into people's minds or dispensing benefits according to people's religious beliefs." *Id.* at 643 (Stewart, J., concurring). Justice White's concurrence stated that he would have invalidated the exclusion under the Equal Protection Clause. *Id.* at 643-46 (White, J., concurring).

199. *See* Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990); *accord* DeForrest, *supra* note 20, at 615-16 (relying on *McDaniel*, in part, to condemn State Blaines as generally unconstitutional). It is an error to read *McDaniel* narrowly to forbid only religious disqualification from "participation in the political process" or as presenting a unique conflict between state and federal rights. *See, e.g.*, Lupu & Tuttle, *supra* note 19, at 965 n.218 (characterizing clergy disqualification in *McDaniel* as "coercively exclud[ing] clergy from one aspect of the right of self-government"); Davey v. Locke, 299 F.3d 748, 763 (9th Cir. 2002) (McKeown, J., dissenting) (arguing *McDaniel* merely involved the "juxtapos[ition] [of] two fundamental rights," one of which was the right "to directly engage in the political process"). The precedential value of the decision is better described by the Supreme Court itself—in *Smith*, the Court described *McDaniel* as forbidding government to "impose special disabilities on the basis of religious views or religious status." *See* 494 U.S. at 877; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (reiterating *Smith*'s interpretation of *McDaniel*); *id.* at 557 (Scalia, J., concurring) (reinforcing the same). The fact that Tennessee had imposed a religious disability on "the right to self-government" likely made the case that much easier to decide, but the controlling factor was the religious disability itself, as *Smith* and *Lukumi* make clear. *See Lukumi*, 508 U.S. at 520; *Smith*, 494 U.S. at 872. It is implausible to suggest that *McDaniel* would have come out differently if Tennessee had instead, for instance, generally forbidden clergy from participating in an otherwise accessible government charity program, simply because of their identity as clergy.

clarifying the non-exemption rule—and *Church of theLukumi Babalu Aye, Inc. v. City of Hialeah*—reaffirming and clarifying the non-persecution rule. Each decision reinforced the strength of the non-persecution rule and placed it in the context of the Court's overall Free Exercise jurisprudence.

1. *Smith* and Peyote

In *Smith*, the Court confronted whether Oregon could "include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug," and could, consequently, deny unemployment benefits to persons who had been fired for using the drug sacramentally during a Native American Church ceremony.[200] In deciding that Oregon could do so without violating the Free Exercise Clause, the Court focused on the general nature of the criminal peyote prohibition, repeatedly characterizing it as a "neutral" or "generally applicable law."[201] "Generally applicable" laws were explicitly contrasted with laws that "were specifically directed against" or that "discriminated against" religious behavior.[202] The Court recognized that the religious free exercise protected by the First Amendment often extends to physical acts—listing as examples devotional or otherwise religion-motivated actions such as "assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from

200. *Smith*, 494 U.S. at 874. Oregon classified peyote, "a hallucinogen derived from the plant *Lophophora williamsii Lemaire*," as a Schedule I controlled substance, the possession of which was punishable as a felony. *See id.* (citations omitted).

201. *See id.* at 874 ("general criminal prohibition" on peyote use), 878 ("generally applicable law"), 879 ("'valid and neutral law of general applicability'"), 880 ("a neutral, generally applicable regulatory law"), 881 (a "neutral, generally applicable law"), 884 ("a generally applicable criminal law" and "an across-the-board criminal prohibition"), 885 ("generally applicable prohibitions of socially harmful conduct"). The Court was careful to distinguish the general criminal prohibition at issue in *Smith* from the individualized denials of unemployment compensation the Court had invalidated in *Sherbert*, *Thomas* and *Hobbie*. *See Smith*, 494 U.S. at 876, 882-84; *see also* Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987). *Smith* left these decisions intact, while limiting their applicability outside the context of "individualized" denials of religious exemptions. *See* 494 U.S. at 884.

202. *See Smith,* 494 U.S. at 877 (observing that "[t]he government may not . . . impose special disabilities on the basis of religious views or religious status" (citing McDaniel v. Paty, 435 U.S. 618 (1978), and Fowler v. Rhode Island, 345 U.S. 67, 69 (1953))); *see also id.* (explaining that government would be prohibiting free exercise if it "sought to ban [religious] acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display"); *id.* at 878 (characterizing respondents' argument that their religious motivation "places them beyond the reach of a criminal law that is not specifically directed at their religious practice"); *id.* at 886 n.3 (explaining that the Court "strictly scrutinize[s] governmental classifications based on religion" (citing *McDaniel*, 435 U.S. at 618, and Torcaso v. Watkins, 367 U.S. 488 (1961))).

certain foods or certain modes of transportation."[203] Further demonstrating what a generally applicable law does not do, the Court hypothesized the following scenario:

> It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.[204]

Finally, the Court also relied on the text of the Free Exercise Clause to develop that distinction. The Court explained that the clause could plausibly be read "to say that if prohibiting the exercise of religion . . . is not the *object* of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[205]

Smith thus solidified a sharp distinction between "generally applicable" or "across-the-board" laws that are not targeted at religious behavior but may incidentally burden it, and laws that are in fact "religion sensitive"—i.e., where the very operation penalizes behavior because of its connection to religious belief or practice. *Smith*'s ruling thereby suggests that the way laws structure their burdens is constitutionally determinative: If a law structures its burdens deliberately to fall on religious conduct alone, then it is not generally applicable. Three years later in its *Lukumi* decision, the Court reinforced that distinction and demonstrated that laws of this variety—imposing religion-sensitive burdens—presumptively violate free exercise rights.

2. *Lukumi* and Animal Sacrifice

While the Court was evaluating judicial exemptions for religious peyote use in *Smith*, the *Lukumi* case was still working its way through the federal courts. Supporting the non-exemption rule, the *Smith* Court cited the federal district court's 1989 opinion in *Lukumi.* The Court did so merely to give an example of one of the many kinds of general civic obligations—in *Lukumi*, animal cruelty laws—that ought not to be forced by the Free Exercise Clause to exempt religious conduct that has been only incidentally burdened.[206] But in

203. *Smith*, 494 U.S. at 877.

204. *Id.* at 877-78.

205. *Id.* at 878 (emphasis added); *accord* Amar, *supra* note 1, at 42-43 (referring to the "unreconstructed" free exercise clause). *But see id.* at 254-56 (discussing the "reconstructed" clause).

206. *See Smith*, 494 U.S. at 889 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989)).

1993, when the Court examined the animal cruelty laws at issue in *Lukumi*, it discovered that, on closer inspection, those laws were in fact a coordinated web of prohibitions and exceptions deliberately designed for one purpose—to criminalize the ritual sacrifices performed by adherents of the Santeria religion.[207] Thus, *Lukumi* allowed the Court to refine the distinction between generally applicable laws on the one hand, and, on the other, those rarer instances of laws whose "object or purpose . . . is the suppression of religion or religious conduct."[208]

The exercise of Santeria—a fusion of Roman Catholicism with traditional African religious practices—involves ritual animal sacrifice. As the Santeria Church of the Lukumi Babalu Aye was preparing to begin worship in the southern Florida community of Hialeah, the Hialeah city council held an emergency session, during which it passed a number of resolutions and ordinances concerning animal cruelty and ritual sacrifice.[209] None of the ordinances passed to further the resolutions mentioned Santeria by name,[210] but, as the Court would remark in the course of its opinion invalidating them, "almost the only conduct subject to [the ordinances] is the religious exercise of Santeria church members."[211]

In essence, *Lukumi* announced no new rule of religious liberty. But by articulating and reinforcing the non-persecution rule implicit in the text and structure of the religion clauses, and developed throughout the Court's jurisprudence, *Lukumi* brings a necessary doctrinal balance to *Smith*. In that sense, *Lukumi* confirms that *Smith*'s non-exemption rule has teeth—it may allow religious conduct to suffer incidental burdens but it draws a non-negotiable line at laws that target religion for specially tailored burdens. Reflecting this balance, at the outset of *Lukumi*, the Court reiterated the overarching standards from *Smith*:

> [O]ur cases establish the general proposition that a law that is

207. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

208. *Id.* at 533.

209. *See generally id.* at 524-28. Various resolutions expressed, for example, "'concern'" that "certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and aimed to oppose "'the ritual sacrifices of animals.'" *Id.* at 526-27 (quoting Resolutions 87-66 and 87-90).

210. *Id.* at 527-28 (quoting Ordinances 87-52, 87-71, and 87-72). For instance, the ordinances (1) prohibited animal "sacrifice," defined as "to unnecessarily kill . . . an animal in a public or private ritual or ceremony not for the primary purpose of food consumption;" (2) restricted that prohibition to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual;" (3) exempted certain "licensed establishment[s]" from the slaughtering prohibition for animals "specifically raised for food purposes" and set zoning areas for slaughterhouse use; and (4) further exempted from regulation the slaughter or processing for sale of "small numbers of hogs and/or cattle per week" in accordance with other state law. *Id.*

211. *Id.* at 535.

> neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.[212]

Elaborating further, the Court explained that minimal free exercise standards are violated when a law "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," and that instances of such "religious persecution" lie at the historical roots of the clause.[213] A law is not neutral under the *Smith* standards if its object is to "infringe upon or restrict practices because of their religious motivation."[214] A law blatantly violates neutrality when it "discriminate[s] on its face," by, for instance, "refer[ring] to a religious practice without a secular meaning discernable from the language or context."[215] But a law may advance its discriminatory object more subtly—engaging in "masked" or "covert suppression of particular religious beliefs"[216]—when its operation "targets religious conduct for distinctive treatment."[217] To illuminate what it meant by covert discrimination, the Court quoted a directive from its Establishment Clause jurisprudence: "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."[218]

The Court unanimously concluded that the Hialeah ordinances violated these fairly straightforward standards of non-persecution because, essentially, the ordinances prohibited a form of conduct (animal killing) only when performed in observance of the Santeria religion. The ordinances were carefully structured to exempt every other form of animal killing that could conceivably fall within their

212. *Id.* at 531-32 (discussing Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872 (1990)).

213. *Id.* at 532 (citations omitted).

214. *Id.* at 533. Using largely the same expression, the Court also remarked that neutrality is violated when "the object or purpose of a law is the suppression of religion or religious conduct." *Id.*

215. *Id.*

216. Bowen v. Roy, 476 U.S. 693, 703 (1986) (Burger, C.J.)

217. *Lukumi*, 508 U.S. at 534.

218. *Id.* (quoting Walz v. Tax. Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)); *see infra* notes 275-80. As to "general applicability," the Court explained that this inquiry focused on equality-of-treatment concerns and was guided by "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 542-43. The Court admitted that the "general applicability" and "neutrality" inquiries are "interrelated." *Id.* at 531. Concurring, Justice Scalia "frankly acknowledge[d] that the terms are not only 'interrelated,' . . . but substantially overlap." *Id.* at 557 (Scalia, J., concurring).

prohibitions—for instance, large-scale slaughterhouses, small-scale farm slaughter, kosher butchers, and hunting.[219] The Court characterized this as a religious "gerrymander" whose effect was "that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to [fulfill Santeria religious requirements], not food consumption."[220] The ordinances, therefore, were not neutral because they "had as their object the suppression of religion."[221] Therefore the Court applied strict scrutiny to the ordinances, citing *McDaniel* and *Smith*, and candidly acknowledging that "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."[222] Unsurprisingly, given the plain object and operation of the Hialeah ordinances, *Lukumi* was not one of those rare cases.[223]

Justice Scalia's concurrence, joined by Chief Justice Rehnquist, sheds additional light on *Lukumi*'s analysis, particularly because Scalia wrote *Smith*. Scalia clarified that the "terms 'neutrality' and 'general applicability' are not to be found within the First Amendment itself," but instead have been used by the Court "to describe those characteristics which cause a law that prohibits an activity a particular individual wishes to engage in for religious reasons nonetheless not to constitute a 'law . . . prohibiting the free exercise' of religion within the meaning of the First Amendment."[224] In Scalia's view, laws are not neutral in that sense when "by their terms [they] impose disabilities on the basis of religion (e.g., a law excluding members of a certain sect from public benefits)."[225] By

219. *Id.* at 535-37. The Court observed that, under Florida case law, even "the use of live rabbits to train greyhounds" would not violate the Florida animal cruelty laws, which the Hialeah ordinances had incorporated. *Id.* at 537 (citing Kiper v. State, 310 So. 2d 42 (Fla. App. 1975), *cert. denied*, 328 So. 2d 845 (Fla. 1975)).

220. *Id.* at 536.

221. *Id.* at 542. For largely the same reason, the ordinances were also not "generally applicable"—while they pursued legitimate governmental interests, at least broadly speaking, in seeking to prevent animal cruelty and to protect public health, they did so "only against conduct motivated by religious belief." *Id.* at 542, 545. The Court reasoned that the ordinances were blatantly "underinclusive" in furthering the asserted legislative goals—failing to encompass many non-religious kinds of animal cruelty and public health hazards. *Id.* at 543-45. For no legitimate reason, the ordinances forced religiously motivated conduct *alone* to "bear the burden" of their prohibitions and they therefore had "every appearance of a prohibition that society is prepared to impose upon [a Santeria worshiper] but not upon itself." *Id.* at 544, 545 (quoting Fla. Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in the judgment)).

222. *Id.* at 546 (citing McDaniel v. Paty, 435 U.S. 618, 628 (1978), and Employment Division v. Smith, 494 U.S. 872, 888 (1990)).

223. *Id.* at 546-47.

224. *Id.* at 557 (Scalia, J., concurring).

225. *Id.* Illustrating that proposition, Scalia cited *McDaniel* and also Chief Justice Burger's opinion in *Bowen v. Roy*, in which Burger stated that "denial of

contrast, laws lack general applicability when, "though neutral in their terms, through their design, construction, or enforcement [they] target the practices of a particular religion for discriminatory treatment."[226] Scalia allowed that his line between these two qualities of discriminatory laws was "somewhat different" from the one drawn in Justice Kennedy's majority opinion, but he judged the distinction inconsequential because the categories overlapped significantly.[227]

3. Summary: Non-Persecution and Free Exercise

The consistent rejection in the Court's free exercise jurisprudence of laws that target religious conduct for special disabilities—laws that impose religion-sensitive penalties—undergirds the non-persecution principle. The Court has long recognized that the laws of a pluralist society will inevitably intrude on certain behavioral demands that religions make of their adherents. In early cases like *Reynolds* and *Davis*, Mormons' religious obligation to engage in polygamous marriages had to give way before society's different conception of marital limits. Over a century later in *Smith*, Native Americans' celebration of a sacrament of their religion bowed before society's need to regulate harmful substances. But there is a deeper principle at work governing the burdens society may legitimately place on religious conduct, one evident in the parameters of the non-exemption

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[governmental] benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications." *Id.*; *see* Bowen v. Roy, 476 U.S. 693, 704 (1986) (Burger, C.J.).

226. *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring) (citation omitted). Jay Bybee provides an accurate synthesis of Scalia's opinions in *Lukumi* and *Smith*. As Bybee explains, the law upheld by Scalia's majority opinion in *Smith* "prohibited the use of peyote generally, . . . [and] necessarily prohibited the religious use of peyote." Bybee, *supra* note 27, at 313. The impact on religiously motivated conduct was incidental, not deliberate. The prohibition was not religion-sensitive. By contrast, in *Lukumi*, Scalia concurred in invalidating "a city ordinance barring the ritual slaughter of animals," a law in which "ritual use was an element of the crime." *Id.* The *Lukumi* law's prohibition was tied to religious motivation; its burden on the Santeria practitioners was unique and deliberate. The law was religion-sensitive. *See also* Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 698 (1996) (observing that *Smith*'s "less well known" holding, which was confirmed in *Lukumi*, "reiterated that laws 'impos[ing] special disabilities on the basis of religious views or religious status' are presumptively unconstitutional, and subject to strict scrutiny").

227. *Lukumi*, 508 U.S. at 557, 558 (Scalia, J., concurring). Any difference seems slight and immaterial. Scalia and the majority agree on the qualities of a law that render it discriminatory for purposes of free exercise analysis, but they merely group those qualities differently under the rubrics of "neutrality" and "general applicability." *Id.* at 557. It appears that Scalia would treat "neutrality" more narrowly than the majority—focusing more on the actual terms of the law—but would treat "general applicability" more broadly—including the "design [and] construction" of the law. *See id.* at 557-58 (Scalia, J., concurring).

rule itself. For that rule coherently operates only in the context of laws that further legitimate governmental goals through "neutral and generally applicable" means and that, by definition, place burdens on religiously motivated conduct only incidentally. In other words, the Court has always premised the soundness of the balance struck in the non-exemption rule on the notion that the laws in question circumscribe conduct for legitimate reasons independent of its religious affiliation or motivation. Once laws begin to impose burdens based on whether a status, organization, or behavior is connected to religion, then the entire basis for the non-exemption rule crumbles.

Gerard Bradley has persuasively explained the intersection between these two complementary lessons. Commenting on the relationship between *Smith* and *Lukumi*, Bradley argues that "[t]hose cases stand for the proposition that where an action is legitimately generally prohibited, the Constitution does not require different treatment for believers who engage in the activity for religious reasons, or for the religious significance they see in or attach to it."[228] But the necessary corollary to this rule, Bradley is careful to add, flows from what I have described as the backbone principle of non-persecution: "Where public authority generally permits an activity—say, slaughtering animals—it may not discriminate against persons who would engage in the activity for religious reasons or for the religious significance they see in or attach to it."[229] Thus, we can broadly say that the Free Exercise Clause does not withhold from government the power to prohibit all polygamy, but does withhold power to prohibit Mormon polygamy only or polygamy engaged in "for religious purposes." Government may forbid peyote use across-the-board for the religious and non-religious alike, but it may not prohibit the "ritual" or "sacramental" use of peyote while exempting all other uses. Eligibility for public office may be regulated based on any number of general criteria (age, citizenship, and criminal record come to mind), but eligibility may not be premised on the nature of a person's connection to religion or to a person's role in a church. Government may enact generally applicable public health rules for animal slaughter and disposal, but it may not tailor those rules to target religious animal slaughter only, while leaving the butcher, the farmer, and the hunter inexplicably unregulated.

What counts here is whether religion is the triggering mechanism for the burden imposed. The distinction between legitimate and illegitimate burdens on religious practice shows that the constitutional defect arises when categorizations such as "religious," "religious affiliation," or "religious purposes" are used as the organizing principle for imposing legal disabilities. "Incidental" burdens—those

228. *See* Bradley, *supra* note 18, at 15 (citations omitted).
229. *Id.*

which, in a sense, accidentally occur only because general laws may conceivably burden someone's religious practice in a religiously plural society—are constitutionally permissible. But laws that reserve their burdens for religious conduct only—"religious gerrymanders," in Justice Harlan's phrase[230]—are impermissible because, in allocating the burdens and benefits of society's laws, they force religiously motivated conduct alone to bear the burdens and forego the benefits. The Free Exercise Clause condemns such laws because, as Michael McConnell explains, "[t]he free exercise principle 'singles out' religion for special protection against governmental hostility or interference."[231]

Notice how the subtle ripening of the non-persecution principle, as seen in the long progression from *Reynolds* in 1878 to *Lukumi* in 1993, reinforces the idea that, at bottom, precisely what non-persecution prohibits is invidious religious categorization. *Reynolds* seemed to stingily protect only Mormons' religious opinions and leave their actions entirely open to legal prohibition, provided they were "in violation of social duties or subversive of good order."[232] In 1890, *Davis* perhaps promised slightly more protection—shielding not only "man's relations to his Maker and the obligations he may think they impose," but also "the manner in which an expression shall be made by him of his belief on those subjects."[233] Like *Reynolds*, *Davis* also recognized the trumping power of criminal law, but added that such laws must be "passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."[234] Looking forward to *Gobitis* in 1940, we find the Court suggesting that "religious liberty" is offended by laws "directed against the doctrinal loyalties of particular sects" or laws "aimed at the promotion or restriction of religious beliefs."[235] A short seven years later gives us the Court's striking dicta in *Everson* that free exercise prohibits states from "exclud[ing] individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[236] *Braunfeld*, in 1961, condemned laws imposing even indirect burdens on religious practice if their "purpose or effect" was "to impede the observance of

230. *See* Walz v. Tax Comm'n, 397 U.S. 680, 696 (1970) (Harlan, J., concurring).
231. McConnell, *supra* note 164, at 43.
232. Reynolds v. United States, 98 U.S. 145, 164 (1878).
233. Davis v. Beason, 133 U.S. 333, 342-43 (1890).
234. *Id.* at 343.
235. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 (1940).
236. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947); *see also* Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (stating that, unlike a "general" law, "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, the law is constitutionally invalid even though the burden may be characterized as being only indirect").

one or all religions" or "to discriminate invidiously between religions."[237] In 1978, *McDaniel* invalidated laws targeting religious status—in the sense of conduct or activity affiliated with religion—for special disabilities.[238] And, in the 1990s, *Smith* and *Lukumi* solidified the prohibition against laws that impose disabilities on a category defined in religious terms.[239]

This can plausibly be viewed as a progression of free exercise principles from simply forbidding laws targeting religious beliefs, to forbidding encroachments on religious observance and practice, to forbidding exclusions based on religiously motivated conduct, status, and affiliation. Overall, the movement has been toward forbidding invidious religious categorization altogether. The elaboration of "general" versus "targeted" laws in *Smith* and *Lukumi* cannot be properly understood apart from this matrix of free exercise decisions stretching back over a century. And *Lukumi* explicitly invoked that long history when it glossed "religious persecution" as laws that "discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct because it is undertaken for religious reasons."[240] Thus, the Court does not invoke the loaded term *persecution* carelessly or outside the context of its own jurisprudence, and it has not suggested that the term is confined to the grossest instances of official religious discrimination. Understanding the term's proper place in free exercise jurisprudence shows that persecution is constitutionally accomplished by the more sophisticated method of an invidious classification based on religion alone.[241]

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237. *Braunfeld*, 366 U.S. at 607.

238. McDaniel v. Paty, 435 U.S. 618, 626-28 (1978).

239. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

240. *See Lukumi*, 508 U.S. at 532. *Lukumi* specifically says that "it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'" *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 703 (1986) (Burger, C.J.)).

241. Just as it is wrong to read *McDaniel* narrowly, see *supra* notes 188-199, it is wrong to restrict *Lukumi* to its facts. *See, e.g.*, Lupu & Tuttle, *supra* note 19, at 963 n.211 (distinguishing *Lukumi* because it involved "coercive, animal protection legislation upon a particular religious sect, rather than the limitation of a government benefit to secular organizations"); Davey v. Locke, 299 F.3d 748, 762 (9th Cir. 2002) (McKeown, J., dissenting) (declining to find "any guidance in *Lukumi* beyond the criminal ordinances at issue there"). Not only does this ignore the Court's language in *Lukumi*—which broadly teaches that, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs *or regulates or prohibits conduct because it is undertaken for religious reasons*"—it more fundamentally ignores *Lukumi*'s place in the larger development of the Court's religious non-discrimination jurisprudence—again, which the Court made clear in its opinion. 508 U.S. at 532-33 (emphasis added). The laws at issue in *Lukumi* doubtlessly presented *egregious* violations of free exercise, because they were designed to stamp out a central religious practice of a minority religious group. But neither the opinion itself, nor the Court's non-discrimination jurisprudence generally, gives any reason to think that *Lukumi* represents a *minimum* level of "religious

In the next section, I will examine how principles from Court's non-establishment and free speech jurisprudence reinforce and round out the scope of this non-persecution rule. But it will be useful to pause at this point and assess the State Blaines in light of the basic tenets of non-persecution drawn from the Court's free exercise cases. Those tenets call the obvious textual applications of the State Blaine Amendments into serious question.[242] All State Blaines explicitly single out religious purposes, religious institutions, and religious affiliation for exclusion from otherwise generally available public benefits. The object of the amendments, which is plain on the face of all the State Blaines, is to place religion at a civil disadvantage with respect to all conduct, institutions, and persons that are "non-religious." In doing so, the State Blaines explicitly exclude themselves from the category of "neutral and generally applicable laws"—the only kind of laws which, under the Free Exercise Clause, may place burdens on religious conduct. Like the clergy exclusion in *McDaniel*, the State Blaines force persons whose behavior or status affiliates them with religion to choose between adhering to that affiliation and receiving public benefits to which eligible "non-religious" persons are entitled. Like the animal sacrifice laws in *Lukumi*, the State Blaines tailor their burdens and exclusions to conduct that is undertaken for religious reasons—only the State Blaines add to that the additional defect of discriminating against religion openly.[243]

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persecution" which must be reached before the Free Exercise Clause is triggered.

242. In a recent article, Mark DeForrest reaches a similar conclusion about the State Blaines. *See* DeForrest, *supra* note 20, at 607. More generally, DeForrest also argues that the State Blaines violate a "principle of nondiscrimination" inherent in liberal democracy itself and in principles of distributive justice. *See generally id.* at 607-13 (relying principally on Paul Weithman, *Religious Reasons and the Duties of Membership*, 36 Wake Forest L. Rev. 511 (2001); Ashley Woodiwiss, *Ecclesial Profiling*, 36 Wake Forest L. Rev. 557 (2001); John Courtney Murray, We Hold These Truths: Catholic Reflections on the American Proposition (1960)).

243. My application of the non-persecution rule to the State Blaines does not rely on the subjective motivations legislators may have had, individually or collectively, in promulgating them. It is not clear whether such "legislative purposes"—those hopes or fears which may lurk in lawmakers' breasts but find no objective expression in the language, structure, or operation of the laws they pass—should figure in analyzing the validity of laws under the Establishment or Free Exercise Clauses. *See, e.g.*, Mark Tushnet, *Vouchers After* Zelman, 2002 Sup. Ct. Rev. 1, 17-18 (2002) (suggesting that the "bad motivations" behind many State Blaines should be irrelevant to assessing their constitutionality). Some of what the Court has said in non-establishment cases suggests that legislators' subjective motivations could be relevant. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 222-23 (1997) (stating that "we continue to ask whether the government acted with the purpose of advancing or inhibiting religion"); Wallace v. Jaffree, 472 U.S. 38, 56-61 (1985) (considering legislators' subjective motivations for "moment of silence" law in determining "'whether government's actual purpose is to endorse or disapprove of religion'" (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring))); *see also id.* at 73-78 (O'Connor, J., concurring) (generally discussing use of legislative history, including some limited use of legislators' statements, in assessing secular purpose of the law). *But see* Tushnet, *supra*, at 17 & n.55 (relying on Sunday Closing Cases to argue that "bad motivation at

B. *"Neutrality" and Non-Persecution*

It is often stated that the religion clauses demand that laws be "neutral" toward religion.[244] The notion continues to play a major conceptual role in the Supreme Court's non-establishment jurisprudence. But "neutrality" is an incomplete and open-ended term; as Douglas Laycock observes, "[t]hose who think that neutrality is meaningless have a point. We can agree on the principle of neutrality without having agreed on anything at all."[245] Yet Laycock rightly does not dismiss neutrality as an intelligible concept—indeed, he argues that one of the jurisprudential roots of religious non-discrimination lies in the Court's repeated assurances over the last two decades that the Constitution mandates government neutrality toward religion.[246] Neutrality, in short, has something to tell us about the non-

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the outset can become irrelevant over time, if eventually a law can be justified by identifying some permissible goals the legislature might be pursuing (today) in keeping it on the books"). As to free exercise cases, the evidence is shakier. In *Lukumi*, only two Justices relied on statements of individual council members' subjective motivations for the animal cruelty ordinances. *See* 508 U.S. at 540-42 (Kennedy, J., joined by Stevens, J.). That reliance was strongly rejected in Justice Scalia's concurrence. *See id.* at 558-59 (Scalia, J., concurring, joined by Rehnquist, C.J.). In any event, the parameters of the non-persecution rule I have analyzed in this article suggest that an *objective* notion of legislative purpose is the relevant one for free exercise purposes. Non-persecution asks how a law operates objectively with respect to religious persons, organizations, and purposes. It would not seem to regard as a necessary or a sufficient condition for a law's invalidity that the lawmakers who passed it *subjectively* wished to persecute religion—*provided* those subjective wishes found no objective expression in the language, structure, or operation of the law. A view that such subjective wishes are *alone* enough to invalidate a law seems inconsistent with the distinction clarified in *Smith* and *Lukumi* between "religion neutral" and "religion targeted" laws.

This issue impacts an analysis of the State Blaines. If invalidation of a particular State Blaine required a specific showing that the legislators passing it subjectively intended to persecute Catholics, the task would be difficult indeed. *See* Lupu & Tuttle, *supra* note 19, at 967-70 (describing difficulties in mounting a purely "animus-based" attack on State Blaines). Further, it would raise the hard question of whether lawmakers' subjective purposes in the late nineteenth century should even matter today. But my analysis of the State Blaines regards such subjective motivation as irrelevant. The State Blaines, on their face, objectively structure categories of public beneficiaries to exclude the religious. Understanding the State Blaines' historical provenance, of course, helps explain why such laws exist. But if we had *no* knowledge about why the State Blaines came into being, they would still operate unconstitutionally against religion. On this point, I disagree with Ira Lupu and Robert Tuttle that a subjective "animus-based" attack is the only way to invalidate the State Blaines. *See id.*

244. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (remarking that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers"); *see also* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 993 (1990) (observing that "[a] wide range of courts and commentators commonly say that government must be neutral toward religion" and assuming that "neutrality is an important part of the meaning of the religion clauses" (citations omitted)).

245. *See* Laycock, *supra* note 244, at 994.

246. *See* Laycock, *supra* note 156, at 63.

persecution principle and, in turn, how that principle applies to the State Blaines.[247]

Among scholars of American religious liberties, there are two prominent competing views of what a principle of neutrality toward religion requires. My purpose is not to choose one over the other.[248] Instead, my modest point is that either view of neutrality supports the non-persecution principle gleaned from the Court's free exercise jurisprudence. I will briefly demonstrate that the Court has often suggested as much—i.e., that religious discrimination is inconsistent with any plausible notion of government neutrality toward religion—when elaborating the requirements of neutrality in its non-establishment cases.

One account of neutrality posits that the religion clauses are co-belligerents in the cause of promoting religious freedom: free exercise forbids discrimination against particular religions and against religion generally, while non-establishment "prevents the government from using its power to promote, advocate, or endorse any particular religious position."[249] Douglas Laycock has coined the influential term "substantive neutrality" to capture this notion—i.e., that "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[250] The religion clauses, so often accused of being in tension, should instead be read holistically as mutually reinforcing guarantees of positive religious liberty.[251] Seen that way, "most of the tension between them disappears. They are complementary provisions, both in the service of the same fundamental right. They bar Congress from abridging religious freedom in one specific way (by legislation 'respecting an establishment of religion'), and in general ('or prohibiting the free exercise thereof')."[252] In a similar vein, Michael McConnell explains that "[t]he Free Exercise and Establishment Clauses serve a complementary function: to reduce the power of government over

247. *See, e.g.*, DeForrest, *supra* note 20, at 608 n.468 (linking State Blaines' discriminatory operation to the Court's use of neutrality in its religion jurisprudence).

248. A substantive conception of neutrality does seem, however, more congruent with the religion-promoting text and purposes of the religion clauses.

249. McConnell, *supra* note 164, at 43.

250. Laycock, *supra* note 244, at 1001; *see also* Laycock, *supra* note 156, at 45 (reiterating argument for substantive neutrality that "an underlying purpose of religious liberty is to minimize government influence on religious choices"); Berg, *supra* note 12, at 122 n.5 (agreeing with Laycock's view of "substantive neutrality"); Lupu & Tuttle, *supra* note 10, at 66 n.96 (contrasting Laycock's "substantive neutrality" with a more formalist view of neutrality).

251. *See* Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 541 (1991).

252. *Id.*

religion, whether to help, hurt, or control, to the greatest extent consistent with the achievement of legitimate secular objectives."[253]

A competing notion of religious neutrality is "formal neutrality." This view holds that "government cannot utilize religion as a standard for action or inaction," because the unified thrust of the Free Exercise and Establishment Clauses "prohibit[s] classification in terms of religion either to confer a benefit or to impose a burden."[254] Formal neutrality thus draws a strikingly different inference from the complementarity of free exercise and non-establishment. Although it reads the clauses as stating a single precept,[255] that precept directs government not merely to avoid interfering with religion, but rather to adopt a mechanistic evenhandedness toward religion, "without regard to whether such evenhandedness helps or hinders religion."[256]

These two views of neutrality make a difference on some important issues. For instance, does the Establishment Clause allow legislatures

253. McConnell, *supra* note 164, at 11. In an earlier article, McConnell proposed a similar view of what he called a "pluralistic" approach to interpreting the Establishment Clause. According to him, "a pluralistic approach would not ask whether the purpose or effect of the challenged action is to 'advance religion,' but whether it is to foster religious uniformity or otherwise distort the process of preaching and practicing religious convictions. A governmental policy that gives free rein to individual decisions (secular and religious) does not offend the Establishment Clause, even if the effect is to increase the number of religious choices. The concern of the Establishment Clause is with governmental actions that constrain individual decisionmaking with respect to religion, by favoring one religion over others, or by favoring religion over nonreligion." McConnell, *supra* note 17, at 175.

254. *See* Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1, 96 (1961); *see also* Mark Tushnet, *Of Church and State and the Supreme Court: Kurland Revisited*, 1989 Sup. Ct. Rev. 373; Laycock, *supra* note 244, at 999-1000 & nn.22-23; Lupu & Tuttle, *supra* note 10, at 66 & n.96.

255. Kurland, *supra* note 254, at 96.

256. Lupu & Tuttle, *supra* note 10, at 66 & n.96; *cf.* Glendon & Yanes, *supra* note 251, at 541 (arguing that the First Amendment should be read holistically as a straightforward declaration that "forbids Congress to interfere with a group of important freedoms," first among which is simply "religious freedom"). Purely formal neutrality has been widely criticized. For instance, Laycock claims that "formal neutrality has been almost universally rejected," that "[n]o major commentator [has] endorsed it for a generation" (he excepts Tushnet, *supra* note 243), and that "[h]ardly anyone else has been willing to apply it universally, because it produces surprising results that are inconsistent with strong intuitions." Laycock, *supra* note 244, at 1000. McConnell rejects what he calls religion-blindness as an across-the-board standard for interpreting the religion clauses, and he points out that Kurland's formulation *itself* illogically uses "religion" as a legal categorization. *See* McConnell, *supra* note 164, at 11. I would add that it is difficult to derive a rule of formal neutrality from the text and purposes of the religion clauses themselves. If the religion clauses, as Akhil Amar has persuasively demonstrated, *see* Amar, *supra* note 1, at 33-34, 41, simply withdrew two objects of legislative power from Congress (i.e., the power to forbid the free exercise of religion and to meddle with state establishments of religion), then why should we read them as impliedly making the additional and vastly broader withdrawal of any power to legislate on religious matters altogether? Indeed, based on text and purposes alone, it would seem more plausible to reason, by negative implication, that the religion clauses *empower* Congress to *promote* the flourishing of religion generally.

to make specific exemptions from laws for religiously-motivated behavior or religious organizations? A "substantively neutral" view would hold that, generally speaking, government may (or perhaps must) do so, and this, indeed, is how the issue has been resolved historically in American legislatures and courts.[257] A "formally neutral" view would reject any special religious exemptions by courts *or* legislatures. *Smith* indicates that the Supreme Court was guided by concerns with formal neutrality when deciding whether religious behavior should receive judicial exemptions from generally applicable laws.[258] At the same time, *Smith* did not wholly embrace formal neutrality, as the opinion itself approves of legislative exemptions.[259] Many proponents of substantive neutrality have, nonetheless, criticized *Smith*.[260]

For present purposes, I need not resolve the tensions between formal and substantive neutrality. Why? On either account of neutrality, laws that explicitly target religion for special disabilities are non-neutral. Such laws violate substantive neutrality because they promote not religious freedom, but hostility toward religion: their object and effect is to demote and penalize religious belief, behavior, or association.[261] Such laws violate formal neutrality for formal

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257. *See, e.g.*, McConnell, *supra* note 164, at 5-6 (arguing that "[t]he Supreme Court has repeatedly held that religious accommodations are constitutionally permissible, even if not constitutionally required" (citations omitted)). McConnell also states:

> [N]ot one historian or constitutional scholar has [in recent years] claimed that the founding generation deemed religious accommodations illegitimate. Accommodations of religion during the years leading up to the framing of the First Amendment were common (the most frequent examples were exemption from military conscription or jury duty, exemption from oath requirements, and exemption from tithes).

Id. at 14; *see also, e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687, 705 (1994) (stating that "we do not deny that the Constitution allows the State to accommodate religious needs by alleviating special burdens" and that "[o]ur cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice").

258. *See supra* Part IV.A.1.

259. *See, e.g.*, McConnell, *supra* note 17, at 166-67.

> The formal neutrality position would make unconstitutional all legislation that explicitly exempts religious institutions or individuals from generally applicable burdens or obligations. Yet the theory of *Smith* is that exemptions are a form of beneficent legislation, left to the discretion of the political branches .... *Smith* thus rejects the formal neutrality position under the Establishment Clause.

Id.

260. *See, e.g.*, Laycock, *supra* note 244, at 1000 (strongly criticizing *Smith*); Lupu & Tuttle, *supra* note 10, at 71-72 & nn.113-15 (discussing criticism and defense of *Smith*); *see also supra* Part IV.A.1.

261. *See, e.g.*, McConnell, *supra* note 17, at 184-87 (arguing that selective exclusion of religious institutions from generally available public benefits would violate neutrality insofar as it "use[s] the government's coercive power to disadvantage religion" (citing Michael W. McConnell, *Unconstitutional Conditions: Unrecognized*

reasons; they use religion as a category for imposing legal burdens.[262] Either conception of neutrality, then, would forbid religious discrimination and therefore accords with the general non-persecution principles under the Court's free exercise jurisprudence. A brief look at the Court's treatment of neutrality (whether that treatment reflects a more formal or more substantive view of neutrality) in its non-establishment cases will demonstrate that idea.

Neutrality as religious non-hostility can be seen as one fixed star in the otherwise untidy constellation of the Court's non-establishment cases. The Establishment Clause is neutral toward religion in that it does not "compel the exclusion of religious groups from government benefit programs that are generally available to a broad class of participants."[263] But the Court has often suggested that neutrality goes beyond merely "not compelling" religious exclusion; neutrality affirmatively condemns governmental hostility toward religion itself.[264] As Justice O'Connor has observed, "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion."[265] For instance, neutrality means that government may not deliberately skew how it distributes aid either in favor of or against religious recipients.[266] In other words,

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Implications for the Establishment Clause, 26 San Diego L. Rev. 255 (1989))).

262. *See* Kurland, *supra* note 254, at 96 (religious clauses "prohibit classification in terms of religion either to confer a benefit or *to impose a burden*" (emphasis added)); *see also* Lupu & Tuttle, *supra* note 10, at 66 n.96 (stating that the "Neutralist believes that religious entities and causes are to be treated exactly like their secular counterparts—no *worse* but no better," and is one "who equates neutrality with nondiscrimination between religious institutions and their secular counterparts" (emphasis added)).

263. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (citations omitted); *see also* Bowen v. Kendrick, 487 U.S. 589, 609 (1988) (observing that the Court has never held, under the Establishment Clause, "that religious institutions are disabled . . . from participating in publicly sponsored social welfare programs"); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (refusing to find under the Establishment Clause any "constitutional requirement which makes it necessary for government to be hostile to religion").

264. *See, e.g.*, *Rosenberger*, 515 U.S. at 839 ("More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design."); *id.* at 846 (O'Connor, J., concurring) (stating that "insistence on government neutrality toward religion explains why we have held that schools *may not discriminate against religious groups* by denying them equal access to facilities that the schools make available to all" (emphasis added)); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (declaring that "State power is no more to be used *so as to handicap* religions than it is to favor them" (emphasis added)).

265. Bd. of Educ. v. Grumet, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring) (emphasis in original).

266. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) (finding Ohio voucher program "*neutral* in all respects toward religion" in that the aid is "allocated on the basis of *neutral*, secular criteria that neither favor *nor disfavor* religion" (emphasis added) (quoting Agostini v. Felton, 521 U.S. 203, 231 (1997)). The Court in *Agostini* found that government aid does not advance religion by creating religious incentives "where the aid is allocated on the basis of *neutral*, secular criteria that

no particular universe of aid recipients may be defined in a way that religious groups get more aid because they are religious groups; conversely, because potential recipients are religious groups, they may not designedly get less.

This religion-friendly side of neutrality is most clearly distilled in the doctrine that laws violate the federal Establishment Clause if they deliberately "inhibit" religion.[267] The notion runs back to the seminal Establishment Clause decision, *Everson* itself, which declared that "[s]tate power is no more to be used so as to handicap religions than it is to favor them."[268] *Everson* also closely links this aspect of non-establishment jurisprudence to the Free Exercise Clause.[269] None of this is to say, however, that the most comfortable argument against religiously-hostile laws lies in the Establishment Clause proper. The Court has rarely, if ever, applied the "inhibition" prong, and there is some doubt as to the coherence of the argument that government disapproval of religion somehow establishes religion.[270] Furthermore,

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neither favor *nor disfavor* religion and is made available to both religious and secular beneficiaries on a *nondiscriminatory* basis." *Agostini*, 521 U.S. at 231 (emphasis added).

267. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (law is an "establishment" of religion if its "primary effect . . . advances [or] inhibits religion"); *see also Agostini*, 521 U.S. at 222-23 (confirming that "we continue to ask whether the government acted with the purpose of advancing or inhibiting religion").

268. *See* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947). Further linking neutrality to non-hostility, *Everson* also stated that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Id.*

269. *See id.* at 16 ("[The Free Exercise Clause] commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith*, or lack of it, from receiving the benefits of public welfare legislation." (emphasis in original)).

270. As to the State Blaines, the argument would be that they themselves "establish" religion, because their purpose and effect is to "inhibit" religion by disqualifying it from generally available public benefits. *See Lemon*, 403 U.S. at 612 (a law's "principal or primary effect must be one that neither advances nor inhibits religion"); *see also* McDaniel v. Paty, 435 U.S. 618, 636-42 (1978) (Brennan, J., concurring) (arguing that Tennessee clergy exclusion also violated the Establishment Clause since the clause, "properly understood, is a shield against any attempt by government to inhibit religion as it has done here" (citations omitted)); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 856-57 n.2 (1995) (Thomas, J., concurring) (suggesting that legal categorization that explicitly discriminates against religion is unconstitutional because it wrongly takes "cognizance" of religion) (citing Madison's Memorial and Remonstrance). Cutting against this line of argument, Michael McConnell has argued that the "apparent symmetry" of the *Lemon* "inhibition" prong is "spurious," pointing out that "in actual practice, actions 'inhibiting' religion are dealt with under the Free Exercise Clause" and that the only case in which the Supreme Court has applied "inhibition" as a matter of establishment law is *Larson v. Valente*, 452 U.S. 904 (1981), a case involving denominational discrimination. *See* McConnell, *supra* note 17, at 118 n.9, 152. In a similar vein, Douglas Laycock has argued that "the Court never took the 'inhibiting' prong of *Lemon* seriously in the context of school finance." Laycock, *supra* note 156,

four members of the current Court have recently suggested that "to require exclusion of religious schools from [a genuinely neutral aid program] would raise serious questions under the Free Exercise Clause."[271] My narrower purpose is to point out that, like free exercise jurisprudence, non-establishment jurisprudence contains a background assumption that laws violate basic canons of legitimacy when they purposefully single out religion for disfavored treatment. This background assumption is evident in much of the Court's elaboration of the neutrality requirement, as the following examples underscore.

Even when forbidding Bible reading in public schools in *School District v. Schempp*—a decision regarded by some as an apogee of Court-imposed separationism[272]—the Court emphasized that the Establishment Clause did not sanction purposeful religious discrimination. Constitutional limits of legislative power were transgressed, the Court said, if the "purpose and the primary effect of the enactment" is "either the advancement or inhibition of religion."[273] Justice Goldberg's concurrence better articulated this idea, explaining that "[t]he fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief."[274]

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at 56.

271. *See* Mitchell v. Helms, 530 U.S. 793, 835 n.19 (2002) (plurality opinion) (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1990); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947); *Rosenberger*, 515 U.S. at 819).

272. *See* Berg, *supra* note 12, at 151-52.

273. Sch. Dist. of Abbington Township v. Schempp, 374 U.S. 203, 222 (1963) (emphasis added). The *Schempp* majority underscored the religious neutrality and non-hostility guaranteed by *both* religion clauses, noting that "the two clauses may overlap." *Id.* As a general matter, the Court remarked that "the ideal of our people as to religious freedom . . . [is] one of '*absolute equality* before the law, of all religious opinions and sects'" and that "'[t]he government is neutral, and, while protecting all, it prefers none, and it disparages none.'" *Id.* at 214-15 (quoting Minor v. Bd. of Educ., 23 Ohio St. 211, 253 (1872) (Taft, J., dissenting)) (emphasis added). The Court described the religion clauses' overarching approach as "wholesome 'neutrality.'" *Schempp*, 374 U.S. at 222. The Court added that "[w]e agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" *Id.* at 225 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

274. *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring). Justice Goldberg's elaboration of neutrality seems to have more of a "substantive" flavor than the majority's articulation, insofar as Goldberg emphasized that non-establishment disabled the government from engaging in or compelling religious practices, from showing "favoritism" to particular sects or to religion generally, and from "deterring" religious belief. *Id.* The majority, by contrast, reasoned that laws may not have the "effect" of either advancing or inhibiting religion. *Id.* at 222. As Douglas Laycock points out, the first two prongs of the *Lemon* test (in particular, the "neither advances nor inhibits" language) "are taken almost verbatim from the Court's elaboration of 'benevolent neutrality' in [*Schempp*]." Laycock, *supra* note 156, at 56.

Plainly absent from this conception of neutrality was any justification for governmental hostility toward religion.

That benevolent view of neutrality was prominent in *Walz v. Tax Commission*, a decision which validated the venerable practice of granting tax exemptions to churches.[275] *Walz* stated categorically that "[t]he general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion."[276] In a thoughtful concurrence, Justice Harlan articulated two related concepts underlying the Court's application of the religion clauses—"neutrality" and "voluntarism."[277] By voluntarism, Harlan meant the principle that "legislation neither encourages nor discourages participation in religious life."[278] Harlan saw in neutrality an "equal protection mode of analysis," requiring the Court to "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."[279] These concepts were, as Harlan explained, "short-form for saying that the Government must neither legislate to accord benefits that favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion."[280] Here, again, we have on display a relationship between government and religion—positively sanctioned by the interplay of the religion clauses—that forbids government from acting either as God's patron or as God's persecutor.

One thus sees that neutrality, which is central to the Court's non-establishment jurisprudence, is itself bottomed on the twin commands

275. *See* Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970).

276. *Id.* at 669. In the same passage, the Court also disclaimed undue rigidity in adhering to "[t]he course of constitutional neutrality," warning that "rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Id.*

277. *See id.* at 694-700 (Harlan, J., concurring); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).

278. *Walz*, 397 U.S. at 696. Harlan cited examples such as school-sponsored prayer or Bible reading or "released-time" programs that were structured to encourage participation in religious instruction. *Id.* As Harlan described it, "voluntarism" still factors significantly into the Court's approach to "neutrality," as seen in the Court's recent discussions of when "religious indoctrination" can be ascribed to the government. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 809 (2000) (plurality opinion) (discussing governmental indoctrination).

279. *Walz*, 397 U.S. at 696. As already discussed, in *Lukumi* the Court drew on Harlan's idea of "religious gerrymanders" to describe a significant impermissible aspect of the Hialeah ordinances—i.e., that they pursued otherwise legitimate governmental objectives only against religious conduct. *See supra* Part IV.A.1.

280. *Walz*, 397 U.S. at 694. Supporting this statement, Harlan quoted the passage from Justice Goldberg's *Schempp* concurrence discussed earlier in this section, and also cited the Court's free exercise discussion in *Torcaso*, discussed *supra* in Part IV.A., which condemned government discrimination in favor of some or all religions. *Id.* at 695 (discussing *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring), and Torcaso v. Watkins, 367 U.S. 488, 495 (1961)).

that government neither favor nor disfavor religion. But what does neutrality add to the non-persecution principle I have already discussed? Principally, neutrality should foreclose the notion that the free exercise and establishment clauses are somehow in tension with each other on the substantive issue of government religious hostility. The proper interaction of the clauses regarding religious benefits may still be murky, but their interaction on religious hostility is clear—both categorically condemn it. Secondly, neutrality reinforces the proposition that it is invidious governmental religious categories themselves that impinge on religious freedom. It is the government categorization that must be scrutinized—i.e., how the government has chosen to structure the exclusions and inclusions in its scheme of distributing benefits. When it is apparent that government has engaged in religious gerrymandering by creating a category of beneficiaries designed to exclude "religious persons" or "religious entities," then government has likely fallen short of the neutrality that the Establishment Clause specifically, and the religion clauses more generally, demand.

Does this mean that government is constitutionally forbidden from ever conferring a special benefit on religious persons? Or does this mean that government may allow certain narrow exemptions from general laws for religious reasons? These hard questions throw us back on the original debate discussed previously over formal versus substantive neutrality. And regardless of the resolution of that debate, one concept unites both sides: Government may not confer special disabilities on religious persons or entities through its structuring of beneficiary categories. That much should be clear from the overlap between the two competing theories of neutrality, and also from the Supreme Court's consistent condemnation of categories explicitly disfavoring religion. There is, in short, some real substance behind the Court's label of neutrality as "benevolent." Whatever benevolence may mean regarding government's favoring of religion, the idea plainly excludes governmental categories that embody *malevolence* toward religion.

C. *Free Speech and Non-Persecution*

Over the last two decades, the Supreme Court has consistently validated the "fundamental First Amendment proposition that government may not discriminate against individuals' or groups' speech on account of its religious nature or the speaker's religious identity."[281] Two aspects of this religious speech jurisprudence reinforce the non-persecution principle that government may not target religion for special disabilities in distributing public benefits.[282]

281. Paulsen, *supra* note 226, at 655.

282. In this Article, I do not address at length the argument that certain

First, the Court's treatment of laws targeting religious viewpoints for exclusion from limited public fora echoes the Court's approach to non-persecution in the free exercise context and to neutrality in the non-establishment context. Second, the Court has consistently rejected as justifications for religious viewpoint discrimination both exaggerated fears of violating the federal Establishment Clause and also states' interests in crafting greater church-state separation. Each of these points reinforces my general argument that an overarching non-persecution principle forbids most of the obvious applications of the State Blaine Amendments.

Since the early 1980s, the Court has repeatedly addressed variations on the following general theme: A governmental body creates a limited public forum for the discussion or dissemination of a broadly defined range of topics, but it explicitly excludes participants if they bring speech or ideas of an overtly religious character. Thus, in *Widmar v. Vincent*, the University of Missouri opened its facilities to any student discussion group, but disallowed facility access to any student group that would engage in religious worship or discussion.[283] Similarly, in *Lamb's Chapel v. Center Moriches Union Free School District*, a local school board made public school property available for after-school use for "social, civic and recreational meetings" and other "uses pertaining to the welfare of the community," while excluding "meetings for religious purposes."[284] The school board applied that policy to forbid a group from showing a film that discussed child-rearing from an explicitly Christian perspective.[285] More recently, in *Good News Club v. Milford Central School*, an elementary school opened its facilities for the same range of uses as in *Lamb's Chapel* but refused to allow a Christian organization access

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applications of State Blaines *independently* violate the Free Speech Clause. There are undoubtedly applications of State Blaines that would squarely abridge free speech—e.g., if State Blaines are used to justify excluding religious viewpoints from public or limited public fora. But the more difficult question, which I do not explore here, is whether the concept of a speech forum is sufficiently expansive to cover the wider array of situations where religious persons and institutions seek equal access to public benefits. *See, e.g.*, Rees, *supra* note 9, at 1313-28 (arguing that excluding religious providers from neutral voucher programs would abridge free speech); *see also* DeForrest, *supra* note 20, at 618-25 (applying free speech principles to State Blaines); Lupu & Tuttle, *supra* note 19, at 962 n.204 (advocating a narrower viewpoint-discrimination ground for result in *Davey v. Locke*, discussed *infra* notes 326-32). Again, however, this Article focuses on free exercise principles as a primary source for attacking the vast majority of the State Blaines' conceivable applications, and so I discuss the Court's religious speech cases insofar as they support my general non-persecution argument.

283. *See* Widmar v. Vincent, 454 U.S. 263 (1981). The student group in *Widmar* was called "Cornerstone," an evangelical Christian organization whose meetings "included prayer, hymns, Bible commentary, and discussion of religious views and experiences." *Id.* at 265 & n.2.

284. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 386 (1993).

285. *See id.* at 386-89.

for after-school meetings that involved religious instruction and activities.[286] Finally, in *Rosenberger v. Rector and Visitors of the University of Virginia*, the University established a Student Activity Fund that provided indirect financial assistance to a wide array of student publications. A student newspaper with an explicitly Christian viewpoint qualified to participate in the Fund but was denied access because of the religious content of the newspaper.[287] In each of these cases, the governmental body claimed that it could legitimately deny equal participation in otherwise generally available benefits—here, participation in a limited public forum—because of the avowedly "religious" content or affiliation of certain groups. But, in every case, the Supreme Court invalidated the religious exclusion as viewpoint discrimination under the Free Speech Clause and, moreover, refused to justify the discrimination under any theory of non-establishment.[288]

The Court's consistent invalidation of the religious speech exclusions in these cases resonates with the general non-persecution principle. In each case, the governmental unit had created a "limited public forum," opening its facilities to a broad but defined range of speakers or topics.[289] For instance, in *Lamb's Chapel* and *Good News Club*, the school boards had opened their facilities under a New York education law that allowed after-school meetings for "'social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community,'" provided that such meetings were

286. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102-04 (2001).

287. *See* Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 820-27 (1995). *Board of Education v. Mergens* is another case that addresses these issues, although *Mergens* does so in the context of the Equal Access Act and not the First Amendment. *See* Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

288. *See Good News Club*, 533 U.S. at 119; *Rosenberger*, 515 U.S. at 845-46; *Lamb's Chapel*, 508 U.S. at 394-97; *Widmar*, 454 U.S. at 276-77. For free speech purposes, the Court has said "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828 (citing Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972)). Discrimination against speech because of the message conveyed is presumptively unconstitutional and, furthermore, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829 (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992)). The Court therefore characterizes viewpoint discrimination as "an egregious form of content discrimination." *Id.* at 829.

289. For example, in *Widmar* the Court explained that, "[t]hrough its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Widmar*, 454 U.S. at 267; *see also Rosenberger*, 515 U.S. at 829 ("Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set."). The speech forum thereby created should be distinguished from a "public forum" which by its nature or design is "open for indiscriminate public use for communicative purposes." *Lamb's Chapel*, 508 U.S. at 392.

"'non-exclusive'" and "'open to the general public.'"[290] Similarly, in *Rosenberger* the Student Activity Fund guidelines authorized fund access to "student news, information, opinion, entertainment, or academic communications media groups."[291] But, in those cases the relevant access provisions mandated explicit exclusions for groups with religious purposes or content.[292] Consequently, in each case a student organization was admittedly eligible for participation in the limited forum because it fell within the forum's defined scope, but the group was nonetheless excluded from participation specifically because of its religious affiliation or religious purposes.

The Court has consistently condemned these exclusions as impermissibly discriminating on the basis of religious viewpoint. While government may permissibly limit the speakers in a limited public forum according to subject matter and speaker identity, such exclusions must be "reasonable in light of the purpose served by the forum and [must be] viewpoint neutral."[293] In each case, participation

290. *See Lamb's Chapel*, 508 U.S. at 386 (quoting N.Y. Educ. Law § 414 (McKinney 1988 & Supp. 1993) (explaining that New York Education Law section 414 "authorizes local school boards to adopt reasonable regulations for the [after-school] use of school property for 10 specified purposes"); *Good News Club*, 533 U.S. at 102-03 (same); *see also* N.Y. Educ. Law § 414 (McKinney 2000). In *Widmar*, the Court explained that the stated policy of the University of Missouri was "to encourage the activities of student organizations," that it "officially recognize[d] over 100 student groups," and that it "routinely provide[d] University facilities for the meetings of registered organizations." *Widmar*, 454 U.S. at 265. The Christian group at issue in *Widmar* had "regularly sought and received permission to conduct its meetings in University facilities" until the University adopted its policy of religious exclusion. *Id.*

291. *Rosenberger*, 515 U.S. at 824 (describing University guidelines relating to Student Activity Fund access). Notice that the forum created in *Rosenberger* involved more than equal access to facilities—it involved equal access to funding. *See* Paulsen, *supra* note 226, at 654 ("Equal access, according to the Court in *Rosenberger*, means no discrimination in eligibility for a right, benefit, or privilege—including funding—on the basis of religious viewpoint." (emphasis omitted)). Paulsen calls *Rosenberger*'s recognition of a free-speech right to equal access to a "funding" forum "a major doctrinal breakthrough in First Amendment law." *Id.* at 710. He also points out that the same issue (equal access of religious persons to neutral sources of public funding) was presented on remand in *Witters*. *Id.* at 711 n.140. Paulsen's analysis of *Rosenberger* thus underscores the obvious connections between religious free speech and free exercise jurisprudence.

292. In *Lamb's Chapel* and *Good News Club*, the school boards had promulgated rules stating that "school premises shall not be used by any group for religious purposes" and that otherwise forbade use "by any individual or organization for religious purposes." *Lamb's Chapel*, 508 U.S. at 387; *Good News Club*, 533 U.S. at 103. Similarly, in *Widmar*, the University adopted a regulation that prohibited use of University buildings or grounds "'for purposes of religious worship or religious teaching.'" *Widmar*, 454 U.S. at 265 & n.3. The exclusion in *Rosenberger*, as befitted a University setting, was more philosophically-nuanced. Among certain student activities excluded from the Student Activity Fund were "religious activities," defined as any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Rosenberger*, 515 U.S. at 825.

293. *Lamb's Chapel*, 508 U.S. at 392-93 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

was denied for no reason "other than the fact that the [speech] would have been from a religious perspective,"[294] and the exclusion therefore plainly amounted to forbidden viewpoint discrimination. As explained in *Rosenberger*, "[b]y the very terms of the [Student Activity Fund] prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[295] The Court categorically rejected the use of concepts like "religion," "religious purpose" and "Christian viewpoint" as legitimate organizing principles for the exclusion of groups and speech from participation in the limited public fora.[296]

The parallels between the Court's reasoning in these cases and its approach to religious neutrality and non-discrimination in its religion clause jurisprudence are unmistakable. The Court itself has referred to its treatment in these cases of public fora to illustrate the proper scope of religious neutrality in the Establishment Clause area.[297] Justice O'Connor made that connection explicit when, in her *Rosenberger* concurrence, she observed that the Court's "insistence on government neutrality toward religion explains why we have held that schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all," citing

294. *Lamb's Chapel*, 508 at 393-94; *see also Good News Club*, 533 U.S. at 112 (reaffirming the consistent view that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint").

295. *Rosenberger*, 515 U.S. at 831.

296. *See, e.g., Good News Club*, 533 U.S. at 110-12. In *Good News Club*, the Court made its most pointed rejection of the argument that the "religious nature" of speech somehow makes it fair game for exclusion. The school had claimed that the explicit Christian content of the Good News Club's teaching activities distinguished them from "pure" moral teaching and character development. In the school's view, the Club's "Christian viewpoint" was "quintessentially religious" and therefore added an "additional layer" to otherwise neutral moral teaching. The Court rejected the school's argument, stating that "we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." *Id.* at 111.

297. For instance, in *Mueller v. Allen*, the Court approved under the Establishment Clause a general education tax deduction—one that included deductions for religious education expenses—for the primary reason that the allowable expenses were incurred by all parents, regardless of whether their children attended public, private non-religious, or private religious schools. 463 U.S. 388 (1983). The Court explicitly relied on the "[s]tate's provision of a forum neutrally 'available to a broad class of nonreligious as well as religious speakers'" in *Widmar* to support its conclusion that the tax deduction at issue was also "neutral" for non-establishment purposes. *See id.* at 397 (1983) (quoting *Widmar*, 454 U.S. at 274). Given *Mueller*'s reliance on *Widmar*, it is easier to see the logic of *Rosenberger*, which "extended" the notion of a speech forum to a forum defined by a neutral *funding* mechanism. *See, e.g.*, Paulsen, *supra* note 226, at 711 n.139 (stating that "[a]rguably, *Rosenberger* is a step beyond *Mueller* and *Zobrest* in that it upholds direct state funding of specifically religious activities").

Lamb's Chapel and *Widmar* as examples.[298] The *Rosenberger* majority was operating on the same premise, as evidenced by its concluding statement that "[t]he neutrality commanded of the State by the separate clauses of the First Amendment was compromised by the University's course of action."[299] Further clarifying the connection, the Court went on to explain that "[t]he viewpoint discrimination inherent in the University's regulation . . . was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires."[300] In sum, the overarching principle in these cases is that religious speech—just like religious conduct and status—may not be excluded from the public arena simply because it is religious. "Religious" cannot be the organizing principle or the basis for classification that results in some speech or ideas being denied entry into an otherwise accessible public forum.[301]

Significantly, these cases also reject "unreasonable fears of establishment" as a justification for excluding religious speech from limited public fora. The governmental units attempted to justify their religious discrimination by raising their "interest in not violating the Establishment Clause" or their "compelling interest in maintaining strict separation of church and state." And in every case, the Court rejected that argument by concluding that allowing the religious groups to participate in the public fora was not even a colorable violation of the Establishment Clause.[302]

Moreover, in *Widmar,* the University of Missouri also grounded its discriminatory policy on the Missouri Blaine Amendment, which the University asserted "ha[d] gone further than the Federal Constitution in proscribing indirect state support for religion."[303] The Court

298. *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring).

299. *Id.* at 845.

300. *Id.* at 845-46.

301. *See* Paulsen, *supra* note 226, at 662 ("There is no 'religion exception' to the Free Speech Clause or the Free Press Clause; religious speakers and groups are entitled to the same equal access to public fora, public facilities, and public funds as other private speakers and groups receive.").

302. *E.g., Good News Club*, 533 U.S. at 112-19; *Widmar*, 454 U.S. at 270-76; *see also Rosenberger*, 515 U.S. at 837-45; *Lamb's Chapel*, 508 U.S. at 394-97.

303. *Widmar*, 454 U.S. at 275. The University relied in part on the general anti-religious-funding provision in article IX, section 8 of the Missouri Constitution, the only possibly relevant part of which provides that no "grant or donation of personal property or real estate [shall] ever be made by [any governmental unit] for any religious creed, church, or sectarian purpose whatever." *See supra* note 107 and accompanying text (discussing Missouri Blaine Amendment). The University also relied on article I, section 6 (addressing the "seminary fund") and article I, section 7 (addressing "county and township school funds"), neither of which seem applicable to the access issue nor to fall within the general parameters of State Blaine Amendments as I have described them. Nonetheless, the Supreme Court deferred to statements of the Missouri Supreme Court that the "Missouri Constitution requires stricter separation of church and State than does [the] Federal Constitution." *Widmar*, 454

approached this claim cautiously, first observing that the Missouri courts had not determined whether "a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and nonreligious speech, would offend the State Constitution."[304] Declining to resolve that issue, the Court also passed over whether the Supremacy Clause would override a more restrictive state policy toward religious accommodation.[305] But, in tension with those preliminary comments, the Court concluded that:

> [T]he state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.[306]

Thus, although the Court seemed to go out of its way to avoid addressing any conflict between the Missouri Constitution and the federal Constitution, its conclusion plainly favored federal religious and free speech rights.

In sum, the Court's consistent protection of religious speech against targeted exclusion from limited public fora—including a public forum in *Rosenberger* defined by a neutral funding mechanism—reinforces the non-persecution principle. First, the religious speech cases underscore the basic idea that religion—whether religiously motivated conduct, religiously affiliated persons or groups, or speech from a religious viewpoint—cannot be singled out for exclusion from participation in public benefits or public fora to which it would otherwise be permitted. Second, and relatedly, the religious speech cases reinforce the point that it is the invidious religious classifications themselves that are constitutionally suspect and per se disfavored. Third, they make the important additional point that religious discrimination can neither be justified by erroneous conclusions about the scope of Establishment nor by pretensions at creating a stricter separation at the state level. Michael Stokes Paulsen has concisely summed up the lessons taught and the principles reinforced by this line of cases: "The Establishment Clause does not authorize, and the Free Speech and Free Exercise Clauses do not permit, government discrimination against religious speakers or religious speech on the basis of religious content, viewpoint, or speaker identity—ever."[307]

U.S. at 275 n.16 (citing Americans United v. Rogers, 538 S.W.2d 711, 720 (Mo. 1976) (en banc)).

304. *Widmar*, 454 U.S. at 275.

305. *Id.* at 276.

306. *Id.*

307. Paulsen, *supra* note 226, at 653 (emphasis omitted).

V. THE STATE BLAINES AND NON-PERSECUTION

What remains is to apply the non-persecution principle described in Part IV to the State Blaines. This appears to be daunting, because, as Part III showed, the State Blaines cover a lot of ground. But, for constitutional purposes, that complexity can be misleading; what unites all State Blaines is the explicit object of separating public benefits from religious persons, institutions, and purposes. I will thus limit myself to assessing that operation of the State Blaines—i.e., whether they may block religious persons' and groups' access to generally available public benefits on the basis of their religious affiliation, status, or purpose. First, I will look at whether State Blaines may operate to prevent the flow of public aid to persons who wish to use the aid to further their religious education or training. That inquiry will take us back to the example that opened this Article—Larry Witters' plan to use public financial assistance to train for the ministry—as well as the situation presented in *Davey v. Locke*, a recent Ninth Circuit decision involving selective state funding of non-religious degrees that will be heard by the Supreme Court in December 2003.[308] In this first section, I take up general defenses to the operation of State Blaines grounded in federalism and in the Supreme Court's non-establishment jurisprudence itself. In the next section, I address whether a state's control over how and why it spends money can provide an additional justification for the State Blaines' religion-sensitive exclusion from equal participation in public benefits.

A. *Educational Funding, Federalism, and Incorporation*

I began this article with Larry Witters' dilemma and now return to it. Recall that Witters qualified for state educational aid because he was blind, and he wanted to use that aid for ministry training at a Christian college. The Supreme Court told Witters he could do so under the federal Establishment Clause, because the funds were distributed without reference to religion and because they ended up at a religious school solely as a result of Witters' private choice to use them there.[309] But on remand, the Washington Supreme Court blocked Witters' use of the funds under the Washington Blaine Amendment—forbidding public funds from being appropriated or applied to any religious worship, exercise or instruction.[310] Witters arguably fell within the plain terms of the prohibition, but the court

308. Davey v. Locke, 299 F.3d 748 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2075 (2003).

309. *See* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (*Witters II*); *see also supra* Part I.

310. Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1122 (Wash. 1989) (*Witters III*); *see also supra* note 116 (discussing Wash. Const. art. I, § 11).

added the case law gloss that "religious instruction" meant only instruction that was "'devotional in nature and designed to induce faith and belief in the student,'" as opposed to instruction marked by the "'open, free, critical, and scholarly examination of the literature, experiences, and knowledge of mankind.'"[311] How does this application of a State Blaine fare under the non-persecution principle?

Notice that Witters' dilemma would arise under the plain terms of any number of other State Blaines. Utah's Blaine Amendment, for instance, enacts an identical ban on funding religious instruction.[312] Pennsylvania's and Virginia's Blaines specifically disallow grants or scholarships to students in a "theological seminary or school of theology"[313] or students in a school "whose primary purpose is . . . to provide religious training or theological education."[314] Nor does it take much hermeneutical imagination to conclude that Witters' situation implicates the use of public money to "aid," "benefit," "assist," or "support" a "society," "seminary," "institution," "association," "instruction" or even a "purpose" that is "religious," "sectarian," "theological," "denominational," or "controlled by" a church or religious institution. Indeed, the more difficult task is to identify any State Blaine whose terms would clearly allow Witters' contemplated use of the funds.[315] The point is not that a court could leniently interpret any State Blaine to favor Witters—as noted above, interpretations have gone both ways—but rather that state constitutions are littered with provisions whose language invites Washington's separationist result.

That result does not fare well under the non-persecution principle. First, as applied to exclude Witters' use of the funds, a State Blaine does not operate as a generally applicable law that incidentally burdens religiously-motivated conduct. Instead, it would be a law that targets its disabilities at purpose, conduct, and affiliation because of their religious character. The funds in question were generally available funds—they were made available to Witters on a religion-neutral basis (he qualified for them because he was blind)—and nothing beyond the religion-sensitive prohibition in the State Blaine would prohibit his use of the funds for ministry training.[316] That

311. *Witters III*, 771 P.2d at 1122 (citation omitted).

312. *See supra* note 119.

313. *See supra* note 107.

314. *See supra* note 120.

315. Some candidates might be those State Blaines whose prohibitions appear limited to specific "funds" (such as "educational" or "public school" funds), because Witters' aid apparently came from a vocational rehabilitation fund. *See, e.g.*, *supra* notes 105, 103, 107 (discussing the Kansas, Ohio, and Nebraska Constitutions).

316. This would be different, of course, if the federal Establishment Clause independently prohibited Witters' use of the funds. In that case, construction of the State Blaine would not logically be implicated.

religion-penalizing application of a State Blaine would therefore merit strict scrutiny under *Smith* and *Lukumi*. Notice, moreover, how the State Blaine's exclusionary operation fits precisely into the prohibition articulated, over forty years before those decisions, in *Everson*—it "exclude[s] individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith . . . from receiving the benefits of public welfare legislation."[317] Notice further that the State Blaines target everyone on *Everson*'s list except the "Non-believer," thereby privileging the areligious and the irreligious over the religious.

Second, the State Blaine's application is patently non-neutral. Washington State has made a pool of state aid generally available to handicapped students, but the State Blaine operates to categorize the recipients of that aid according to whether they will use the aid for "religious" or "non-religious" instruction.[318] This is nothing other than a religious gerrymander.[319] A government benefit program has been structured to exclude religion because it is religious—a contemplated religious use is the sole disqualifying trigger. Aid is therefore distributed to disfavor religious persons and purposes.

Finally, the religious speech cases reinforce the analysis. In those cases, religious groups were eligible to participate in limited public fora, but they were excluded only because of their religious affiliation and viewpoint. The limited public fora in those cases are directly analogous to the neutrally-available educational funds in *Witters*.[320]

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317. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947); *see supra* note 182.

318. Again, notice that the federal Establishment Clause does not prohibit the religious use of the aid contemplated by Witters. Thus, the pool of aid is genuinely "generally available" to Witters. Washington State is thus penalizing Witters' religious choice *because* it is religious, and not because its hands are tied by the Establishment Clause.

319. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993); Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring); *see also supra* notes 218-23, 230, 279 and accompanying text.

320. *See* Paulsen, *supra* note 226, at 711-12 & nn.139-40 (explaining *Rosenberger*'s precedential implications for neutral governmental funding programs and observing that the same principles were involved in *Witters* on remand). Indeed, as I have explained, the Court itself has drawn the analogy between the limited speech fora in the religious speech cases, and the notion of a "neutral" distribution of public funds based on non-religious criteria. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 397 (1983) (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)); *supra* notes 1-4. Both the majority opinion and Justice O'Connor's concurrence seemed to flinch from embracing the logical application of *Rosenberger*'s holding to neutral disbursements from "general tax revenue." *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 840-41 (1995) (attempting to distinguish the student fees disbursements from an expenditure from a general tax fund); *id.* at 851-52 (O'Connor, J., concurring) (claiming that the student fund "simply belongs to the students" and is not "tax revenue"). The distinction is unpersuasive. It is difficult to understand how the student fee program—which exacts fees from all students and makes them neutrally available for student groups' private uses—is constitutionally different from the same

Witters was eligible to receive the funds and the federal Establishment Clause presented no plausible impediment to his using them for religious purposes. But the State Blaine operated to disqualify him solely because his purposes were religious. It is no rejoinder that Witters involved funding and not speech. The simplest answer is that *Rosenberger*, too, involved a religious group's access to generally available funding. But the better answer is that *Rosenberger* logically applied to a discriminatory funding scheme the principles of religious non-persecution found in the earlier religious speech cases, in free exercise cases like *Smith*, *Lukumi*, and *McDaniel*, and in the neutrality principle consistently elaborated in the Court's non-establishment jurisprudence, going back to *Everson* itself.[321] Religious status, purpose, or affiliation may not be independently used to exclude persons from participation in public benefits.

Notice a further complicating factor in Witters' situation. The Washington Supreme Court suggested that its Blaine Amendment targeted only "devotional" religious purposes. That is, if Witters had wanted to use the funds to become a purely secular expert in comparative religion, the State Blaine would not have barred his use of the funds.[322] This distinction weakens the constitutional footing of the State Blaine even further. First, it arguably raises the stakes of religious discrimination from religiously-motivated conduct to religious belief itself—Witters is being excluded from using the funds not simply because of a generally religious purpose, but because he takes religion seriously enough to become a minister.[323] Second, it opens the State Blaine to an independent viewpoint discrimination challenge under the Free Speech Clause—the State Blaine is not merely excluding religion, but is excluding certain religious

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kind of program involving "general tax revenues." *See, e.g.*, Paulsen, *supra* note 226, at 712 (criticizing as unpersuasive the majority's and Justice O'Connor's qualifications of the holding in *Rosenberger* as applied to a "general tax fund"); Laycock, *supra* note 156, at 66-67 & n.144 (arguing that the *Rosenberger* "majority hedged the opinion with unpersuasive distinctions and reservations" about general tax revenues and directness of funding); *see also Mueller*, 463 U.S. at 397 (comparing limited speech forum in *Widmar* to generally available tax deduction for educational expenses). Since *Rosenberger*, the Court has relied on the limited forum cases for "instruction" in assessing the constitutionality of a government subsidy programs derived from general tax funds. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 544 (2001) (observing that "limited forum" cases like *Lamb's Chapel* and *Rosenberger* "do provide some instruction" for cases in which "government establishes a subsidy for specified ends").

321. *See, e.g.*, Paulsen, *supra* note 226, at 657 (arguing that "*Rosenberger*'s equal access to funding follows naturally from *Widmar, Mergens,* and *Lamb's Chapel*, each of which involved a claim of some type on public resources by a religious group").

322. *See* Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1122 (Wash. 1989) (*Witters III*) (citations omitted).

323. *See* McDaniel v. Paty, 435 U.S. 618, 626-27 (1978); *id.* at 632 (Brennan, J., concurring); Torcaso v. Watkins, 367 U.S. 488, 489-90 (1961).

viewpoints.[324] Finally, it unmasks the religious bigotry lurking beneath the State Blaine: Washington will tolerate handing over its educational funds to those who engage in "open, free, critical, and scholarly examination of the literature, experiences, and knowledge of mankind," but not to those who undertake religious instruction that is "devotional in nature and designed to induce faith and belief in the student."[325]

Witters essentially resurfaced as a statutory matter in the Ninth Circuit's recent decision in *Davey v. Locke*.[326] *Davey* is significant not only because it invalidates a fairly widespread statutory discrimination against religious education,[327] but also because the Supreme Court will hear the case in December 2003. *Davey* addresses Washington State's "Promise Scholarship," an aid program begun in 1999 to help fund the first two years of college for high-achieving students from low- to middle-income families.[328] But the program specifically excludes from participation students who are "pursuing a degree in theology."[329] Defending its program before the Ninth Circuit, Washington justified the theology exclusion by reference to the Washington State Blaine—the same provision that had frustrated Larry Witters' ability to study

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324. *See* Lupu & Tuttle, *supra* note 19, at 962 n.204 (offering viewpoint discrimination as a narrower alternative ground for result in *Davey*).

325. *Witters III*, 771 P.2d at 1122 (citations omitted). This "motivational" parsing of a State Blaine merely deepens its unconstitutional application as to Witters. But a "categorical" reading would amount to unconstitutional religious discrimination as well. That is, if the Washington Supreme Court had simply declared that *all* religious studies were ineligible for funding—whether or not they were "devotional"—it would still have singled out "religious" as a category excluded from public benefits. Nothing in the Court's development of the non-persecution principle would *limit* persecution to discrimination against devotional religious motivation only. But the Court *has* suggested that religious discrimination targeted at particular qualities of belief is especially disfavored. *See, e.g.*, Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 876-77 (1990) (citing Sherbert v. Verner, 374 U.S. 398, 402 (1963), and *Torcaso*, 367 U.S. at 488).

326. *See* Davey v. Locke, 299 F.3d 748 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2075 (2003).

327. Washington's certiorari petition lists thirteen other states with similar statutory funding restrictions on financial aid to theology or divinity students. Petition for Certiorari at 21 & n.4, *Davey* (No. 02-1315) (citing laws from Alabama, Florida, Kentucky, Louisiana, Maryland, Michigan, Missouri, New York, Ohio, Oregon, South Carolina, South Dakota, and Wisconsin).

328. The scholarship paid $1,125 during the 1999-2000 year and $1,542 for 2000-01 and could be spent on any educational expense, including room and board. *Davey*, 299 F.3d at 750-51. The general eligibility criteria require that students (1) be in the top 10% of their 1999 high school graduating class; (2) have a family income no greater than 135% of the state median income; and (3) attend an accredited public or private university in Washington. *Id.* at 751.

329. Washington defines an "[e]ligible student" as "a person who . . . is not pursuing a degree in theology." *Id.* at 751 n.3. The eligibility criteria are codified in Wash. Admin. Code § 250-80-020(12)(a)-(f). *Id.* The court also noted that Wash. Rev. Code § 28B.10.814 provides that "[n]o aid shall be awarded to any student who is pursuing a degree in theology." *Id.* at 750 n.1. The court did not say whether "theology" is defined by Washington state law. *See generally id.* at 748.

for the ministry over two decades ago.[330] The Ninth Circuit, in an opinion by Judge Rymer, declared the theology exclusion in the Promise Scholarship criteria unconstitutional under the Free Exercise Clause, relying on the religious non-discrimination principle derived mainly from *Lukumi*, *McDaniel*, and *Rosenberger*, and denying that the Washington Blaine could justify the religious discrimination.[331]

It is hard to see any constitutional difference between the statutory exclusion for theology degrees in *Davey*, and the application of Washington's Blaine to bar Witters from using state funds for religious instruction. Both operate as laws that target religion—here, education that is affiliated with religion or has a religious purpose—for exclusion from otherwise generally available public aid. Neither imposes merely incidental burdens on religious conduct. Neither is neutral toward religion in any plausible sense, because both structure categories of public aid to remove beneficiaries who are motivated by religion or who simply direct their studies toward religious ends.[332] Both laws, then, violate the religious non-persecution principle and, under strict scrutiny, must be justified by a compelling state interest.[333]

In a recent article, Ira Lupu and Robert Tuttle offer some thoughtful objections to the foregoing analysis.[334] They criticize what they call the "Free Exercise Clause approach" to attacking the State Blaines—roughly equivalent to the non-persecution principle—i.e., "that the state may not generically treat religious entities worse than secular ones."[335] Principally, they say the argument proves too much,

330. *Id.* at 758; *see supra* note 3 and accompanying text. The plaintiff, Joshua Davey, was in virtually the same situation as Witters. Already selected as a Promise Scholar, Davey enrolled in an accredited private Christian school, Northwest, intending to enter the ministry, and declared a double major in Pastoral Ministries and Business. The Pastoral Ministries major was "designed to prepare students for a career as a Christian minister." *Davey*, 299 F.3d at 751. Northwest's theology offerings were grounded on the assertion that "the Bible represents truth and is foundational," whereas theology curricula at Washington public universities were generally "taught from an historical and scholarly point of view." *Id.* Washington determined that Davey's major in Pastoral Ministries constituted a "theology" degree and therefore disqualified him for scholarship eligibility. *Id.* Davey chose to forego the scholarship and continued to pursue his major. *Id.* at 751.

331. *Id.* at 752-58. Judge McKeown dissented, relying primarily on the federalism and funding objections that I address in this and the next section. *Id.* at 760-68 (McKeown, J., dissenting); *see infra* notes 342, 398.

332. It was unclear from the Ninth Circuit's opinion whether the statutory exclusion in *Davey* has the additional vice, as *Witters* did, of excluding only "devotional" theology courses. *See, e.g.*, *Davey*, 299 F.3d at 755-56, 760; Lupu & Tuttle, *supra* note 19, at 962 n.203.

333. For a thoughtful defense of *Davey*, *see* Kent Greenawalt, *Is It Davey's Locker for the No-Funding Principle?*, 45 J. of Church & St. (forthcoming Dec. 2003).

334. *See* Lupu & Tuttle, *supra* note 19, at 957-72 (2003). Their objections are not directed specifically toward the application of State Blaines in *Witters* and *Davey*, but instead are more general. That said, the authors do suggest that *Davey* would have been better resolved as a case of viewpoint discrimination. *See id.* at 962 n.204.

335. *Id.* at 963-64. My approach, although normatively similar to the approach Lupu and Tuttle criticize, draws on jurisprudence not only from the Free Exercise

because "American constitutional law, federal and state, has for many years done exactly what this argument condemns."[336] By this, they mean primarily that the federal Establishment Clause has often been interpreted to require government to "single out" religious entities for "special" treatment in many areas. For instance, government cannot directly subsidize religious indoctrination, nor can it intervene in church disputes involving matters of faith.[337] Thus, by attacking any rule drawing a "line between religious and nonreligious organizations," the free exercise/non-persecution argument against State Blaines undermines, they say, "each and every religion-specific doctrine under the federal religion clauses."[338]

Lupu and Tuttle's second rejoinder, sounding in federalism, complains that the non-persecution argument is "hostile to notions of respect for state law, and in particular to the tradition of independent state constitutional law."[339] They contend that, even if a narrower form of the non-persecution argument would salvage the religion-sensitive doctrines in federal constitutional law, it would still "deny the states any room whatsoever for their own church-state policy."[340] In other words, states would be wrongly confined under a ceiling of federal non-establishment principles—they would have absolutely no room "to have a non-establishment policy broader than whatever five Justices of the U.S. Supreme Court find to be the content of federal law at any given moment."[341] The authors' resolution of the federalism issue, by contrast, would leave "each state . . . free to make its own constitutional policy of church-state relations, and to extend it beyond the federal policy, so long as the state approach serves reasonable purposes of the sort associated with the regime of Separationism."[342]

Clause but also from the Establishment and Free Speech Clauses. That said, I think the Free Exercise Clause is the most apt constitutional locus for the State Blaines' unconstitutional operation.

336. Lupu & Tuttle, *supra* note 19 at 964.

337. *Id.* The authors cite, *inter alia*, Mitchell v. Helms, 530 U.S. 793, 809 (2000) (reaffirming that the government cannot subsidize religion by using aid that "results in governmental indoctrination"); Agostini v. Felton, 521 U.S. 203, 228-29 (1997) (holding that the government may not directly subsidize religion); Jones v. Wolf, 443 U.S. 595, 602-03 (1979); Serbian East Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-12 (1976) (holding that the government may not intervene in property or personnel disputes that are internal to religious communities and organizations and involve religious matters).

338. Lupu & Tuttle, *supra* note 19, at 964. The authors also point to the doctrine excepting clergy-congregation relationships from federal anti-discrimination law, *id.* at 964 n.216, as well as various religious freedom restoration acts enacted by the federal government and many states in response to *Smith*, *id.* at 965 n.217 (citations omitted).

339. *Id.* at 965-66.

340. *Id.* at 965.

341. *Id.*

342. *Id.* at 966. The authors are cautious, however, about saying what such "reasonable purposes" might be. They admit that the purposes supporting a "regime

Lupu and Tuttle's objections go to the heart of the religious-liberty and federalism issues presented by the State Blaines, but ultimately they neither undermine the non-persecution principle nor save the State Blaines from constitutional invalidity. First and foremost, they largely reduce the non-persecution principle to the untenable formalist notion that laws may not "single out" religion for any purpose whatsoever. But the non-persecution principle condemns a different, narrower kind of legal categorization—it forbids singling out religion for disfavored treatment and, in the context of the State Blaines, disfavored treatment of the kind that excludes persons and organizations from participation in public benefits only because they are somehow religious. Second, it is reductionist to claim that the Supreme Court has generally "singled out" religion in its religion clause jurisprudence in order to "disfavor" religion. Furthermore, that claim is premised on the implausible notion that, whether as a textual, historical, or jurisprudential matter, the Constitution itself singles out religion for disfavor. Third, the authors' federalism-based argument undervalues the effect of incorporation of the religion clauses against the states. It is more plausible to conclude that incorporation limits rather than expands states' power to achieve greater non-establishment.

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of Separationism" are in need of "restatement and reinvigoration," especially because current defenders of separationism—the *Zelman* dissenters, for instance—"have tended to rely excessively on justifications now viewed by many as outmoded." *Id.* The authors conclude by stating that "[w]hether states can defend a Separationist policy broader than the federal constitution requires will thus depend on the efforts of judges and academics to provide precisely this sort of rehabilitation of the Separationist ethos." *Id.* The authors point to two of their articles as laying some possible groundwork. *Id.* at 966 n.222 (citing Lupu & Tuttle, *supra* note 10; Ira C. Lupu & Robert W. Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & Pol. 537 (2002)). Along those lines, the dissenter in *Davey*, Judge McKeown, herself articulated some "reasonable purposes" for Washington's Blaine Amendment. Washington, she said, could justify its State Blaine in order to "define[] its vision of religious freedom as one completely free of governmental interference," to "reflect[] its strong desire . . . to insulate itself from the appearance of endorsing religion," and to evince "the state's strong prophylactic interest in steering clear of endorsing or supporting religion through direct funding of religious pursuits." Davey v. Locke, 299 F.3d 748, 761-62, 766 (McKeown, J., dissenting).

Lupu's and Tuttle's suggestions are intriguing, but they leave unanswered a fundamental question. Even *if* judges or academics succeed in "reinvigorating" the purposes of the "Separationist ethos"—an ethos the authors admit is currently founded on a tissue of anachronism and anti-religious hostility—why should their "rehabilitated" purposes suffice as legitimate, not to mention *compelling*, justifications for states' targeted exclusion of religious persons and groups from public benefits? Regardless of what rejuvenated brew of "Separationism" might be concocted, the legal operation of that "ethos" will still be measured against the free exercise rights of religiously motivated state citizens who, needless to say, will continue to object to their religion-based second-class citizenship. In short, it is implausible that *new* reasons for religious discrimination will prove any more legitimate or compelling than the old reasons.

At its broadest, Lupu and Tuttle's criticism of the approach this Article suggests is that "American constitutional law, federal and state, has for many years done exactly what" the non-persecution principle "condemns."[343] But what, exactly, does non-persecution condemn? As I have been at pains to demonstrate, it condemns (among other things) the targeted exclusion of persons and organizations from public benefits (1) for which they are otherwise eligible, (2) because of their religious affiliation or purpose. Is it fair to say that "American constitutional law" has done exactly this for many years, or indeed ever?

It is virtually impossible to reduce to specifics what the Supreme Court has done over the last century as it has worked out the constitutionally permissible relationships between religion and government. Its universally criticized jurisprudence has charted an evolutionary development of doctrines seeking to balance different theories about what the religion clauses require—and not something reducible to one purpose such as disfavoring religion by excluding it from generally available public benefits.[344] In other words, what American constitutional law has been doing since at least *Reynolds*[345] in 1878 is, broadly speaking, trying to figure out why the Constitution singled out religion as it did, and how the purposes behind that singling out should translate into practical relationships between the polity and religion. A long-standing generalized object of disfavoring religion is, to put it mildly, hard to reconcile with the Court's many statements (dating at least from *Everson*[346]) that the Establishment Clause does not require government hostility toward religion[347] and that government acts permissibly and even in concert with "the best of our traditions" when it seeks to accommodate religious practices and beliefs.[348] It is impossible to reconcile with the ardently pro-religious and pro-Christian statements from earlier courts, Justices, and lawmakers.[349]

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343. Lupu & Tuttle, *supra* note 19, at 964.

344. *See, e.g.*, Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 Harv. L. Rev. 1397, 1403 (2003) (observing that "[t]he constitutional jurisprudence of the Religion Clauses navigates among competing tacit accounts of the role of religious organizations in a democratic society").

345. Reynolds v. United States, 98 U.S. 145 (1878).

346. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

347. *See supra* notes 263-72 (discussing the non-hostility thread in *Everson*, *Bowen*, *Rosenberger*, *Grumet*, *Agostini*, *Mitchell*, and *Zobrest*).

348. *See, e.g.*, Zorach v. Clauson, 343 U.S. 306, 314 (1952) (stating that when the legislature acts to accommodate religious belief or practice, it "follows the best of our traditions"); *see also* Bd. of Educ. v. Grumet, 512 U.S. 687, 705 (1994); *id.* at 714 (O'Connor, J., concurring); *id.* at 723 (Kennedy, J., concurring); *id.* at 743-45 (Scalia, J., dissenting). Each of the Justices acknowledged the consistent American legal tradition of accommodating religious belief and practice.

349. *See, e.g.*, Holy Trinity Church v. United States, 143 U.S. 457, 465-72 (1892) (explaining that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people"); Davis v. Beason, 133

Lupu and Tuttle also characterize too broadly what a plausible rule of non-persecution condemns. Non-persecution simply does not amount to a formalist (á la Philip Kurland) argument that law cannot ever use "religion" as a basis for legal categorization.[350] The non-persecution rule is narrower than that. It says law may not single out religion with the object of disfavoring or punishing it. It is clearly violated when, as State Blaines do, laws exclude religious persons and organizations from public benefits because they are religious.

The State Blaines represent a political judgment of nineteenth-century vintage, enshrined in almost forty state constitutions, about the relationship between religion and public benefits. My argument is that their collective judgment is at odds with the long-standing and consistent tradition of religious non-discrimination as seen in free exercise jurisprudence, in the neutrality concept, and in the more recent religious speech cases.[351] Is it possible that certain of the Court's non-establishment decisions (particularly in the school aid context), or indeed certain Justices' individual views, have reflected a "separationist" or "religion-hostile" cast reminiscent of the State Blaines? Roughly speaking, yes. Many commentators refer to the "strict" separationism reflected in certain decisions or periods that was possibly the result of anti-religious currents.[352] The seeds of such

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U.S. 333, 341 (1890) (remarking that "[b]igamy and polygamy are crimes by the laws of all civilized and Christian countries"); Vidal v. Girard's Ex'rs, 43 U.S. 127, 198-99 (1844) (stating it is unnecessary "to consider what would be the legal effect of a devise in Pennsylvania for the establishment of a school or college, for the propagation of Judaism, or Deism, or any other form of infidelity [because] [s]uch a case is not to be presumed to exist in a Christian country; and therefore it must be made out by clear and indisputable proof"); People v. Ruggles, 8 Johns. 290, 294, 296 (N.Y. Sup. Ct. 1811) (Kent, J.) (stating that "[t]he people of this state, in common with the people of this country, profess the general doctrines of christianity, as the rules of their faith and practice" and that "[t]hough the constitution has discarded religious establishments, it does not forbid judicial cognisance of those offences against religion and morality which have no reference to any such establishment"); *see also* 3 Joseph Story, Commentaries on the Constitution of the United States § 1871, at 728 (Fred B. Rothman & Co. 1991) (1833) ("The real object of the [Establishment Clause] was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects."), *discussed in* Amar, *supra* note 1, at 252 n*; *see also* Amar, *supra* note 1, at 247 (discussing the First Congress's "extending the Confederate Congress's Northwest Ordinance of 1787, a regime that one leading scholar has described as 'suffused with aid, encouragement, and support for religion'" (quoting Gerard V. Bradley, Church-State Relationships in America 98 (1987))).

350. *See supra* Part IV.B. (discussing Kurland and formal neutrality).

351. *See, e.g.*, Ira C. Lupu, *The Increasingly Anachronistic Case against School Vouchers*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 375, 386 (1999) (stating that "[t]he Protestant paranoia fueled by waves of Catholic immigration to the United States, beginning in the mid-nineteenth century, cannot form the basis of a stable constitutional principle, and the stability of the principle has been undermined by the amelioration of the concerns" (citing Hamburger, *supra* note 173)).

352. *See, e.g.*, Berg, *supra* note 12, at 122-23, 151-52, 161-62 (commenting on flux of "strict separationism" in religion jurisprudence and that "a distrust of Catholic power

separationism may have been sown in absolutist language in *Everson*,[353] or it may have grown from more deep-seated misunderstandings about the history and purposes of the religion clauses.[354] Certain Justices have been accused, plausibly, of harboring "separationist" ideas,[355] of clinging to outdated notions of religious "divisiveness,"[356] or of simply being anti-religious.[357]

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and Catholic education was still a factor in the stricter 'no-aid' separationism of the 1960s and 1970s," although less so than in the 1940s and 50s); Laycock, *supra* note 156, at 53-54 (discussing tension between the "no-aid" and "non-discrimination" strands in the Court's religion jurisprudence, beginning with *Everson*); Lupu, *supra* note 351, at 388 (asking "[i]f the line of decisions from *Everson* to *Lemon* was driven substantially by the then-demographics of public and private education, coupled with anti-Catholic animus, what remains to justify principles forbidding direct aid to sectarian elementary and secondary schools?"); McConnell, *supra* note 17, at 120, 127 (commenting on the tendency of the Warren and Burger Courts "to press relentlessly in the direction of a more secular society" and "to view religion as an unreasoned, aggressive, exclusionary, and divisive force that must be confined to the private sphere"); *id.* at 127 (arguing that the Warren and Burger Courts' "legal doctrines . . . reinforced their lack of sympathy for religion").

353. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947) (stating that "[n]either a state nor the Federal government can . . . aid one religion, [or] aid all religions . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion").

354. *See, e.g.*, Hamburger, *supra* note 31, at 454-63 (discussing misapprehension of the *Everson* parties and Justices about the nature of Establishment Clause); *see also* Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (generally criticizing Court's non-establishment jurisprudence and observing that "[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history").

355. *See, e.g.*, Lupu & Tuttle, *supra* note 19, at 949-52 (criticizing Justice Souter's no-aid separationism); Fried, *supra* note 13, at 188 (criticizing Souter's *Zelman* dissent because it treated "twenty years of jurisprudence" from *Mueller* to *Zobrest* "as a mistake," and because Souter's no-aid separationism was actually reflected in the Court's jurisprudence for a "relatively brief" period from 1971-83).

356. *See, e.g.*, Lupu & Tuttle, *supra* note 19, at 952-55 (criticizing Justice Breyer's concerns with religious divisiveness). Lupu and Tuttle argue that Breyer's *Zelman* dissent "shows deep insensitivity to the history, limits, and failings of the concerns for 'political divisiveness,'" and relies on "a history of Protestant-Catholic tension in the United States that, if anything, should embarrass a Court that spawned the regime of no-aid Separationism out of deeply anti-Catholic premises." *Id.* at 954.

357. *See, e.g.*, *id.* at 952 n.162 (noting Justice Stevens' "long and unbroken record of opposing the cause of religion no matter what the issues presented"); Bd. of Educ. v. Grumet, 512 U.S. 687, 749 (1994) (Scalia, J., dissenting) (claiming that Justice Stevens' concurrence was "less a legal analysis than a manifesto of secularism" that "announce[d] a positive hostility to religion"); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting) (contending that Stevens' majority opinion "bristles with hostility to all things religious in public life"); *see also* Berg, *supra* note 12, at 129 (commenting on anti-Catholic rhetoric in the opinions of Justices Black, Douglas, and Rutledge); Laycock, *supra* note 156, at 57 (discussing historical scholarship documenting that the "intellectual anti-Catholic movement [of the mid-1900s] attracted the favorable attention of Justices Black, Frankfurter, Rutledge, and Burton" (citation omitted)); Lupu, *supra* note 351, at 385 (commenting that Justice Jackson's *Everson* dissent and Chief Justice Burger's *Lemon* opinion were "open and conspicuous tracts about the pervasive religious indoctrination thought to

But there is a difference between noticing these elements in the lengthy and complex history of the Court's religion clause jurisprudence, and raising them to the level of a normative premise of that jurisprudence. An argument that American constitutional law has targeted religion for particular disfavor asks us to make just that fundamentally implausible interpretive move. Even assuming that any anti-religious stripe of separationism ever held sway in the Court's jurisprudence, it has largely vanished—particularly concerning equal access to neutrally available public benefits, where a far more neutralist regime is firmly in place.[358] Second, as noted above, such a premise would have been flatly at odds with what the Court has consistently said about government hostility toward religion.[359] Third, it is more plausible to argue that any occasional anti-religious currents in the Court's non-establishment cases were wrong to begin with because they were out of step with a proper interpretation of how the religion clauses were supposed to interact. Certainly, when the Court has consciously altered course in its non-establishment cases, it has explicitly discarded premises that were at odds with the deeper principles of the religion clauses.[360]

The major examples Lupu and Tuttle rely on to support their "singling out for disfavor" argument fail to do so. It seems strange to describe the doctrine forbidding government intervention in faith-based religious disputes as primarily disfavoring religion. Perhaps, as the authors point out, that doctrine "deprive[s] religious factions of the opportunity for authoritative dispute resolution by the state,"[361] but it seems more plausible that the doctrine simply recognizes the delicate position religion occupies in our secular polity and seeks to protect religion from the corrosive effects of direct governmental meddling in its theological affairs—an area, moreover, in which government has no special competence. The no-subsidy or no-funding rule seems a better candidate for a doctrine that affirmatively

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accompany the system of Catholic education"); McConnell, *supra* note 17, at 121-22 (commenting on Black's anti-Catholic bias in his *Allen* dissent).

358. *See, e.g.*, Lupu & Tuttle, *supra* note 19, at 918 (commenting that, on the eve of *Zelman*, "only the most ostrich-like Separationist could have denied the flux in the law of the Establishment Clause," explaining that "[i]n the context of access of private parties to public fora for purposes of religious expression, and direct government transfer of material resources to religious institutions, norms of non-Establishment have been tending sharply toward the paradigm of Neutrality and away from the metaphorical wall of church-state separation" (citations omitted)).

359. *See supra* notes 343-44 and accompanying text.

360. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 661-62 (2002) (sharply limiting Board of Educ. v. Nyquist, 413 U.S. 756 (1973)); Mitchell v. Helms, 530 U.S. 793, 808 (2000) (plurality opinion) (overruling *Meek* and *Wolman*); *id.* at 837 (O'Connor, J., concurring) (agreeing with the plurality); Agostini v. Felton, 521 U.S. 203, 222-35 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985)); *see also* Paulsen, *supra* note 226, at 711 n.138 (noting that *Nyquist* has not been formally overruled but it "must be regarded as moribund in light of . . . subsequent decisions").

361. Lupu & Tuttle, *supra* note 19, at 964.

disfavors religion—by putting a church on lesser footing than a secular recipient of some forms of government largesse—but it is a weak foundation on which to build the broad premise that American constitutional law specially disfavors religion. The parameters and the historical provenance of the no-subsidy rule continue to be disputed,[362] but assume for a moment that the Establishment Clause affirmatively requires some form of a rule that prohibits direct, unrestricted cash payments to religious groups for religious purposes. It is a long, and in my view insupportable, leap to assume from that rule alone that the Constitution sanctions a general disfavoring of religion. Even if such a rule obtains, it is more plausible to regard it as, at most, one limited disadvantaging of religion that is worked out in the Constitution itself—a specific resolution, so to speak, of the so-called "tension" between free exercise and non-establishment. And, furthermore, there are good reasons to let that stand as a unique constitutional balance that the states ought not be able to aggravate, at the risk of trampling on free exercise values, especially when the federal religion clauses apply with full force to the states themselves through incorporation. At bottom, the argument that federal non-establishment doctrine itself disfavors religion begs the more fundamental question at the heart of the State Blaines' constitutional validity—can the states legitimately go beyond whatever is legitimately demanded by federal disestablishment and heap greater disfavor upon religion as a matter of state constitutional policy?[363] As my arguments throughout this piece demonstrate, that is a notion rendered deeply implausible by constitutional text, structure, history, and jurisprudence.

A more fundamental refutation of the notion that American constitutional law has often singled out religion for disfavored treatment lies in the text and purposes of the Constitution itself. The Constitution plainly singles out religion: for instance, it forbids religious tests for federal office and "accommodates the religious desires of those who were opposed to oaths by allowing any officeholder—of any religion, or none—to take either an oath of

362. *See, e.g.*, Lupu, *supra* note 351, at 376 (questioning "the force of the constitutional case against direct state aid to sectarian elementary and secondary schools" and claiming that "the arguments against direct aid rest on precedents and policies whose contemporary relevance has dwindled dramatically"); *id.* at 377-80 (criticizing the jurisprudential foundation for the "direct/indirect" distinction); *id.* at 388-93 (questioning reliance on General Assessment controversy and Madison's *Memorial* as the basis for "direct funding" prohibition). *But see* Greenawalt, *supra* note 333 (defending the continued vitality of a no-funding principle in non-establishment law).

363. As explained *infra*, this question is bound up with the issue of how incorporation of the religion clauses against the states affects the states' power to craft a church-state separation greater than the federal Establishment Clause requires. *See infra* 369-85.

office or an affirmation."[364] Religious scruples here are singled out for special solicitude, not disfavor. What of the paradigmatic singling out of religion—the Free Exercise and Establishment Clauses? The former—forbidding Congress from making any law that prohibits the free exercise of religion—hardly sounds like it imposes a disadvantage on religion. Indeed, as already noted, it was originally conceived as forbidding laws punishing religion *qua* religion.[365] The latter, as Akhil Amar has persuasively demonstrated, was originally designed to (1) forbid Congress from creating "The Church of the United States," and (2) prevent Congress from disestablishing existing state religious establishments.[366] The claim to find in these materials a general charter for disabling religious persons or religious organizations vis-á-vis their secular counterparts is unconvincing. If anything, their text and purposes alone would seem to leave Congress free to promote the general flourishing of religion, as it did in the territories and in its provision of legislative and military chaplains.[367] And, as we shall see, incorporation of the religion clauses against the states only lends additional weight against the general proposition that American constitutional law recognizes disfavoring religion as a valid normative premise.

So, Lupu and Tuttle's first major objection—that the non-persecution rule condemns (and would therefore dismantle) a long-standing practice of American constitutional law—turns out to be overstated. What about their federalism objection? Does the non-persecution rule unfairly handcuff the states in balancing their own church-state policy? Perhaps in 1800, but certainly not since 1940 and probably not since 1865. In other words, the federalism objection fails to take seriously the effect of incorporating the religion clauses against the states.

It is common doctrine that both religion clauses apply against the states, through the Fourteenth Amendment, with the same force as they apply against the federal government.[368] As to free exercise, the effects of this are relatively easy to understand. Free exercise is a paradigmatic individual and associational right against government overreaching, and so its application against the states should simply disable states from legislating to prohibit free exercise, just as the clause had, before, limited only the federal Congress.[369] Thus, when

364. Bd. of Educ. v. Grumet, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring) (citing U.S. Const. art. II, § 1, cl. 8; art. VI, cl. 3).

365. *See supra* notes 23, 174, 179.

366. Amar, *supra* note 1 at 33-34, 41, 246.

367. *Id.* at 248 (citing Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 Mich. L. Rev. 2347 (1997)).

368. *See supra* note 25.

369. Akhil Amar and Kurt Lash have suggested that the "reconstructed" Free Exercise Clause can plausibly be interpreted to protect religious exercise *more* broadly than the original clause, requiring for instance religious exemptions from

the Supreme Court holds that a law trenches on someone's free exercise rights, incorporation makes that the end of the story. State legislatures cannot pass such laws any longer, and thus the Supreme Court's decision (whether by a majority of five, six, seven, eight or nine Justices) in a real sense "den[ies] the states any room whatsoever for their own church-state policy" on that issue.[370] The converse is slightly different. If the Supreme Court holds that a law does not violate free exercise, then states have some latitude to accord their citizens greater rights under state law (provided these greater rights do not independently violate the Establishment Clause). Thus, even as *Smith* interpreted federal free exercise not to command religious exemptions from general laws, the Court recognized (and arguably invited) states to legislate such exemptions under state law.[371] In other words, states had more latitude to develop a distinctive church-state policy under their own laws.

As to non-establishment, the effects of incorporation are knottier. It is not at all clear that non-establishment is properly described as an individual or associational right against government—perhaps it is more accurately a "right of the public at large."[372] This makes it more difficult to say precisely what rights state citizens themselves gain when the Establishment Clause is incorporated against their state governments.[373] Regardless, it is safe to say as a matter of the Supreme Court's jurisprudence that incorporation means this: Whatever the federal government cannot do "respecting an establishment of religion," the states also cannot do.[374] Thus, when the Supreme Court holds that a particular government practice establishes religion, that is the end of the story. States may no longer enact such practices and, to that extent, their prerogatives to experiment with different church-state policies—which they doubtlessly had before incorporation—vanish.[375] But what about when the Court, as it recently did in *Zelman*, declares that an existing practice does not constitute an establishment? Surely other states are

non-discriminatory general laws. Amar, *supra* note 1, at 254-56; Lash, *supra* note 23, at 1149-56.

370. Lupu & Tuttle, *supra* note 19, at 965. Notice that the result would be no different if the invalidated policy had "been federal constitutional law a few short years ago"—i.e., if the Supreme Court had held previously that the policy did *not* violate free exercise, but reversed itself. *Id.*

371. *See* Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1989).

372. Amar, *supra* note 1 at 252.

373. *See id.* at 33-34, 41, 251-54; McConnell, *supra* note 21, at 1485 n.384.

374. Even this statement becomes tangled when we notice, as Akhil Amar explains, that "what the Establishment Clause prohibited the federal Congress from doing" was, in large part, "meddling with state establishments." *See* Amar, *supra* note 1, at 33-34, 41.

375. Lupu and Tuttle do not address why this inevitable effect of incorporation is not equally "hostile to notions of respect for state law, and in particular to the tradition of independent state constitutional law." *See* Lupu & Tuttle, *supra* note 19, at 965-66.

not, at that point, required to enact such a practice. But the crucial question is whether the Court's non-establishment decision sets some kind of maximum ceiling for a policy of church-state separation in the states. Or, put another way, can the citizens of a state plausibly claim more non-establishment rights under state law than the Court has identified under the federal Constitution? And, if so, can they coherently claim such rights if their claims are not somehow connected to the free exercise rights (or other personal rights) that incorporation plainly gives them?

Akhil Amar has provided a complex but persuasive analysis of this question with his model of "refined incorporation" of the Bill of Rights. According to Amar, incorporation of the Establishment Clause is an awkward matter because (1) the original clause was primarily a states'-rights provision forbidding Congress from disestablishing state establishments, and (2) consequently, it is difficult to identify what additional personal rights were guaranteed to state citizens through non-establishment incorporation.[376] Amar argues that the object of the Fourteenth Amendment—designed to protect fundamental rights of United States citizens against state encroachment—suggests that collective or structural rights like non-establishment must be subtly "refined" to apply coherently against state governments.[377] On this understanding of incorporation, state citizens could claim rights of non-establishment against state laws that coerced their "bodily liberty and property," such as "[t]o the extent a state created a coercive establishment, decreeing that individuals profess a state creed or attend a state service or pay money directly to a state church."[378] Amar notices, of course, that "all these examples also seem like textbook violations of religious 'free exercise,'" thus linking the rights citizens may claim under the incorporated Establishment Clause with their less-awkwardly-incorporated free exercise rights.[379]

Amar's refined-incorporation proposal would, of course, significantly alter the Supreme Court's non-establishment jurisprudence by allowing the states more latitude in legislating about

376. Amar, *supra* note 1, at 32-34, 41, 246-56.

377. *Id.* at 251-56; *see generally id.* at 215-30 (explaining "refined incorporation").

378. *Id.* at 252.

379. *Id.* Amar also suggests that state citizens might also claim certain refined non-establishment rights that are not strictly grounded in principles of "coercion," but that sound rather in the "basic touchstones" of Fourteenth Amendment "ideals of liberty and equality." *Id.* at 253-54. By this, he seems to mean that state citizens might be able to object to state laws on the basis of religious equality, such as if a state favored one religious denomination or declared itself "The Baptist State." *Id.* At the same time, Amar admits that non-establishment incorporation "may not matter all that much" in such cases since "principles of religious liberty and equality could be vindicated via the free-exercise clause (whose text, history, and logic make it a paradigmatic case for incorporation) and the equal-protection clause." *Id.* at 254.

religion.[380] But notice its implications for our present question—may state citizens claim greater non-establishment rights than the federal Constitution supposedly gives them? Refined incorporation suggests they could not. First, because personal non-establishment rights are an elusive notion—especially when untethered from other, clearly personal rights like free exercise, free speech, or equal protection—it would not make sense under Amar's formulation to say that incorporation has guaranteed any such phantasmal rights to state citizens against their own governments, much less greater ones. Non-establishment is best conceived as a structural and collective value, and so it is hard to explain how state citizens could coherently ask for "more of it" individually as a result of incorporation. Second, Amar suggests that state citizens' proper invocation of their incorporated non-establishment rights would occur only when the state coerces their consciences or property to support an official state church or creed, or when the state has violated basic norms of religious equality—all problems reached more comfortably by free exercise, free speech, and equal protection principles. Thus, there is a sense that incorporated non-establishment values simply duplicate other incorporated rights.[381] Finally, Amar's broader view of incorporation supports a "no" answer. If incorporation of rights was designed to increase state citizens' personal liberties against state governments (and it is hard to imagine it was not), it makes little sense to argue that, post-incorporation, state legislatures have *more* power to define their own visions of church-state separation vis-á-vis federal standards. In other words, incorporation of the federal Establishment Clause against states should tend to nationalize, rather than localize, a uniform policy of church-state separation. To say that incorporation tended to empower states to develop their own church-state policies runs counter to any plausible understanding of incorporation, refined or not.[382]

Whether or not Amar is right, thinking broadly about incorporation suggests answers to my question. For instance, we know that state citizens have equally as many free exercise rights against state governments as against the federal government. And we know that states are bound, at the very least, by a minimum standard of non-establishment—that is, what the federal government cannot do, the

380. Justice Thomas has picked up on Amar's suggestion. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 676-81 & n.4 (2002) (Thomas, J., concurring) (citing Akhil Amar, *supra* note 25, at 1159, and Lietzau, *supra* note 25, at 1206-07); *see also* Lupu & Tuttle, *supra* note 19, at 947-49.

381. Amar, *supra* note 1, at 254.

382. For an illuminating discussion of the irresolvable contradictions raised by the notion that state and federal governments can legitimately pursue different church-state policies in this area, see Viteritti, *supra* note 30, at 1154-55 (arguing that, in this area, "[t]he differences between federal and state standards are so basic that they cannot coexist within a single constitutional framework").

states cannot do. This tells us something about the limits on states when they experiment with greater church-state separation (as Lupu and Tuttle insist they can). When states do this, they are not acting on any affirmative grant of power or prerogative from the federal Constitution—they are obviously acting in their own state interests. But they are always acting under an affirmative obligation not to violate any citizen's federal free exercise rights, which plainly apply against state governments in full force. This suggests that, whether or not state citizens can coherently ask state governments for more non-establishment, what the state does in response is always limited by its citizens' federal free exercise rights.[383] This also suggests that "more non-establishment" or "greater church-state separation" cannot be independent justifications for state policies. Those policies must always be measured against the superior limitations of federal free exercise (not to mention free speech and equal protection).[384]

Lupu and Tuttle's concerns with federalism and localized church-state policies thus turn out to be question begging. Whatever distinctive church-state policies a state wants to pursue will always be limited by the demands of free exercise. Incorporation of the federal Establishment Clause against the states cannot logically be interpreted as a charter for greater state power in defining its own separationist vision. Given the logic of incorporation, the only legitimate direction a state can go in—at least in the area of individual rights—is in according its citizens greater free exercise rights than those guaranteed federally. By this logic, of course, states could plausibly pursue greater church-state separation in ways that do not encroach on free exercise. They could, for instance, decide not to employ legislative chaplains or not to use any religious language or symbolism in state speech or on state property. But an argument that a principle forbidding religious discrimination or religious persecution unfairly limits states' freedom to formulate their own church-state policies is an argument against incorporation itself. By its nature, incorporation of the religion clauses limits states and it is beyond dispute that individual free exercise rights are one such limitation. Thus, assessing the validity of State Blaine Amendments throws us, not back on incorporation and federalism, but rather onto the key question—which I have explored in this Article—of whether they violate free exercise rights.

383. *See, e.g., id.* at 1154 (discussing the Washington Supreme Court's decision on remand in *Witters III* and arguing that "[w]hile secularists in Washington [State] were confident that the state court was exercising legitimate authority to prevent indirect aid to a religious school, the action by the state court also served to encumber the constitutional right of the seminary student to choose a school that reflected his own values and aspirations").

384. *See, e.g.*, DeForrest, *supra* note 20, at 605-06 (generally discussing federal constitutional limitations on State Blaines that arise inevitably from incorporation).

B. *Selective Funding*

State Blaine Amendments are in large measure concerned with the destination and use of government funds. So, is my non-persecution argument against State Blaines open to the basic objection that the government can, indeed must, control how it spends its own limited resources?[385] The black-letter principles supporting this rejoinder, all true in the abstract, roll off the tongue. Government is under no obligation to fund the exercise of my constitutional rights—i.e., I have a constitutional right to freely exercise my religion, but that alone does not entitle me to a government-funded Bible.[386] Government may further its own policy choices through the government speech it funds and the government programs it sponsors—effectively refusing to endorse other legitimate policy choices and programs.[387] Government may create incentives to undertake certain behaviors legitimately in the public interest through selective funding, even if, to that extent, it creates disincentives to undertake other behaviors—behaviors that may be "constitutionally protected."[388] Are these relatively straightforward maxims the answer to the State Blaine riddle? Probing under their surface suggests these principles, better understood, actually condemn the operation of the State Blaines for largely the same reasons the non-persecution principle condemns them.

First, it should be clear that the rejoinder that government need not fund the exercise of constitutional rights adds nothing to the debate. The non-persecution argument against State Blaines is not grounded on the naked demand that, simply because religion is constitutionally protected, religious persons and organizations are entitled to government funding. Instead, the argument is that, because religion is constitutionally protected, State Blaines may not exclude persons or organizations from otherwise accessible government benefits simply because they are religious. Non-persecution, therefore, is an argument against religion-sensitive exclusion, not an argument demanding religion-based inclusion. Furthermore, couching the

385. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 832 (1995) (noting the "unremarkable proposition that the State must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission"); McConnell, *supra* note 165, at 989 ("The government cannot spend money on everything. It must be selective.").

386. *See, e.g.*, McConnell, *supra* note 165, at 1001 & n.35 (stating that it is "surely correct that there is no . . . general obligation" for government to "provide the material resources necessary for the exercise of a constitutional right" (citing DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 198-200 (1989))).

387. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001); Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229, 235 (2000); *Rosenberger*, 515 U.S. at 833; Rust v. Sullivan, 500 U.S. 173, 193-95 (1991).

388. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 312-18 (1980); Maher v. Roe, 432 U.S. 464, 474-76 (1977).

debate in terms of "funding religion" is misleading. Strictly speaking, non-persecution does not ask that religion *qua* religion be funded at all.[389] But when a government funding program neutrally furthers secular interests in, for instance, education, health care, or child care, a religious person or organization seeks inclusion in the program on the basis of being a qualified education, health care, or child care provider—and not as a "religious" provider. It merely asks not to be discriminated against because of its religious affiliation.[390]

When government spends money to facilitate its own speech—instead of creating public fora for the exchange of viewpoints—logically, it should be able to make choices about the content of that speech.[391] This principle overlaps with the similar notion that, when government funds a program to convey a government message—i.e., "when it enlists private entities to convey its own message"—it may "regulate the content of what is or is not expressed" in that program.[392] But, again, do these principles have anything relevant to say about the operation of the State Blaines? First, notice that they are only relevant to the narrow question of how State Blaines might restrict a state government's own speech or a state program enlisting private entities to spread a government message. If the State Blaines would typically mean that the government itself cannot use its funds to speak in a religious voice or spread religious messages, then the State Blaines do not add anything significant to preexisting federal constitutional limitations on government speech.[393] A different

389. That request itself would run aground on the legitimate historical concerns behind the religion-funding controversies of the early republic. *See, e.g.*, Laycock, *supra* note 156, at 48-49.

390. *See, e.g.*, McConnell, *supra* note 17, at 184. McConnell argues that:

> [W]hen the government provides financial support to the entire nonprofit sector, religious and nonreligious institutions alike, on the basis of objective criteria, it does not aid religion. It aids higher education, health care, or child care; it is neutral to religion. Indeed, to deny equal support to a college, hospital, or orphanage on the ground that it conveys religious ideas is to penalize it for being religious.

Id. (emphasis omitted).

391. *See, e.g.*, *Velazquez*, 531 U.S. at 541 (observing that "[w]e have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker" (citing *Southworth*, 529 U.S. at 229, 235)); *Rosenberger*, 515 U.S. at 833 (recognizing "the principle that when the State is the speaker, it may make content-based choices" such as when a public university "determines the content of the education it provides").

392. *Rosenberger*, 515 U.S. at 833 (citing *Rust*, 500 U.S. at 194, and Widmar v. Vincent, 454 U.S. 263, 276 (1981)); *see also Velazquez*, 531 U.S. at 541.

393. It is doubtful, for instance, that government could craft funding programs to further its own "religious" speech. This would cut against the dominant non-establishment principle that government must have secular purposes for its laws. As for the use of religious speech by government itself—e.g., religious language in a presidential speech, or the employment of legislative chaplains by Congress—those instances are either non-justiciable (presidential speech) or are permissible under the Establishment Clause (chaplains). *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983). Perhaps a Blaine Amendment could be interpreted by a state government to forbid

situation arises, however, if a State Blaine would prevent government from including any person or organization in a government message program, simply because of their religious identity or affiliation.[394] This restriction would have nothing to do with government shaping the content of its message—with regulating "what is or is not expressed" in the context of its own program—nor with government "tak[ing] legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[395] Precisely because it is not plausibly related to the content of government expression, this kind of categorical exclusion savors of disabling religious persons and organizations because they are religious. It is hard to see how such a policy would find constitutional shelter under the government speech doctrine.

Finally, outside the sphere of its own messages, government may use selective funding to create incentives to undertake certain private behavior, at least indirectly creating a disincentive to undertake other behavior.[396] A contentious example is abortion: Government may constitutionally structure Medicaid payments so that they are available to pay for "childbirth" but not available to pay for nontherapeutic abortions, thus creating an arguably strong incentive in favor of childbirth, and against abortion, for Medicaid recipients.[397] Is this the answer to the State Blaine issue? Just as government may

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the funding of state legislative chaplains or prayers, or to prohibit public officials from using any religious language in public speeches, or to prohibit any religious symbolism whatsoever on public property. As I explained *supra*, however, those applications of a State Blaine to create a greater church-state separation than the federal Constitution demands would probably not run afoul of the non-persecution principle, because they do not plausibly limit anyone's federal free exercise rights. *See supra* notes 386-88 and accompanying text.

394. For example, one might claim that the inclusion of a religiously-affiliated organization in a government message program would—even if the organization fully complied with the speech requirements of the program—nonetheless run afoul of a State Blaine that forbade public funds from being spent "for the benefit of," "in aid of," or "in support of" any "church," "religious society," or "religious institution." Similarly, one might claim such inclusion would constitute an "appropriation" of public funds "in aid of" or "for the benevolent purposes of" a religious group.

395. *Rosenberger*, 515 U.S. at 833 (citing *Rust*, 500 U.S. at 196-200). Nor would it be any less illegitimate if the same "anti-religious-participant" notion were expressed in the government's *definition* of the program itself—i.e., if the government program were described as a "non-religious child care program." *See, e.g.*, Paulsen, *supra* note 226, at 666 n.32 (rejecting "definitional manipulation" of a limited public forum to incorporate "the precise condition that is substantively unconstitutional").

396. *See, e.g.*, McConnell, *supra* note 164, at 39-40 (commenting on government's "power to create incentives for individuals to alter their conduct by providing financial support to one choice and not to a substitute").

397. *See* Harris v. McRae, 448 U.S. 297, 314 (1980) (constitutional protection afforded a woman's choice to have abortion "did not prevent [the state] from making 'a value judgment favoring childbirth over abortion and . . . implement[ing] that judgment by the allocation of public funds'" (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)); *see generally* McConnell, *supra* note 165, at 989-92, 1000-01 (discussing abortion funding decisions).

financially incentivize childbirth and thereby disincentivize the constitutionally-protected right to choose an abortion, may government also use selective funding to create financial incentives in favor of secular or non-religious behaviors and the concomitant disincentives to religious behaviors and affiliations? This reasoning has some superficial appeal,[398] but to accept it requires ignoring two basic propositions. Generally, government may not use its selective funding power to unconstitutionally penalize the exercise of constitutional rights.[399] Specifically, there is a profound difference between the constitutionally-protected right to choose an abortion and the constitutionally-protected right to free exercise of religion.

A distinction of constitutional magnitude lies between the government's mere refusal to fund the exercise of constitutional rights and its penalizing the exercise of those rights by placing conditions on access to government funds.[400] This is not the place to plumb the depths of the unconstitutional conditions doctrine,[401] but its basic tenets reveal that the State Blaines go beyond refusing to fund religion and instead penalize religious identity, affiliation, and purposes. As Michael Paulsen explains, the unconstitutional conditions doctrine holds that "[g]overnment may not condition one legal right, benefit, or privilege on the abandonment of another legal right, benefit, or privilege," provided that (1) the government could not directly command the abandonment of the right, benefit, or privilege, and (2) the condition is not "directly germane to (in the sense of being practically inseparable from) the nature of the right or benefit itself."[402] Crucial to applying the doctrine is "defining the

398. It was, for example, the rhetorical centerpiece of Judge McKeown's dissent in *Davey*. *See* Davey v. Locke, 299 F.3d 748, 764-66 (9th Cir. 2002) (McKeown, J., dissenting).

399. *See, e.g.*, Sullivan, *supra* note 344, at 1415 ("Government use of funding leverage can exert coercion, as a long line of constitutional conditions decisions suggests."); McConnell, *supra* note 165, at 1015 (noting that "[a] common understanding of constitutional law is that although the government has no obligation (absent exceptional circumstances) to subsidize the exercise of constitutional rights, it is forbidden to penalize the exercise of those rights").

400. *See* McConnell, *supra* note 165, at 989 (asking "when is the government's refusal to fund a constitutionally protected choice an impermissible 'burden' on the exercise of the right?"); *see also Davey*, 299 F.3d at 754-55 (stating that government "may selectively sponsor or pay for programs that it believes to be in the public interest" but "government may not deny a benefit to a person because he exercises a constitutional right" (citing Regan v. Taxation With Representation, 461 U.S. 540, 545 (1983))).

401. *See generally* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 5 (1988); Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 San Diego L. Rev. 255 (1989); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989); *see, e.g.*, Paulsen, *supra* note 226, at 665 n.30 (noting proliferation of scholarly refinements of unconstitutional conditions doctrine).

402. Paulsen, *supra* note 226, at 664-65. The "directly germane" proviso is necessarily narrow, referring to "conditions that are directly 'germane,' in the strong

exact nature of the 'right' which is being conditioned" in order to "provide a determinate, baseline point-of-reference against which the constitutionality of the condition may be judged."[403] How do the State Blaines fare under these principles? Take *Witters* and *Davey* as examples.

On the strength of its Blaine Amendment alone, Washington State essentially said to Larry Witters and Joshua Davey, "You may have access to state educational aid, on the condition that you not use the money for ministry training (Witters) or for a theology degree (Davey)."[404] Apart from their religious plans, Witters and Davey were, of course, eligible for the funds. Was Washington simply refusing to fund their religious choices, or was Washington wrongly penalizing the exercise of their constitutional right to free exercise? First, we must define the exact nature of the rights being conditioned. It is not difficult to imagine, just as the Supreme Court did in *McDaniel*, that Witters' and Davey's free exercise rights encompassed their pursuit of religious vocations.[405] Washington asked Witters and Davey to abandon those rights in order to participate in state educational funding. Washington, of course, could not have commanded this abandonment directly. Nor, importantly, was the condition imposed on access to the funds directly germane to the nature of the funds themselves. That is, the fact that instruction was religious was not fundamentally at odds with the neutral provision of educational funds for the handicapped (Witters) or for high-achieving students in certain income brackets (Davey).[406] It is thus difficult to escape the conclusion that Washington did more than refuse to fund the exercise of Witters' and Davey's constitutional rights; instead, Washington penalized the exercise of those rights by exacting the loss of all state educational assistance.[407]

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sense of being inextricably intertwined with the nature of the right or benefit itself." *Id.* at 666 n.32. The exception is narrow, explains Paulsen, to prevent government from "circumvent[ing] the general rule against unconstitutional conditions by the expedient of simply defining its 'limited' public forum in terms of the precise condition that is substantively unconstitutional." *Id.*

403. *Id.* at 665. Similarly, Michael McConnell explains that, in assessing selective funding problems, one must first engage in "careful consideration of the nature of the constitutional right implicated by the funding decision, including the nature of the countervailing interests of the government." McConnell, *supra* note 165, at 992.

404. *See supra* notes 1-4, 326-36.

405. *See* McDaniel v. Paty, 435 U.S. 618, 626 (1978); *see also id.* at 632, 635 (Brennan, J., concurring) (arguing that ministerial exclusion penalizes both religious belief and status).

406. Imagine, by contrast, that Witters' or Davey's religious use of the funds would have independently violated the Establishment Clause. Perhaps only in that sense would a "no religious use" condition on the funds have been "directly germane" to the funding program. Of course, in that instance, the condition would merely duplicate the federal non-establishment constraints on Washington.

407. The loss of *all* scholarship funds underscores the penalizing nature of Washington's condition. This was not a case where someone is merely forced to

But is this analysis inconsistent with the Supreme Court's decisions that allow government to fund childbirth but not abortion? Briefly, no.[408] The abortion right and the free exercise rights at issue here are not congruent. Government is not required to act in an evenhanded way as between abortion and childbirth; it must refrain from imposing an undue burden on a woman's choice to have an abortion.[409] Government, however, has a legitimate interest in the protection of fetal life throughout pregnancy.[410] Thus, short of unduly burdening abortion rights, government is free to promote childbirth.[411] In other words, encouraging childbirth is a legitimate government purpose that is legally and logically separable from objective hostility to the abortion right.[412] Government can therefore encourage childbirth in

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"bear the costs" of exercising constitutional rights, but rather a case in which someone is "made *worse off* than he would have been had he not exercised" those rights. *See* McConnell, *supra* note 165, at 1015 (emphasis added). Because of their religious choices, Witters and Davey lost the entire scholarship, not merely the amount of money that might have gone toward "religious" instruction or training. Compared to a scholarship student enrolled, say, in biochemistry or philosophy, Witters and Davey are not merely "poorer," proportionally speaking; instead, they have been excluded from the funds *altogether*. A wholesale exclusion from benefits, as opposed to a reduction in benefits only "to the extent of the cost of exercising the constitutional right," is more in the nature of a penalty. *See generally id.* at 1015-19.

408. Michael McConnell exhaustively explores various answers to this question in his *Selective Funding* article. *See* McConnell, *supra* note 165.

409. *See* Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992) (state regulation violates constitutional guarantee of liberty only if it "imposes an undue burden" on woman's choice to abort); *see also* Maher v. Roe, 432 U.S. 464, 473-74 (1977) (explaining that *Roe v. Wade*, 410 U.S. 113 (1973), did not declare an "unqualified 'constitutional right to an abortion'" but rather protected a woman from "unduly burdensome interference with her freedom to decide whether to terminate her pregnancy"). *Casey* explained that an undue burden is "a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 505 U.S. at 877.

410. *See Casey*, 505 U.S. at 876 (referring to "the recognition that there is a substantial state interest in potential life throughout pregnancy"); *see also id.* at 875 (observing that "in practice" *Roe*'s trimester framework "undervalues the State's interest in the potential life within the woman").

411. *See id.* at 878

> To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

Id.; *see also* McConnell, *supra* note 165, at 1034-38 (describing, pre-*Casey*, an alternative to a pure "privacy" rationale for abortion rights, one recognizing that "the government's interest in protecting unborn life is legitimate, but limited to non-coercive means").

412. *See* McConnell, *supra* note 165, at 1006 & n.49 (explaining the difference between reasons for selective funding that are "hostile" to rights—i.e., reasons that "depend for their persuasive power upon antipathy to the exercise of the rights in question"—and "non-hostile" reasons that "could be accepted even by proponents of the affected rights," even if they were not persuaded by them) (emphasis omitted).

its own speech and can structure programs like Medicaid to fund family planning services that include childbirth but exclude abortion.

By contrast, government must adopt a distinctly more agnostic stance toward religion. The notion that government funds could be spent in order to incentivize "the secular" over "the religious" simply flies in the face of a century-and-a-half of religion clause jurisprudence. Non-establishment doctrine has long recognized that, just as government may not prefer religion over non-religion, it also may not prefer non-religion over religion.[413] Similarly, the Free Exercise Clause, as originally understood and as confirmed by *Smith* and *Lukumi*, forbids laws that adopt a hostile stance toward religion—where laws overtly or covertly target religion *qua* religion—and not where neutral laws incidentally burden religious exercise.[414] Finally, the religious speech cases, based on equal access to public fora for religious and non-religious viewpoints alike, are impossible to square with a government interest in furthering the secular over the religious.[415] None of this is contradicted by the proposition that laws must have secular objects—certainly they must, but they also cannot have "encouragement of non-religion and discouragement of religion" as an object. That is, when laws have a genuinely secular purpose, they are simply agnostic toward religion; but when a law has as its

413. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (stating that "State power is no more to be used so as to handicap religions than it is to favor them" and that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary"); Bd. of Educ. v. Grumet, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring) ("The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion.").

414. *See supra* Part IV.A. This forecloses the suggestion that there persists in free exercise jurisprudence a general form of balancing test analogous to the abortion-rights inquiry. Admittedly, the *Sherbert* line of unemployment compensation cases engaged in such balancing. *See* Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 883 (1990) (discussing the *Sherbert* balancing test); *see also* Sherbert v. Verner, 374 U.S. 398, 402-03 (1963). And, relying on *Sherbert*, Judge McKeown claimed in her *Davey* dissent that a "substantial burden" test was still the controlling standard for free exercise violations. *See* Davey v. Locke, 299 F.3d 748, 763-64 (9th Cir. 2002) (McKeown, J., dissenting). It is difficult to square that view with *Smith*, however. *See Smith*, 494 U.S. at 883-85 (confining applicability of *Sherbert* to cases, like the unemployment compensation context, where a benefit program invites "individualized governmental assessment of the reasons for the relevant conduct," essentially empowering government to determine whether religious reasons justify compensation). *Smith* explicitly excludes any form of *Sherbert* balancing from cases involving "across-the-board criminal prohibition on a particular form of conduct." *Id.* at 884. In my view, the best reading of these passages from *Smith* is that *Sherbert* is essentially dead, insofar as it advocates a "balancing" approach to free exercise challenges to general laws. *See id.* at 885 (stating that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, *like its ability to carry out other aspects of public policy*, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development'" (citation omitted) (emphasis added)).

415. *See supra* notes 301-10, 320-25.

purpose the encouragement of non-religious purposes, it is hard to understand that purpose, legally or logically, apart from an objective hostility to religion itself.[416]

Thus, the application of the Washington State Blaine to Witters and Davey appears to constitute an impermissible penalty on their exercise of religion under the unconstitutional conditions doctrine. This accords with Michael Paulsen's broad statement of the doctrine as applied to religious persons and groups seeking equal access to public fora or public benefits. Paulsen argues that "government may not condition a religious speaker or group's equal access to a public forum, public benefit, or any otherwise generally available privilege on the religious speaker or group's abandonment of rights of religious autonomy, identity, self-definition, self-governance, or religiously-motivated conduct."[417] Notice how Paulsen's statement of the unconstitutional conditions doctrine interacts with the non-persecution principle. Government may not broadly and neutrally offer benefits—whether in the form of access to a public forum, to public funding, or to inclusion in government programs—but essentially exclude religious recipients by attaching religion-sensitive conditions to those benefits.

We can plausibly understand the State Blaines' targeted exclusion of religious persons, groups, and purposes from public benefits in this alternate way, as a generalized condition that these persons and groups abandon their religious identity, affiliation, or purpose in order to access public benefits. The unconstitutional conditions doctrine suggests that such a condition typically amounts to a penalty on the exercise of religion. Government generally cannot condition access to a legal benefit on the abandonment of religious purposes, identity, or affiliation. Of course, government could do so if it could command the abandonment directly—but it is hard to imagine that government could ever plausibly do that. More importantly, when would such a condition be so directly germane to the benefits offered that government would have no choice but to exclude religious persons or groups from access to them? One plausible answer, of course, is if the federal Establishment Clause affirmatively forbade religious inclusion in those benefits. But, as we have seen, non-establishment law today will rarely compel exclusion of religious persons or groups from neutrally-available government benefit programs.[418] Thus, the unconstitutional conditions doctrine suggests that when states, through their State Blaines, try to reach beyond the Establishment Clause in this way—excluding religious persons and groups from

416. *See* McConnell, *supra* note 165, at 1006 & n.49.
417. Paulsen, *supra* note 226, at 667.
418. *See supra* note 264.

neutrally available benefits because they are religious—states unconstitutionally punish religious exercise.[419]

Generally, this section addresses a rejoinder to my argument grounded in government's ability to control how and why it spends money. It suggests that the general proposition that government must selectively allocate its resources sheds no light on the debate. It also suggests that, when government itself is speaking or spreading its own message through private entities, State Blaines may plausibly operate to require state government to speak in a non-religious voice. But it is doubtful that State Blaines could legitimately require state governments to restrict the participation of religious persons or groups in government message programs simply because they are religious. Such a categorical restriction has little to do with government's ability to shape its own message. Finally, the range of legitimate government purposes suggests that, while government may legitimately (albeit, non-coercively) structure subsidies to encourage childbirth over abortion, government may not legitimately encourage non-religion over religion. Relatedly, the unconstitutional conditions doctrine suggests that government may not legitimately condition access to public benefits on recipients' abandonment of religious identity or affiliation. The State Blaines' overall exclusion of religious persons, groups, and purposes from participation in public benefits runs aground on these principles. More generally, however, the "funding" rejoinder to my non-persecution argument, much like the

419. Much of the current debate over unconstitutional conditions on religious participation in public benefits addresses more subtle conditions on religious providers. The debate centers on whether religious providers' access to public benefits can be conditioned on their abandonment of principles or practices connected to their religious identity. For instance, may religious schools' participation in a neutral voucher program be conditioned on their not discriminating in selecting students on the basis of religion? On their not discriminating in hiring teachers on the basis of religion? On their agreement not to require voucher students to participate in religious observance or instruction? On their agreement not to impart religious teaching that may run afoul of anti-discrimination laws? *See, e.g.*, Paulsen, *supra* note 226, at 662-63; Lupu & Tuttle, *supra* note 19, at 972-82; *see generally* Symposium, *Public Values in an Era of Privatization*, 116 Harv. L. Rev. 1212 (2003). This important inquiry is beyond the scope of this Article. But my assessment of the unconstitutional conditions doctrine, as applied to State Blaines, does suggest some general answers. It would seem, generally speaking, that such conditions cannot have the object or effect of circumventing the foundational principles of religious non-discrimination. That is, if the general principle is that government may not exclude religious providers from otherwise available benefits, government cannot then condition participation in a way that essentially accomplishes the same thing. Such conditions would not be genuinely neutral. So, for instance, a public university cannot condition religious groups' access to generally available funds or fora on the groups' not "discriminating" on the basis of religion in selecting its officers. *See* Paulsen, *supra* note 226, at 691. Similarly, government cannot condition religious schools' participation in a voucher program on the schools' not teaching religious tenets that "discriminate" against other religions or against behavior objectionable from their religious standpoint. The issues here quickly become far more complex, but this is not the occasion to explore them more fully.

"federalism" rejoinder, begs the foundational question posed by non-persecution: In the allocation of otherwise available public benefits, may government constitutionally discriminate against religious persons, organizations, or purposes because they are religious? The answer provided by constitutional text, structure, history, and jurisprudence is a consistent and resounding no.

VI. CONCLUSION

This extended analysis of the State Blaine Amendments has focused on the historical context in which the State Blaines developed and also on the legal context in which they currently operate. The State Blaines arose during a period of divisive national upheaval over the issue of funding Catholic schools. They are a legal residue of that crisis, representing a set of judgments about the relationship between religion and the public square, and they persist to the present day in almost forty state constitutions. The State Blaines use a variety of linguistic formulas, but they are united by an overarching purpose—to exclude religious persons and groups from the equal enjoyment of public benefits. Given the sentiments motivating their birth, we should not be surprised that the general operation of the State Blaines, from today's vantage point, is out of harmony with the foundational currents of the Supreme Court's religion clause jurisprudence. One of those currents in particular calls the State Blaines into serious question—the Court's consistent condemnation of laws that target religious belief, worship, status, and affiliation for disfavored treatment.

In this Article, I have focused on the likely operation of State Blaines implicated when public benefits are made generally available to religious and non-religious persons and groups on a neutral basis. As broad and varied as the State Blaines are, they will likely operate legitimately in some limited areas.[420] But in this increasingly common context—seen in the rise of "voucher" programs and "charitable choice" movements—the operation of the State Blaines raises serious constitutional questions under the First Amendment. When the State Blaines exclude persons and groups from participation in broad-based social programs, they single out religion for disfavored treatment. That disfavor cannot be justified by states' own federalism interests, nor by their prerogative to selectively fund certain activities over others. The Supreme Court has never approved a law that singles out religious persons or groups for special burdens *because* of their religious character. When the Court finally takes the constitutional measure of the State Blaines—and it will have that chance this term—the State Blaines are likely to fall.

420. *See supra* Part III.

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 12(b)

STUART KYLE DUNCAN
Nominee to be United States Circuit Judge
for the Fifth Circuit

On the Side of the Angels?

updating the Mississippi Supreme Court's View of the Judicial Role, 2004-2008

Kyle Duncan

On the Side of the Angels? Updating the Mississippi Supreme Court's View of the Judicial Role, 2004-2008

Kyle Duncan*

Judges, as James Madison knew, are not angels. To their bewilderment, I often tell law students that the doctrine of separation of powers relies on this key anthropological insight. It is right there in Madison's famous *Federalist* 51: "[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." Madison, of course, was referring to the balance of legislative, executive, and judicial powers, but his point applies equally to the subject of this paper: the role of a court. Perhaps more than any other public official, judges are tempted to extend their power, in order to solve, directly and creatively, the pressing matters of justice in the cases before them. If improperly exercised, the judicial power distorts the balance of governmental authority in favor of our least-accountable officials.

As with any public official, once judges have broadened powers—whether properly constituted or not—they prune them rarely. However, the Mississippi Supreme Court has, over the past three decades, proven the exception. As explained in a previous white paper by James W. Craig and Michael B. Wallace, from 1980 to 2004, the Mississippi Supreme Court gradually reduced its interpretive reach in key areas such as statutory interpretation and the law of standing.

This paper updates Craig and Wallace's work and shows that, over the past four years, the Mississippi Supreme Court has continued on that path. The focus will be on the court's performance as an interpreter of statutes, since that area provides the largest sampling of decisions. At the same time, the paper will note some cases where the court has not been as restrained. As one justice has recently observed,

> I am convinced that a majority of this Court is committed to both the doctrine of separation of powers and the rejection of judicial activism. Nevertheless, backsliding can take place on a court as easily as in a church.[1]

I. STATUTORY CONSTRUCTION

How a court interprets statutes is a bellwether of its restraint. This is so because, under the guise of technical "rules" of statutory construction, activist courts may subtly rewrite laws to further the judges' own policy preferences. Such favored approaches include the search for laws' "spirit" or "purposes" that override the purposes gathered from the plain terms of the laws themselves. As Craig and Wallace illustrated, while this was an ingrained habit with the Mississippi Supreme Court throughout the 1980s and 1990s, the court became more willing to leave undisturbed those choices the legislature had actually inscribed on the law. A review of the court's statutory interpretation decisions over the past four years confirms this more restrained approach. It is particularly evident with respect to a statute such as the Mississippi Tort Claims Act ("MTCA"), a law that makes hard choices in painful cases—just those cases in which activist judges are tempted to do "justice" in disregard of the law's terms and the judges' own legitimate power.[2]

For example, *University of Mississippi Medical Center v. Easterling* presented the wrenching case where, after an infant died following a laparotomy,

* *Assistant Professor of Law, University of Mississippi.* *I am grateful to the Federalist Society for its support of the research and writing of this paper, and to Christopher Morris for his excellent research assistance. I am particularly indebted to the esteemed professors Robert A. Weems and Guthrie T. Abbott of the University of Mississippi Law School, without whose superb work on the Mississippi Supreme Court I could not have completed this project. All opinions are, however, my own.*

the mother's claim was dismissed because she failed to comply with the 90-day notice provision of the Mississippi Tort Claims Act.[3] Overruling the circuit court's softening of the notice provision, the Mississippi Supreme Court ruled that "strict compliance [with the 90-day rule] was required." The court overruled prior decisions allowing "substantial compliance" with the rule.[4] Resisting the temptation to bend the law in the face of tragic facts, the court cited its "constitutional mandate to faithfully apply the provisions of constitutionally enacted legislation," and declined to disturb the policy choice enacted in the limitation provision.[5]

A year after *Easterling*, the court reaffirmed its strict interpretation of the MTCA's limitation provisions in *Caves v. Yarbrough*.[6] In this important decision, the court refused to temper the MTCA's one-year statute of repose with a "discovery rule" that would suspend the limitation period until the plaintiff discovered his cause of action.[7] The court found that the law's "clear" and "unambiguous" terms forbade it from "judicially amending" the statute to include a discovery rule. Because of its recent embrace of a restrained method of statutory interpretation, the court was compelled to overrule prior decisions that had performed exactly such "judicial amendments."[8]

The court's deference to the legislature has not been confined to the MTCA's time limits. For example, in *Powell v. Clay County Board of Supervisors*, the Court ruled that the plain language of the MTCA afforded sovereign immunity to county government employees against the wrongful death claim on behalf of a county jail inmate who fell to his death from a county-operated garbage truck.[9] In a case of first impression, *Mississippi Department of Transportation v. Allred*, the court ruled that the statute's $50,000 damages cap plainly applied to a single tortious occurrence, regardless of the number of governmental entities sued.[10] Reaffirming *Allred* the following year in *Estate of Klaus ex rel. Klaus v. Vicksburg Healthcare LLC*, the court ruled that a different cap—this one limiting a wrongful death plaintiff's noneconomic damages against healthcare providers to $500,000—likewise applied to a single occurrence, regardless of the number of plaintiffs. The court rebuffed the dissent's argument that the statute was ambiguous and that, to honor the legislature's real "intent," the damages cap should apply to each plaintiff separately:

> [T]he dissent's suggestion that this Court should redress the perceived legislative error by judicial fiat requires an act of judicial activism. To properly preserve the separation of powers mandated by [art. I, §§ 1-2 of] the Mississippi Constitution … this Court should act with restraint.

The court has taken a restrained approach to interpreting statutes addressing venue, forum non conveniens, subpoenas, punitive damages, and workers' compensation.

The court has also taken a restrained approach to interpreting statutes addressing venue,[11] *forum non conveniens*,[12] subpoenas,[13] punitive damages,[14] and workers' compensation.[15] In another example, when ruling that a wrongful death statute forbade severance of a case into three separate lawsuits, the court remarked that it was "ever mindful of our duty… not to legislate."[16]

A significant trend towards tightening party-joinder requirements in mass tort claims began with the court's decision in *Janssen Pharmaceutica, Inc. v. Armond*.[17] The court reversed a permissive interpretation of Mississippi Rule of Civil Procedure 20 that allowed joinder in a mass tort action of all plaintiffs, provided venue was proper for only one

plaintiff.[18] *Janssen* adopted a stricter reading of the phrase "transaction or occurrence" from the rule, thereby limiting trial courts' discretion to allow broad joinder of claims.[19] Following the decision, the court also promulgated amendments to the Mississippi Rules of Civil Procedure, apparently designed to enforce the court's more restrictive understanding of the party-joinder rules.[20]

The court has also refused to water down the statutory requirements for products liability claims,[21] termination of child support,[22] issuance of restraining orders,[23] and extension of long-arm jurisdiction.[24] Significantly, the court has declined to create novel causes of action by "creatively" interpreting statutes. For instance, in *Laurel Yamaha, Inc. v. Freeman*, the court found the relevant motor safety statutes did not create a claim for "negligent entrustment" against a motorcycle dealer who sold a motorcycle to an eighteen-year-old.[25] The court remarked that "it is the task of the Legislature and not this Court to make the laws of this state" and that it was "unwilling to impose duties which were not expressly created by statute." Similarly, in *Warren v. Glascoe*, the court ruled that a statute requiring a minor with a learner's permit to be accompanied by a licensed driver did not make the licensed driver vicariously liable for the permittee's negligence.[26] Finally, in *Franklin Collection Service, Inc. v. Kyle*, the court ruled that the statutory medical privilege did not apply to a medical bill.[27] Observing that the statute had given way to the Mississippi Rules of Evidence, the court went out of its way to underscore that, even if it applied, the statute's "very specific language" would not extend to a medical bill:

> [T]his Court has no right, prerogative, or duty to bend a statute to make it say what it does not say. No citation of authority is necessary for the proposition that courts, judges, and justices sit to apply the law as it is, not make the law as they think it should be.

Of course, the court must, at times, interpret genuinely ambiguous statutes. Such occasions, as discussed already, provide a ready pretext for using "legislative intent" to inject judges' personal proclivities into a decision.[28] The current court frankly admits the difficulty of these cases and seeks a careful interpretation of ambiguous language.[29] For example, in a pair of significant decisions, *Scaggs v. GPCH-GP, Inc.* and *Pope v. Brock*, the court construed a new rule requiring plaintiffs to provide sixty days' notice prior to beginning certain medical malpractice actions.[30] The sixty-day period extended the normal two-year limitations period, but just how was unclear: did a new sixty-day limitation run from the date of notice, or was the original two-year period simply tolled for sixty days?[31] Finding the statute ambiguous, the court deployed a general rule that excludes from a limitation period any time when a person is "prohibited by law" from prosecuting a lawsuit, and ruled that the 60-day notice requirement therefore tolled the two-year limitation.[32] In both cases, the court signaled its awareness of the "legislative intent" problem. In *Scaggs*, the court wrote that its "primary objective" in cases of ambiguity was "to adopt that interpretation which will meet the true meaning of the Legislature." In *Pope*, the court was more explicit:

> The phrase 'intent of the Legislature' is often used when what is really meant is 'intent of

The court has refused to water down the statutory requirements for products liability claims, termination of child support, issuance of restraining orders, and extension of long-arm jurisdiction.

> the statute.' Our duty is to carefully review statutory language and apply its most reasonable interpretation and meaning to the facts of a particular case. Whether the Legislature intended that interpretation, we can only hope, but we will never know.

However, one can find examples where the court did not show absolute restraint in reading the plain terms of the law. Even in these cases, the court seldom demonstrates the kind of creativity in statutory construction that characterizes activist courts in other states. For example, in *Cousin v. Enterprise Leasing Co.*, the court had to decide whether a car rental company violated its statutory duty to rent only to "duly licensed" drivers when it rented to a driver with a facially-valid license that was in fact suspended.[33] The court essentially read other sections of the rental car law—imposing specific duties with regard to comparing signatures and recording license information—as glossing the "duly licensed" language to mean "facially valid and unexpired."[34] The court also drew on comparable cases from other states construing similar, but not identical, statutory duties. The dissenting justices accused the majority of "injecting an exception" into the clear language of the statute, an exception that would be better left to the legislature. In *Cousin*, the court may have relaxed its rigor in statutory interpretation, but it is difficult to say the court thus veered into judicial activism. If the legislature disagrees with the court's understanding of the "intent of the statute," the legislature can easily amend it.

In Cousin, the court may have relaxed its rigor in statutory interpretation, but it is difficult to say the court thus veered into judicial activism. If the legislature disagrees with the court's understanding of the "intent of the statute," the legislature can easily amend it.

In *Hartman v. McInnis* (a decision alluded to at the beginning of this paper), the court applied a rule requiring a foreclosing mortgagee to establish the "fair market value" of the foreclosed properties in order to establish a right to a deficiency judgment. In the eyes of two dissenting justices, however, the problem is that the "fair market value" rule was invented by previous courts and had no grounding in any statutory language. The dissent thus chastised the majority for perpetuating this relic of an ostensibly bygone era of judicial activism:

> When called upon to interpret and apply statutes in recent years, this Court has moved toward a textualist policy, that is, a strict application of statutes as they are written. Today, this Court backslides. Hopefully, the majority opinion represents no more than a temporary departure—a brief lapse of judgment—by some whose voting record and frequently-proclaimed disdain for judicial activism suggested the majority's analysis (or lack thereof), and agreed with the view set out below.

But, as the dissent itself suggests, *Hartman* likely does not signal a return to the days of activism. The majority only declined to discard an apparently longstanding rule, albeit one not anchored to any statutory mandate. Furthermore, it seems from the tenor of the dissent that the question of changing the rule was not a focus of the appeal.

A potentially more serious disregard of statutory language was presented in *Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby*.[35] In that case, the court had to determine when a person may make, as a surrogate, a health-care decision for someone who is mentally or physically disabled. The relevant statute provided that a surrogate health-care decision

could be made "if the patient has been determined by the primary physician to lack capacity."[36] The court admitted that the record was devoid of any such determination by a physician. Nonetheless, the court found the statutory requirement fulfilled because of the court's own appraisal from the record that the patient "lacked the capacity to manage her affairs or make appropriate medical decisions on her own behalf."

Two dissenting justices sharply attacked the majority for creating an "exception to the statutory requirement" that "serves as a substitute for the actual language included in the statute." In their view, "[a] more obvious and blatant example of judicial activism would be difficult to find." It is hard to resist the conclusion that in this case the majority ignored a clear statutory requirement because, based on difficult facts, it believed the underlying "purposes" of the law had been achieved. No harm, of course, may have been done, but the decision now stands for the proposition that the statutory requirement—and the concrete safeguard the legislature created for disabled persons' autonomy in making health-care decisions—may be judicially altered under the right facts.

Looser standing requirements create a wider canvas on which activist judges can legislate their own preferences.

II. STANDING

In their previous white paper, Craig and Wallace identified additional benchmarks for measuring the relative restraint of the Mississippi Supreme Court. Key among those was the doctrine of standing, which is a set of threshold rules that regulates the kinds of interests and injuries parties may seek to vindicate before the courts. Looser standing requirements create a wider canvas on which activist judges can legislate their own preferences. As an enabler of the court's activism, Craig and Wallace identified broad standing rules in Mississippi that would invite the attorney general, other public officials, and even private citizens to bring abstract questions before the courts.[37] The authors indicated that, more recently, the court had begun to interpret standing rules with greater restraint, seeking to rein in the tendency to allow standing to plaintiffs who could allege only abstract and non-individualized harms.[38]

While it appears there have not been any significant developments in the Mississippi law of standing since Craig and Wallace's paper, the court's decision in *City of Picayune v. Southern Regional Corp.* is worth noting.[39] That case addressed whether private citizens had standing to challenge the management of a hospital by a non-profit charitable corporation. Answering that question, the court summarized Mississippi's general law of standing and, seemingly with approval, wrote the following:

> It is well settled that Mississippi's standing requirements are quite liberal. This Court has explained that while federal courts adhere to a stringent definition of standing [limited to Article III "cases and controversies"]… the Mississippi Constitution contains no such restrictive language. Therefore, this Court has been 'more permissive in granting standing to parties who seek review of governmental actions.'[40]

But the court emphasized that, to have standing, an individual's claim "must be grounded in some legal right recognized by law, whether by state or by common law."[41] The court then proceeded to deny standing to the citizen-plaintiffs on the ground that the relevant corporation statute limited challenges to "the Attorney General, a director or by a member or members in a derivative proceeding."[42] Thus,

despite the court's reiteration of the permissive standing rules in Mississippi, its decision in *City of Picayune* took a restrained position and limited private-citizen standing by the plain terms of the relevant statute.

CONCLUSION

The foregoing discussion amply demonstrates that the Mississippi Supreme Court has continued to reduce the scope of its power. This paper closes with a discussion of the court's recent handling of political questions, which, as Craig and Wallace explained, is another sure index of restraint insofar as the court appropriately defers the resolution of controversial questions to coordinate branches of government.[43] In *Barbour v. State ex rel. Hood*, Governor Haley Barbour's writ setting a special election to fill Senator Trent Lott's vacated U.S. Senate seat was challenged by Attorney General Jim Hood as violating, among other things, a Mississippi election statute.[44] Hood argued that the plain terms of the statute required the special election to take place within ninety days (that is, before March 19, 2008) of the governor's writ (issued on December 20, 2007). Barbour argued, however, that the statute allowed him to set the special election on the day of the November 8, 2008 general election. The resolution of this dilemma turned on the interpretation of a confusingly written statute, and precisely on whether the word "year" meant "calendar year" or "365-day period."[45]

The court approached the question with understandable delicacy, declaring itself "ever mindful of the wisdom of our predecessors in exercising caution and exhibiting reluctance to inject themselves in election matters." Indeed, the court took just the route suggested by that quotation. It found that the election statute did not address the peculiar situation presented—where a U.S. Senator resigns in the same year as a general election (2007), but *after* that year's general election had already been held. The court simply did not know how the terms of the statute applied to that strange state of affairs, and thus deferred to the governor's decision to set the special election in November 2008. One justice bitterly dissented, accusing his colleagues of ignoring the plain language of the election law as well as "reason and common sense."

The court simply did not know how the terms of the statute applied to that strange state of affairs, and thus deferred to the governor's decision to set the special election in November 2008.

For present purposes, the point is not whether the majority correctly read the statute, but rather the majority's posture of deference toward a coordinate branch of government in the resolution of a delicate political question. The majority analogized its position to a court affording *Chevron* deference to an agency's statutory construction, and refused to find the governor's interpretation unreasonable. The "void" in the election statute's coverage, reasoned the majority, "is unquestionably within the Legislature's province to amend, should it be so inclined."[46] Notably, the debate between majority and dissent took place on the grounds of judicial restraint. The majority found a gap in the statute and deferred to the governor (and to future legislative amendments). The dissenting justice accused the majority of "judicial legerdemain" and charged it with "abandon[ing] its recent trend to [sic] apply a strict standard of statutory construction."[47]

The one concurring justice agreed with the majority's result, but on the grounds that having a special election in March, instead of November, would "place an undue financial burden on the taxpayers of Mississippi" and would deprive the citizens of Mississippi of "the opportunity and time

to get to know the candidates and their positions on issues before electing a United States Senator to fill this vacancy for the next four years."[48] The reader was told that "an expedited special election is not fair to the voters or the candidates. Mississippians deserve better."

The reasons given by the concurring justice may be wise and well meant. But the question is whether, had the majority adopted his view, it would have been a proper or improper exercise of judicial power. In judging the work of the Mississippi Supreme Court, answering that question is how the people should ascertain whether their court remains on the side of the angels.

Endnotes

1 Hartman v. McInnis, __ So.2d __, 2007 WL 4200613 at *20 (Miss. Nov. 29, 2007) (Dickinson, J., concurring in part and dissenting in part).

2 The "Mississippi Tort Claims Act" commonly refers to §§ 11-46-1 through 11-46-23 of the Mississippi Code. *See, e.g.,* Mississippi Dept. of Transp. v. Allred, 928 So.2d 152, 154 (Miss. 2006).

3 928 So. 2d 815 (2006); *see* Miss. Code Ann. § 11-46-11(1) (90-day notice requirement).

4 *See, e.g.,* City of Pascagoula v. Tomlinson, 741 So. 2d 224 (Miss. 1999) (allowing substantial compliance with the 90-day notice provision).

5 *Cf.* Saul v. Jenkins, 963 So. 2d 552 (Miss. 2007) (under plain language of Miss. Code Ann. § 15-1-36, nursing home can claim benefit of sixty-day notice provision only if it is a licensed institution).

6 __ So. 2d __, 2007 WL 3197504 (Miss. Nov. 1, 2007).

7 *See* Miss. Code Ann. § 11-46-11(3) (Rev. 2002).

8 Observing that "in recent years this Court has recognized its duty to apply a strict standard of statutory construction, applying the plain meaning of unambiguous statutes," the court repudiated decisions such as *Barnes v. Singing River Hospital*, 733 So. 2d. 199 (Miss. 1999): "[w]e recognize, without citation of any authority to do so, this Court in years past 'incorporated' a discovery rule into the MTCA, stating simply that 'justice is best served by applying a discovery standard to such cases.'"

9 924 So. 2d 253 (Miss. 2006) (interpreting Miss. Code Ann. § 11-46-9(1)(m)); *see also* Collins v. Tallahatchie County, 876 So. 2d 284 (Miss. 2004) (interpreting a different section of the governmental immunity statute, § 11-46-9(1)(d), to afford discretionary immunity to a justice court judge for allegedly abusing his discretion in failing to send an arrest warrant to the sheriff's office in a domestic violence case).

10 928 So. 2d 152 (Miss. 2006) (interpreting Miss. Code Ann. § 11-46-15(1)).

11 *See* Medical Ins. Co. of Miss. v. Meyers, 956 So.2d 213 (Miss. 2007) (language of Miss. Code Ann. § 11-11-3 indicates venue is proper where substantial acts or omissions occurred (and not where the cause of action accrued), and does not allow the "piling" of acts or events to establish venue).

12 *See* Goodwin v. Culpepper Enter., Inc., 963 So.2d 1166 (Miss. 2007) (amended *forum non conveniens* rule, Miss. R. Civ. P. 82(e), did not apply retroactively).

13 *See* Syngenta Crop Protection, Inc. v. Monsanto, 908 So.2d 121 (Miss. 2005) (plain language of Miss. Code Ann. § 79-4-15.10(a) does not allow a Mississippi trial court to subpoena out-of-state documents from nonresident nonparty corporations).

14 *See* Shelter Mut. Ins. Co. v. Dale, 914 So.2d 698 (Miss 2005) (language of Miss. Code Ann. § 63-15-43(2)(b) does not prevent an insurer from excluding coverage for punitive damages by amendatory endorsement to its automobile liability policies).

15 *See* Federated Mut. Ins. Co. v. McNeal, 943 So.2d 658 (Miss. 2006) (Mississippi Worker's Compensation Act, Miss Code Ann. § 71-3-71, unambiguously provides that an insurance company, having paid compensation benefits to an injured employee, has the right to reimbursement from the employee's recovery against a third party, regardless of whether the recovery made the employee whole).

16 Rose v. Bologna, 942 So.2d 1287, 1290 (Miss. 2006) (interpreting Miss Code Ann. § 11-7-13).

17 866 So.2d 1092 (Miss. 2004).

18 The court distinguished prior decisions which had seemingly taken a more permissive stance on joinder. *See, e.g.,* American Bankers Ins. Co. v. Alexander, 818 So.2d 1073 (Miss. 2001).

19 *See* Miss. R. Civ. P. 20(a) (allowing joinder where

persons assert a right to relief "in respect of or arising out of the same transaction, occurrence, or series of occurrences").

20 *See, e.g.,* Miss. R. Civ. P. 20, cmt. ("[t]he phrase 'transaction or occurrence' requires that there be a distinct litigable event linking the parties."); Miss. R. Civ. P. 42, cmt. ("[i]n exercising its discretion to consolidate cases or particular issues, the Court must recognize that on some issues consolidation may be prejudicial").

21 *See* Williams v. Bennet, 921 So.2d 1269 (Miss. 2006) (plaintiff failed to advance a design defect claim in a case involving a handgun that discharged when dropped, because he did not establish the necessary elements of proof under Miss. Code Ann. § 11-1-63).

22 *See* Edmonds v. Edmonds, 935 So.2d 980 (Miss. 2006) (Miss. Code Ann. § 95-5-23 (since amended) did not provide for termination of child support by emancipation when minor child sentenced to life imprisonment).

23 *See* Jackson State Univ. v. Upsilon Epsilon Chapter, 952 So.2d 184 (Miss. 2007) (dissolving restraining order issued in favor of fraternity against university on grounds of failure of strict compliance with Miss. Code Ann. § 11-51-95).

24 *See* Sealy v. Goddard, 910 So.2d 502 (Miss 2005) (Mississippi long-arm statute, Miss. Code Ann. § 13-3-57, does not provide for personal jurisdiction over the nonresident heirs of a nonresident tortfeasor).

25 956 So.2d 897 (Miss. 2007) (interpreting Miss. Code Ann. §§ 63-1-6 & 63-1-63).

26 880 So.2d 1034 (Miss. 2004) (interpreting Miss. Code Ann. § 63-1-21).

27 955 So.2d 284 (Miss. 2007) (interpreting Miss. Code Ann. § 13-1-21).

28 Craig and Wallace indicated in their previous white paper that this was a common strategy of the more activist version of the court, which sought to formulate "that statement of [legislative] purpose which may best justify the statute today, given the world we live in" (quoting Stuart's Inc. v. Brock, 543 So.2d 649, 651 (Miss. 1989)).

29 One such politically significant case, *Barbour v. State*, will be discussed below.

30 *See* Scaggs v. GPCH-GP, Inc., 931 So.2d 1274 (Miss. 2006); Pope v. Brock, 912 So.2d 935 (Miss. 2005).

31 *See* Miss. Code Ann. § 15-1-36(15) (Rev. 2003) (providing that medical malpractice claims may not be begun "unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action," and providing additionally that if notice is served within sixty days of the expiration of the applicable limitations period, "the time for the commencement of the action shall be extended sixty (60) days from the service of the notice"); *see also* Miss. Code Ann. § 15-1-36(2) (two-year statute of limitations for medical malpractice claims).

32 *See* Miss. Code Ann. § 15-1-57 (excluding from limitation period the time when a person "shall be prohibited by law … from commencing or prosecuting any action or remedy"). The *Pope* Court also drew insight from the California Supreme Court's interpretation of a closely related statute.

33 948 So.2d 1287 (Miss. 2007).

34 *See* Miss. Code Ann §63-1-67(1)-(3) (Rev. 2004).

35 __ So.2d __, 2008 WL 95814 (Miss. Jan. 10, 2008).

36 *See* Miss. Code Ann § 41-41-211(1) (Rev. 2005).

37 *See, e.g.,* Van Slyke v. Bd. of Trustees, 613 So.2d 872 (Miss. 1993) (extending broad standing rules to private citizens); Fordice v. Bryan, 651 So.2d 998 (Miss. 1995) (allowing legislators and Attorney General to challenge Governor's veto as unconstitutional); Dye v. State ex rel. Hale, 507 So.2d 332 (Miss. 1987) (allowing senators to challenge the validity of internal legislative rules).

38 *See, e.g.,* City of Jackson v. Greene, 869 So.2d 1020 (Miss. 2004) (parents of public school children lacked standing to challenge city council's decision to confirm the appointment of school trustees); Bd. of Trustees v. Ray, 809 So.2d 627 (Miss. 2002) (interpreting Miss. Code Ann. § 7-5-1 as limiting state agency standing to sue another agency).

39 916 So.2d 510 (Miss. 2005).

40 *Id.* at 525-26 (Citations omitted).

41 *Id*. at 526.

42 *Id*.; *see* Miss. Code Ann. § 79-11-155.

43 *See, e.g.,* Mauldin v. Branch, 866 So.2d 429 (Miss. 2003) (holding that state courts have no power to impose congressional redistricting); Tuck v. Blackmon, 798 So.2d 492 (Miss. 2001) (declining to intervene in dispute between senator and Lieutenant Governor over whether conference committee bills should be read *in toto* on the senate floor before a vote).

44 974 So.2d 232 (2008).

45 *See* Miss. Code Ann. § 23-15-855 (providing that a special election to fill a vacant seat "shall be held within

ninety (90) days from the time the proclamation is issued… unless the vacancy shall occur in a year that there shall be held a general state or congressional election").

46 *Barbour*, 974 So.2d at 241.

47 *Id.* at 246 (Graves, J., dissenting) (citation omitted).

48 *Id.* at 244-45 (Easley, J., specially concurring).

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 12(d)

STUART KYLE DUNCAN
Nominee to be United States Circuit Judge
for the Fifth Circuit

Heritage Remarks re HB2 Litigation (July 7, 2016)

Theme: The ideological worldview of the DOJ lawsuit—in the DOJ's own words

- Brief recap of status of litigation: *G.G.*, HB2 litigation, TX + 12 States
- Core of DOJ claim:
    - the concept of "sex" discrimination in three federal laws(T9, T7, VAWA) includes the concept of "gender identity";
    - and so, if a law requires people to use public restrooms, changing rooms, or showers designated for their "biological sex," (as HB2 does) then that law discriminates illegally; why? because it does not allow certain people—people whose "gender identity" diverges from their "biological sex"—to use the bathrooms corresponding to their "gender identity"
    - DOJ feels very strongly about this, to put it mildly; when announcing the lawsuit against NC, the US Attorney General called HB2 "state sanctioned discrimination" and she compared HB2 to "the Jim Crow laws that followed the Emancipation Proclamation" and the "fierce and widespread resistance to Brown v. Board of Education."
- There is much to talk about here, but let me focus on something I have found quite illuminating about these cases—and that is the DOJ's views about the concept of "sex" and "gender identity" as it relates to the issues in this lawsuit.
    - Ultimately, that view is what drives the DOJ's legal claims.
    - And that view is what DOJ believes is inscribed in the federal anti-discrimination laws at issue here.
    - Importantly, one does not have to guess what DOJ's view on these matters is—because they state it with admirable and unmistakable clarity in the legal proceedings they have now brought against North Carolina. Let's take a look.
- First, let's start with the concept of "sex"
    - According to DOJ, "sex" is determined by "multiple factors." Those factors include "external genitalia" and also include "hormones, internal reproductive organs, chromosomes, secondary sexual characteristics, … brain anatomy, and gender identity"

- Now what about that last one, "gender identity"; what is that? DOJ tells us that this is "a person's internal sense of being male or female." And there's more:
    - Gender identity is "at least in part determined by biology," and "studies suggest" that it is a "biological function of the brain."
    - [For instance, studies have found that "transgender women have brain anatomy" more similar to non-TG women and to non-TG men.]
- Now, what about when "gender identity" –this internal sense of being male and female—diverges from what DOJ calls a person's "sex assigned at birth"?
    - This condition is called, according to the DMV5, "gender dysphoria."
- Now let's try to put these concepts together—at least from DOJ's viewpoint. If we have a person whose "internal sense of being male or female" diverges from the "biological sex assigned to them at birth"—in other words, a person with "gender dysphoria"—then what aspect of "sex" trumps? Here's what DOJ tells us:
    - "For purposes of determining whether a person is a man or a woman, <u>gender identity is the critical factor</u> because it is the underlying basis for how one presents oneself to others in society in ways that typically communicate what sex one is in our culture."
    - So gender identity trumps.
    - And what about any kind of attempt to help a person re-align their gender identity with their biological sex? DOJ tells us that this causes "substantial psychological pain," is "now considered medically unethical."
    - Instead, the *only* way to approach gender dysphoria—according to DOJ—is to effect what it calls a complete "social transition" to the new gender identity: and this means "access to sex-segregated bathrooms and changing facilities," including "shower facilities" (15)

- So there you have it. And I submit to you that, taking this worldview about "sex" and "gender identity" at face value helps explain—not condone, but explain—why the Attorney General of the United States publicly states that a law like HB2—a law that wants men to use the men's restroom and the men's

shower, and that wants women to use the women's restroom and the women's shower—is just like Jim Crow laws and just like "fierce resistance" to *Brown v. Board of Education*.

- A couple of closing comments:
    - DOJ's position is that this concept of "sex"—that includes "gender identity" and that views "gender identity" as a *trump*—is contained in Title IX and Title VII, which prohibit discrimination on the basis of "sex."
    - Now, at the risk of being thought naïve, I must point out that the term "gender identity" appears <u>nowhere</u> in those statutes or in any regulation implementing those statutes.
    - To the contrary, long standing Title IX statutes and regulations expressly permit facilities to be separated on the basis of sex, including restrooms, locker rooms, and showers.
    - What DOJ is relying on is a letter from the Office of Civil Rights written in Jan 2015, that purports to interpret Title IX's regulation as incorporating the DOJ worldview about "gender identity."
    - Furthermore, I also have to point out that numerous federal laws and regulations expressly *distinguish* between the concepts of "sex" on the one hand and "gender identity" on the other—including, ironically, one of the federal laws on which DOJ is suing VAWA (which prohibits discrimination on the basis of "sex" *and* "gender identity").
    - One might say that federal law, then, plainly distinguishes the concept of "sex" from "gender identity" and that by trying to read Title IX and Title VII to *contain* both (and indeed to have GI *trumping* biological sex), DOJ is seeking to rewrite the statute.
    - Finally, however, note that DOJ's position on these matters is not *merely* about the positive law. Listen again to what they say in their brief: "For purposes of determining whether a person is a man or a woman, gender identity is the critical factor…." (4) Let that sink in. Our federal government is telling us—not merely what it thinks the law is—but what "is a man" and what "is a woman." Something has gone wrong.

Texas A.G. attacks transgender ruling

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Body

Obama administration's directive to schools is a 'gun to the head,' he says

Texas Attorney General Ken Paxton leveled sharp criticism against the Obama administration's directive to the nation's schools that they must make accommodations for transgender students, calling it a "gun to the head" that threatens the independence of school districts to handle the issue how they see fit.

Paxton, who has filed a lawsuit against the Obama administration challenging its position, railed Thursday against the guidance to schools that directs them to allow transgender students to use bathrooms that align with their gender identity. Speaking at the conservative Heritage Foundation think tank in Washington, he said the guidance, under threat of a loss of federal funding for noncompliance, is federal overreach that puts students at risk.

Ten other states joined the lawsuit, which was filed in a federal court in Texas. Paxton this week asked the court to allow schools to disregard the guidance until the case is decided, hoping to block it from going into effect next school year.

"There are a host of reasons why allowing 14-year-old boys into girls' locker rooms is a bad idea," Paxton said.

Paxton spoke alongside Roger Severino, director of the Richard and Helen DeVos Center for Religion and Civil Society, and attorney Kyle Duncan, all three of them assailing the Obama administration's approach to transgender rights.

The panel comes as lawmakers, school administrators, parents and the courts are debating how schools and the public should accommodate transgender people. Lesbian, gay, bisexual and transgender advocates say barring transgender people from the facilities that align with their gender identities is a violation of their civil rights that threatens their well-being. But those who support such rules say they are necessary to safeguard privacy and traditional values.

"Things have moved so far, so fast and so surprisingly, and not in a good way," Severino said in his opening remarks. "We're at an inflection point in America, and it's all related to the idea of sexual identity, sexual morality and the role of faith in the public square."

The panelists disagreed with the Obama administration's interpretation of Title IX, the federal law that prohibits sex discrimination in public schools. The administration has said that the law bars discrimination based on gender identity and, by extension, protects the right of transgender students to use whichever bathroom they choose.

Duncan is representing the North Carolina legislators who passed H.B. 2, a state law that requires people to use public facilities that correspond to the sex listed on their birth certificates. Duncan said the Obama administration has misinterpreted federal law to extend protections to transgender people.

"The whole concept of sex has been turned on its head," Duncan said.

Paxton rebutted the Obama administration's argument that Title IX protects the rights of transgender students in public schools.

"The federal government's guidance letter in May relies on Title IX's prohibition on sex discrimination to conclude that students can use the bathroom or shower of the gender they feel like. In short, Obama thinks that sex is the same as gender," Paxton said, going on to quote a classic comedy film. "But as Inigo Montoya told Vizzini in 'The Princess Bride': 'You keep using that word. I do not think it means what you think it means.' "

Paxton argued that Congress, when it passed Title IX in 1972, intended to bar discrimination based on biological sex, not gender identity.

"Congress has understood sex to be biological and gender to be cultural," Paxton said. "But the president has a habit of going it alone when Congress fails to do what he wants. True to form, his agencies have done just that."

Paxton said the Obama administration has done more than just issue guidance on the issue.

He said the administration has gone outside its authority and rewritten rules without going through the proper procedure, pressing states into abiding by a new regulation that Congress has not legislated.

"Over 18 percent of our Texas education budget is composed of federal funds," Paxton said. "That is clearly a gun to the head."

Texas schools, he said, are "all worried about losing their money."

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LSU Federalist Society Debate Outline 10/27/15 KD

Theme: Our legal system should have a robust set of conscience protections for persons and associations who adhere to the view that marriage is intrinsically and exclusively a man-woman relationship—which was the universal view in virtually every culture and legal system (and in every American state) up until the last decade. The rapid change in our culture and law toward general acceptance of same-sex marriage means that the need for such conscience protections is particularly urgent.

- Protecting the consciences of those whose beliefs fall outside the mainstream is a tradition deeply rooted in our history and our legal systems.
    - Examples: conscientious objectors to war (both at the founding (Quakers) and during Vietnam (e.g. *Seeger, Gilette*); Jehovah's Witnesses who refused to salute the flag (*Barnette*); religious persons who refused to swear oaths in court ("oath or affirmation"); no religious test for federal or state offices (Art. VI; *Torcaso*); federal and state reaction to *Smith* decision in passing religious freedom laws (e.g. RFRAs, RLUIPA).
- An important aspect of protecting consciences is to avoid requiring people to participate in actions to which they are conscientiously opposed.
    - For example, we do not coerce pacifists to participate in manufacturing munitions, on pain of losing their unemployment compensation (*Thomas v. Review Bd*).
    - We do not coerce doctors or nurses to participate in abortions; nor do we coerce prison guards to participate in capital punishment (federal and state statutes providing such protections)
    - The Supreme Court's *Hobby Lobby* decision recognized that a conscientious refusal to participate in certain practices is a key part of conscience protection in the federal RFRA; the current round of cases (*Little Sisters of the Poor*, etc.) will test the boundaries of that principle.
- These two ideas (protecting minority beliefs; preventing coerced participation) is the proper framework for viewing a person's conscientious refusal to participate in a same-sex wedding.
    - Persons and associations who view marriage as intrinsically a man-woman institution are now clearly in the minority in

the United States; the rapid pace of cultural and legal change on this issue places those persons in particular jeopardy of governmental penalties (see, e.g., the US Solicitor General's comments during the *Obergefell* oral argument concerning the potential loss of tax exempt status).

- The recent disputes over gay rights are properly viewed as refusals to participate in a ceremony that raises conscience problems for those with particular religious beliefs (examples: the photographer case in New Mexico (*Elane Photography*); the florist case in Washington; the baker case in Colorado (*Masterpiece Cakes)).*
    - Where state religious freedom statutes are in place, courts should analyze these kinds of cases under the balancing test employed by the Supreme Court in *Hobby Lobby*. This does not ensure the religious dissenter wins, but it does require the government to show that there is no other way of providing the contested service other than coercing this person to provide it.
    - Anti-discrimination laws should not simply trump religious freedom statutes in situations like these.
    - Where there is no religious freedom statute in place, or where application is doubtful, state and local lawmakers should act to ensure a sensible balance between the rights of conscience and the rights of same-sex couples to receive wedding-related services (Utah is an example of such a compromise).
    - The fact that these persons are in commercial businesses should not eliminate their ability to claim conscience protection (*Hobby Lobby*).
- The recent case involving a county clerk refusing to issue same-sex marriage licenses presents a slightly different issue, because at first the clerk took the position that her office would issue no marriage licenses (and not just the clerk personally).
    - Nonetheless, even situations like this involving public officials can be sensibly handled by a compromise, such as allowing certain clerks to opt-out of issuing licenses while ensuring some other clerk will issue them (North Carolina has legislatively provided for a scheme like this).

        - Example of judges being coerced into officiating at same-sex weddings by judicial ethics committees (La, OH).

- All sides of this issue should want robust conscience protections like these
    - It will contribute to civic peace on a divisive issue.
    - It will allow for specific accommodations tailored to different situations (e.g., business accommodations vs. public officials).
    - It is the balance that has been properly struck throughout our history on various issues.
    - It respects the dignity of all persons in this debate.

BYU Fed Soc Remarks (4 Dec 2014)

Thank BYU Federalist Society, President Matt McCune

Theme: "Who decides whether States should adopt same-sex marriage—federal courts or state citizens?"

Basic upfront point:

- *If* the right to marry someone of the same sex is a *constitutional right*, then of course the democratic process has *nothing* to say about it.
- But *my* basic point is that nothing in the Fourteenth Amendment (or any other provision of the Constitution) contains a constitutional right to same-sex marriage.
- This is not to disparage people who want to enter into such a marriage.
- It is only to say that, if they wish to change marriage law to make that possible, they must do so by convincing their fellow citizens that it is good policy to do so; they should not be able to do this through the *federal courts*.

Admittedly, given recent judicial developments, I place myself in the minority by taking this view. But I want to try to explain to you why it is nonetheless *correct* and why the *two or three* federal courts to have held this should be upheld by the US Supreme Court.

(1). Background: same-sex marriage in 1972 (*Baker*); *Baehr*—1999; *Goodridge*—2003; DOMA and state constitutions; in last five years (nearly 10 States); *Windsor* (2013).

(2). The recent flood of judicial decisions (starting with Utah); now over 20 district courts and 4 circuits have struck down state laws. Why? EP—*irrational*; DP—"right to marry"; heavy reliance on *race* (*Loving; Plessy*); heavy reliance on "privacy" (*Casey; Lawrence*); heavy reliance on *Windsor* ("If feds can't define marriage as man-woman, why should states be able to?").

(a). Some notable dissenters: *Robicheaux*; *Conde-Vidal*; *DeBoer*

So, how do you make a case that States should be able to decide this issue, and that it's not a "constitutional right"?

(1). Start with what *Windsor* actually *said*:

(a). DOMA § 3 was unconstitutional because it "interfered with state sovereign choices about who may be married"; it usurped the *states* "historical and essential authority to define the marital relation" (seven pages, 16 paragraphs)

(b). It did *not*: recognize a fundamental right to same-sex marriage (just the opposite—man-woman definition "essential" until recent years), nor say that sexual orientation receives heightened scrutiny (just the opposite—used rational basis review).

(c). What it *did* say was that the federal definition of marriage intruded into the *States* historic authority to define the marital relation.

(d). The vast majority of lower courts have simply blown by this major premise of *Windsor*. If they are right, then the whole of *Windsor*'s reasoning was window dressing, wasted ink.

(2). What about Equal Protection?

(a). "Treating like alike."

(b). Why has marriage been defined in man-woman terms for time out of mind? Is a man-woman couple simply unique in some way that justifies man-woman marriage laws? Quote *Hernandez* (NY 2006): "An orderly society requires some mechanism for coping with the fact that sexual intercourse … commonly results in pregnancy and childbirth. The institution of marriage is that mechanism."

(i). That may have been a great idea in the past, it still may be, or maybe it should be changed. But ask yourself: is that *irrational* or *hateful*? Is it like saying, "Only left-handed people can get married? Redheads can't get married?" And then ask yourself: is

that rule *anything* like the ugly rule that says "Blacks can't marry whites?"

(ii). But why don't we have "fertility licenses" for marriage, then? Because we don't live in a crazy, totalitarian country, thank heavens?

(c). There's a second part of the EP analysis: is it wrong for citizens to say, "We don't want to change the traditional definition?"

(i). Again, *Windsor*: "statewide deliberative process"; "weigh pros / cons"; marriage definition has "substantial societal impact"

(ii). What does *Schuette* have to say about this? There is a crucial function that popular deliberation plays in a representative democracy. It is "demeaning to the democratic process" for judges simply to take certain issues away from the people.

(3). What about DP?

(a). Here we're talking about the issue of "fundamental rights"; meaning we're asking a court to remove an issue from the democratic process.

(b). Do we want courts to be guided by *anything* in doing that? I think so. So, what? The Supreme Court has said "legal traditions deeply rooted in our national history" (*Glucksberg*)

(c). "Right to marry?" Yes and no. *Zablocki* (financial ability), *Turner* (incarceration), *Loving* (race); Do these cases add up to a right to marry someone of the same-sex? Well, ask yourselves this: do they add up to a right to marry your first cousin? A thirteen year old? If you say yes to the same-sex marriage question, don't you also have to say yes to these other ones?

(d). The better answer is the one reached by *Robicheaux* and *DeBoer*: no decision by the Supreme Court has remotely touched on this issue; our traditions may well protect some kind of "right to marry" within certain limits, but they show *no* indication of

protecting a right so broad that it has nothing to do with the *genders* of the people in the marriage.

(e). Compare the "right to die"? Is there such a right? *No.*

(f). Finally, what about "privacy"? Isn't entering into marriage the same kind of *private, intimate* choice like deciding whether to use contraception, having an abortion, or other choices about sex? The crucial distinction here is *public recognition* versus *private choices*. And it is made by no other than *Lawrence v. Texas* (does not deal with "whether the government must give formal recognition to any relationship that homosexual persons may enter"

Summing up:

Cincinnati Federalist Society (6 Nov 2014)

- Thank Lawyers Ch of Cincinnati Fed Soc / Pres Matt Byrne
- Topic: *Hobby Lobby* case / what it means for religious freedom.
- Background
  - Mandate basics (ACA reg; all FDA contrac incl ECs; exemptions (relig er; g/f); penalties; "accommodation.")
  - Litigation history: non-profits delayed / for-profits to front.
  - Basic claim RFRA (reaction to *Smith*): if govt "subs burdens" a "person's" "religious exercise," must meet strict scrutiny
  - US arg: for-profit can't ex rel; "attenuation"; 3P interests; compelling int in access to contraceptives
  - *Hobby Lobby* case
    - Background (Greens, religious bus.)
    - District court ("Corporations do not pray"); emergency appeals (Sotomayor)
    - Tenth Circuit (en banc, 5-3)
      - "persons" include corporations; sole proprietors but not corps?
      - "subs burden": *pressure* on plaintiff, not "theological" inquiry
      - "religious exercise"? against forced participation (e.g., making tanks, death penalty (guards, pharmacies))
      - compelling interest? Numerous exemptions
      - what about "abortion"? govt *conceded* how drugs worked.
    - Supreme Court (Alito maj)
      - Aff'd CA10 on RFRA "person" and "subst burden"; assumed mandate furthered CI but found not a LRM.
  - Non-profit cases
    - "Accommodation"; "just a form"

- *LSOP* order before *HL*; *Wheaton* order after
- Continued litigation (LSOP CA10; EWTN CA11)

- Significance for RL in US?
  - RFRA robustly protects rel ex; but it's a statute
  - Forcing employers to provide certain ins benefits can implicate conscience; limited applicability to *taxes*; applicability to same-sex benefits? participation in SS weddings? (*Elane Photog* case)
  - Religious exercise extends to all walks of life, even business (return to DCt "corporations do not pray").

Professor, Solicitor, General Counsel:
Lessons From and For Being a Flexible Advocate

Kyle Duncan, Duncan PLLC Blackstone Remarks August 6, 2014

- Thanks ADF, Jeffrey Ventrella; my wife Martha, who is with our 5 small children right now, for allowing me to stay at the Ritz Carlton without her.
- I think I'm expected to provide you with some kind of career advice. That's a problem. I'm the last person to look to for career advice, because from a human perspective my legal "career" seems haphazard, incoherent, lacking in foresight or planning or long term goals: I have worked as an ASG in TX; been a law professor in MS; been the SG of Louisiana; been GC of the Becket Fund in DC; now I run my own small firm. In short, I can't seem to keep a job. I am frankly envious of people who make a lengthy and consistent career in government service, academia, a non-profit, or in a law firm. I often wonder what character defect keeps me from being like them.
- And yet: as the saying goes, God writes straight with crooked lines. In other words, "in everything God works for good with those who love Him, who are called according to His purpose." (Rom. 8:28). Over the years, the Lord graciously put me in the right place at the right time to do legal work that has always been interesting, has paid the bills, and, I hope, has been worthwhile to His Kingdom. If the path doesn't make sense to me, what do I know? I have had the opportunity to argue cases in state and federal appellate courts around the country, including the US Supreme Court; to defend pro-life and pro-family laws in Texas and Louisiana; to write about issues of religious liberty that I thought were important; to defend the rights of many wonderful organizations and people, including Hobby Lobby Stores and the Green family in a recent dispute over health insurance; and, most recently, to defend the marriage laws of my home state, Louisiana, against federal challenge.
    - Each of these opportunities was a gift to me from God, not anything I sought after or achieved. Just like my marriage and my children. All I was asked to do was "correspond" as faithfully as I could to God's

grace, as we Catholics sometimes like to say. I suppose these are some fruits of being "flexible"—i.e., not being able to keep a job—and I am grateful for them beyond measure.

- I'm also grateful to be doing what I have always wanted to, which is run my own firm. I hope to be doing that for a long time, if it pleases the Lord and if I can provide for my family. My firm is called Duncan PLLC, by the way. Please send me business, all you within the sound of my voice.

- But all I think I've established so far is that you don't want to take any career advice from me. So, what do I have to tell you? Well, I would like to offer some personal reflections about the different roles I've had as a lawyer, about various opportunities and challenges they presented. And then I want to say something about the vocation of a Christian lawyer, whatever setting you practice in.

- There is no question that being a lawyer in different settings gives you unique opportunities to develop different aspects of your professional skills. Each has its own challenges, too.
    - So, being a law professor is great because it allows you a great deal of flexibility to think and write deeply about topics of your choosing. I recall writing an entire law review article on Justice Scalia's dissent in the Ten Commandments case. I wouldn't have time to do that now, and nobody would pay me to do it (they might pay me not to). You are not bound by the pressures of litigation or billable hours. And you have the wonderful opportunity to actively shape the legal worldview of young lawyers. It's a nice schedule, too.
        - And yet, as a law professor one needs to constantly guard against the danger of remaining on the level of pure theory. I'm sure Chief Justice Roberts is relieved to know that I share his concern that, for a long time, the legal academy has not been helping the judiciary decide actual cases—meaning that much of

the work of legal academia lacks actual impact on the law. I wondered often about the basic utility and purpose of law review articles, and I still do (or maybe I just suspected that the number of people reading my articles could fit into a ZipCar).

- Being a government attorney is also great. As a young lawyer in the Texas SG's office I was given an incredible amount of responsibility for appeals, first in the intermediate courts, then in the Texas Supreme Court, the Fifth Circuit, and even the US Supreme Court. I recall being asked quite unexpectedly to draft a cert petition in a capital murder case—all by myself. This was a great and scary thing to be doing two or three years out of law school. I had the same experience as Louisiana SG: finding myself on one day arguing a case in the Louisiana Supreme Court against 200 insurance companies over billions of dollars in post-Katrina recovery; on the next day, arguing in the US Supreme Court whether the New Orleans DA's office would have to pay $20 million because a prosecutor wrongly buried exculpatory evidence 20 years ago; and on the next day, arguing in the Fifth Circuit about whether Louisiana had to change its birth certificates to say that a child has two fathers. It was humbling, terrifying, and a great honor, to be asked to represent the government in those cases.
    - And yet: as a government attorney you work really long hours for little money; you don't always get to choose your cases; and sometime politics, which is always there, intrudes a bit too much. Also, it may be tempting to let the quality of work slide ever so much in government work, which is something that should never ever happen.
- Being a non-profit attorney is also great. All of your cases are mission-driven. You represent great people in great causes. You don't have to worry about billable hours, and you get to devote yourself wholeheartedly to matters that engage your mind and your heart. If I had not been in the non-profit world, I would not have had the

opportunity to represent clients like Belmont Abbey College, Wheaton College, EWTN, Little Sisters of the Poor, and Hobby Lobby. What great cases; experiences I will never forget.

- And yet, the non-profit world has its own temptations. As a lawyer, you do not represent a "mission" or a "cause"; you represent a real flesh-and-blood client with real legal problems. Now, you hope that your mission and your client's case point in the same direction. But as a lawyer you owe your first allegiance to your client. That can never be in question. A non-profit lawyer must always keep this in the front of her mind, as a matter of ethics and basic integrity. Plus, you have to work really long hours and you have to worry about fundraising and you usually don't make a lot of money.

- But, having said all that about the different kinds of practice, I said I would offer some general reflections from my experiences about the vocation of a Christian lawyer.
    - First, what is the vocation of the Christian lawyer? I believe it is the same vocation as anyone who works for a living, which is just about everyone. It is to sanctify one's daily work and offer it as a sacrifice to Christ, for His Glory, to further His will, and to win souls for Him. I find it amazing that God wants us to work for Him; after all, He does not need our work to accomplish anything. And yet He asks us to work together with Him, as if I were writing a brief and I asked my five year old son to hit the "space" key at the end of every sentence.
        - And if, like me, you are the proud sort who is tempted to think your legal work is very, very "important," I like to remember this saying from St. Francis de Sales, who was a great Catholic bishop in France in the 16th Century: "*In all your affairs, rely wholly on God's providence, through which alone you must look for success. Nevertheless, strive quietly on your part to*

cooperate with its designs.… Imitate little children who with one hand hold fast to their father while with the other they gather strawberries or blackberries from the hedges. — St. Francis de Sales, *Introduction to the Devout Life*, III.10"

- When I am tempted to over-state the importance of my work—which is too often, I'm sorry to say—I remind myself that I am no greater than a child holding his Father's hand, picking strawberries. This puts things in perspective.
- And I think we should remember that any honorable work can be sanctified and offered to God. Not just "religious" work. Work itself is not a consequence of the Fall—*suffering* in work is—after all, Adam and Eve were called to work in the garden before they got kicked out. And so are we, who have been redeemed by Christ.

- Second, a Christian's legal work can be sanctified whatever kind of legal work it happens to be (I'm leaving out here helping the mob launder money). Sure, it's easy to understand this if you're working on a pro-life case. But what if you're working on a will? or a real estate case? or a criminal prosecution? That work can be offered to Christ as a pleasing sacrifice just as well—if it is done excellently, and with integrity, and with love.
    - The ancient Christian writer Tertullian wrote about the early Christians, who participated in all of the secular activities of the Romans (except the sinful ones). He wrote that "we sojourn with you in the world, abjuring neither forum, … nor bath, nor booth, nor workshop, nor inn, nor weekly market, nor any other places of commerce. We sail with you, and fight with you, and till the ground with you." (Apology XLI) Let's apply that to legal work: Christian lawyers are in government law, they are in academia, they are in non-profits, they are in firms; they are criminal

lawyers, contract lawyers, transactional lawyers, and family lawyers. They sanctify their work in all of these settings. Salt is needed everywhere.

- Third, I am fairly sure that God does not like shoddy legal work. I have never thought there was a "Christian" way of writing a brief, or a "Christian" way of making a legal argument, any more than there was a "Christian" way of playing the violin or building a house. But if there is anything a Christian *must* do, he or she must do great work. Excellent work. Work with absolute integrity. Finished as well as possible. Consider what this means for a Christian advocate: whether you are making an argument about pro-life legislation or an argument about a contract dispute, your argument should be *persuasive*. It should be well done. It should have integrity.
- Fourth, litigation can be nasty business. Especially dealing with the kinds of issues many of us deal with. I try to take very seriously the Lord's warning to "make friends with your adversary on the way to court." I don't mean to settle all your cases. I mean to treat your adversary in court with a great deal of genuine respect, even honor. They are not your enemy. I suggest even carrying this practice over into the arguments you make. I don't mean blunting your argument; your argument should cut to the bone. But I mean making arguments as if your adversary were people for whom Christ died—which they are—and not minions of the devil. I suspect you will win more cases this way, and you may win your adversary too. What a terrible witness for a Christian lawyer to give if, when the judge knows you are coming to court, he expects ugly, sanctimonious, and unpersuasive arguments. What a great witness, on the other hand, if the judge expects from you excellent, razor sharp arguments that zealously advocate for your client while respecting your adversary.

- Conclusion:

- I'd like to end by encouraging you to pray. When I pray, I often start out by saying, "Lord, I don't know how to pray. Teach me to pray." About my work as a lawyer, I try to pray often that the Lord would use whatever gifts He has given me exactly as He wills, where He wills, for what purposes He wills. You all have immense gifts, too, much greater than mine. I will pray for you that the Lord will show you how He wishes you to sanctify your legal work for His purposes, which are always much, much better than we can imagine.

Update: ***BRADY***
Kyle Duncan

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"There are three components of a true *Brady* violation:

1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;

2) that evidence must have been suppressed by the State, either willfully or inadvertently; and

3) prejudice must have ensued."

Strickler v. Greene, 527 U.S. 263, 281-82 (1999) (helpful formatting added).

1. Relevant standards governing prosecutors' disclosure duties:

a. ABA Model Rules of Professional Conduct:

i. Rule 3.8(d): "The prosecutor in a criminal case shall … make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]"

ii. Rule 3.8(g): "When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit."

iii. Rule 3.8(h): "When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction."

iv. See also Rule 3.8, comment (1), (7), (8)

b. Louisiana Rules of Professional Conduct

i. Rule 3.8(d): "The prosecutor in a criminal case shall … make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows, or reasonably should know, either tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]"

c. Louisiana Code of Criminal Procedure

i. Article 718 ("Documents and tangible objects")

ii. Article 719 ("Reports of examinations and tests")

iii. Article 722 ("Confessions and statements of codefendants")

2. The *Brady* Rule

a. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.")

b. *United States v. Agurs*, 427 U.S. 97 (1976) (duty to disclose applies whether or not accused requests)

c. *United States v. Bagley*, 473 U.S. 667 (1985)

i. *Brady* encompasses impeachment as well as exculpatory evidence.

ii. "Materiality" means a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

d. *Kyles v. Whitley*, 514 U.S. 419 (1995)

i. *Brady* encompasses evidence "known only to police investigators and not to the prosecutor" and thus "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in [the] case."

ii. Materiality is *not* a sufficiency-of-evidence test: "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict."

iii. Once a *Brady* error has been found "there is no need for further harmless-error review."

iv. Materiality is defined "in terms of suppressed evidence considered collectively, not item by item."

v. *But:* "We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the [*Brady*] rule requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate."

1. But see *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) ("Although ... *Brady* only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. [Citing ABA Rule 3.8(d)]. As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."

e. *Strickler v. Greene*, 527 U.S. 263 (1999):

i. "[I]f a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*."

ii. Federal habeas petitioner established "cause" for not raising *Brady* in state proceedings because he had reasonably relied on prosecutor's open file policy and state had maintained during state habeas that petitioner had received "everything known to the government." (Petitioner failed to establish "prejudice," however).

iii. See also *Banks v. Dretke*, 540 U.S. 668 (2004) (discussing "cause" and "prejudice" rule from *Strickler*).

3. Recent cases of interest

   a. *Smith v. Cain*, 132 S. Ct. 627 (2012) (noting "evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict," but is material where the impeached eyewitness "was the *only* evidence linking Smith to the crime").

      i. See also *U.S. v. Reese*, 745 F.3d 1075 (10th Cir. 2014); *Browning v. Trammell*, 717 F.3d 1092 (10th Cir. 2013)

      ii. *U.S. v. Macias-Farias*, 706 F.3d 775 (6th Cir. 2013)

      iii. *U.S. v. Olsen*, 737 F.3d 625 (9th Cir. 2013) (dissent from denial of *en banc* rehearing)

   b. *Skinner v. Switzer*, 131 S. Ct. 1289, 1300 (2011) (noting that a *Brady* claim may *not* be asserting via a section 1983 action)

   c. *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012) (state court ruling that alleged impeachment value of undisclosed material was "ambiguous" and "speculative" was a reasonable application of *Brady* and thus not reviewable on federal habeas under AEPDA).

   d. *Cash v. Maxwell*, 132 S. Ct. 611 (2012) (statements / dissents from denial of certiorari in *Maxwell v. Roe*, 628 F.3d 486 (9th Cir. 2010)

   e. Louisiana/ federal cases of interest:

      i. See generally *In re Jordan*, 2004-2397 (La. 6/29/05); 913 So.2d 775

      ii. *State v. Mangerchine*, 11-599 (La. App. 5 Cir. 2/14/12); 88 So.3d 621

      iii. *Pitonyak v. Stephens*, 732 F.3d 525 (2013)

      iv. *Cobb v. Thaler*, 682 F.3d 364 (5th Cir. 2012)

      v. *Reed v. Stephens*, 739 F.3d 753 (5th Cir. 2014)

      vi. *Lande v. Cooper*, 2013 WL 5781691 (E.D. La. Oct. 25, 2013)

4. *Connick v. Thompson*, 131 S. Ct. 1350 (2011)

   a. Specific issue was whether Orleans Parish DA's Office could be liable under section 1983 for "failure to train" prosecutors on *Brady* obligations. Larger issue was whether the policies or practices of a DA's Office with respect to *Brady* disclosure could give rise to section 1983 liability for the office.

   b. A DA's Office (assuming it does not have sovereign immunity) may be liable under section 1983 based on injury caused by "[o]fficial … policy," such as the

decisions or acts of the policy-making official or officials, as well as "practices so persistent and widespread as to practically have the force of law."

c. But only in "limited circumstances" may a DA's Office be liable under section 1983 for a "failure to train" employees. This is the "most tenuous" ground for section 1983 liability, because it is settled law that a municipality is *not vicariously* liable for the torts of its employees.

d. To establish "failure to train" liability under section 1983, a plaintiff must prove that an Office's failure to train employees amounted to "deliberate indifference" to the rights of those with whom the untrained employees come into contact.

e. Making this stringent showing normally requires a "pattern of similar constitutional violations" by employees, sufficient to put the Office on notice of a training problem. Only in very narrow circumstances may failure-to-train liability be based on a *single* incident in which an employee causes harm.

f. The bottom line holding in *Connick* is that a plaintiff must prove some "pattern" of similar *Brady* violations before a DA's Office may be found liable under section 1983 for a particular *Brady* violation. A *single* violation of *Brady* by a prosecutor is almost never going to be enough to hold the Office liable on a failure-to-train theory.

g. The court's reasoning turned on the fact that the "employees" at issue in a case like this are *lawyers*, who are already trained to exercise legal judgment. Thus, the fact that a prosecutor violates *Brady* does not automatically give rise to the inference that the Office's training policies were "deliberately indifferent."

    i. Contrast the situation, for instance, where a police department arms officers without offering any explanation about the constitutional limits for the use of deadly force. This is the kind of situation where section 1983 liability may be premised on a "single incident."

h. Keep in mind that *Connick* addresses only "failure to train" liability. It does *not* address potential liability based on an Office's possibly defective *Brady* disclosure policy. In *Connick*, the jury had rejected the plaintiff's theory that the Office's *Brady* policy itself had caused the injury.

i. Nor does *Connick* remotely suggest that a DA's Office should *not* have *Brady* training. To the contrary, *Connick* is a forceful reminder that an Office should take great pains to make sure its *Brady* training is careful, regular, and up-to-date.

*****

Baton Rouge Federalist Society Remarks June 26, 2014

Thanks to Baton Rouge Chapter; Beverly Moore

Themes: *Hobby Lobby* case and conscience; marriage litigation

1. *Hobby Lobby* (to be decided on Monday)
    a. Background: mandate; litigation
    b. HL and Green family; path to Supreme Court
    c. What's at stake?
        i. Who has conscience rights? Only churches? What about business owners? Why not? "Corporations don't pray?"
        ii. Can government force *me* to pay for someone else's contraception? What about abortions? Not a "burden" on conscience? What's next? (*Elane Photog.*?)
        iii. "Freedom of worship"? Or "free *exercise* of religion" Note SG's *Hosanna Tabor* argument.
        iv. Brief word about non-profit cases.
2. Louisiana marriage litigation (thanks for hiring me AG, Gov)
    a. Background; *Windsor*; recent decisions (what do they miss?)
    b. Our argument: case is not about whose definition of marriage is the "right" one; it's about who gets to decide that question—the citizens of the individual states or federal judges? It's a *federalism* case.
    c. What does *Windsor* say? *States* have essential and historic authority to define marriage. NY validly recognized SSM in 2011; LA validly declined to recognize it in 2004. That's our Constitution at work.
    d. Holmes: Our Constitution "is made for people with fundamentally differing views." (*Lochner* dissent)
    e. Cases are only at the beginning; not a foregone conclusion.

Montgomery Fed Soc Remarks – KD

** Thanks Montgomery Fed Soc; Allen Mendenhall; Chris and Julia Weller

*** Subject: *Hobby Lobby* case. Theme: the threat to our religious freedom that comes—not from a foreign nation or a foreign religion—but from our own federal government.

(a). This threat is not as violent and obvious as the story I saw on the news this morning about the Sudanese woman sentenced to death for converting to Christianity. But it is deeply troubling all the same. After all: the United States is supposed to set an example of religious freedom for the world. Based on the controversy surrounding the federal HHS mandate, we are failing.

*** Basic points:
(1). What is the HHS mandate?;
(2). Where are we in the litigation over the mandate?
(3). Focus on the *Hobby Lobby* case;
(4). Three ways in which the HHS litigation shows a threat to religious freedom from our own government.

(1). *Mandate*:
- regulation;
- all health insurance policies (non-g'f);
- all FDA approved contraceptives, sterilization for women—*including emergency contraceptives* (Plan B, Ella, etc.) (govt admits action of drugs)
- penalties;
- exemptions?

(2). *Litigation*:
- over a hundred cases have been filed by all sorts of entities—religious schools, health care organizations, broadcasting networks (EWTN), states (Alabama), and businesses;
- basic claims under 1st A and RFRA (compelling to do something our faith tells us we can't do; if we don't, govt will fine us severely or we have to drop health ins and pay penalties).
- Why business cases have gone forward more quickly (delay; "accommodation")

(3). *Hobby Lobby*
- Green family, history of business (from garage to over 500 stores)
- Religious practices in business (Sunday closing; ads; no alcohol; store chaplains; giving vast majority of profits to charity; no abortion, abortion drugs in health plan)

- Lawsuit in OK (Sept 2012; facing penalties of about 1.3 million per day; Jan 1 deadline)
- District court: "corporations do not pray, etc"; owners not burdened because only corporation must act
- 10th Cir, Sotomayor deny emergency relief
- 10th Cir grants initial en banc hearing
- En banc rules for HL 5-3: a business corporation can bring a claim under RFRA; the mandate substantially burdens HL's religious exercise by threatening them with massive penalties, business disruption if they don't do an action directly contrary to their faith
- SCt: case argued March 25, decision expected within the month

(4). Threats to religious freedom from federal government?

First, the government's arguments would gut RFRA and the First Amendment by sealing off "religious exercise" from people who are running a business or engaging in any kind of commercial pursuit.

- RFRA was supposed to be a broad protection for religious freedom; bipartisan; yet, ten years after passage, the left and the federal government have turned against the statute when it comes to *health insurance* and *contraception / abortion drugs*
- "Corporations cannot pray"; "profit making enterprises cannot have religious motivations"
- Corporate form? What about incorporated churches, charities, hospitals, schools?
- Profits incompatible with religious faith? *This,* in a world where corporations take moral positions all the time? (green, fair trade, "caffeinate your conscience") *This* from an administration that praised CVS for stopping sale of tobacco products? This is a theological position.
- Most basically, the government's view ignores the *flesh and blood people* whose faith animates their business.
- Corporations may not "pray" or "go to heaven" but their owners do.

Second, the government is trying to create a theology

- Catechism goes like this: "It's only a sin if you *personally* have an abortion; it's not a sin if you pay for someone else's abortion."
- That's been the government's position all along—dressed up in fancy legal language like "attenuation" and "indirect burdens."
- You don't have to be a theologian to see through this: This is like saying that if my neighbor asks me for a gun to kill his wife, and I buy it for him, I'm not culpable.
- Kennedy / SG exchange over whether gov'ts position would allow it to force a for-profit business owner to pay for abortion.
-

Third, the government wants to redefine religious freedom to be only "freedom of worship"

- Religious employer exemption—limited to houses of worship only
- Everyone else (including religious universities, etc) must act as a conduit for abortion-causing drugs and other contraceptives
- The employees' "right" to have "access" to government-determined health care trumps everything (compelling interest)
- Now, my "right" is to have someone else pay for what I want, regardless of whether they have a conscientious objection to it.
- This has already opened the door to forcing payment for emergency contraceptive drugs; a short step to surgical abortions.
- Note government word games about "abortion" and "pregnancy"

Conclusion:

- This started before *Hobby Lobby* in *Hosanna Tabor* (religious orgs have no special protection from 1st Amendment in deciding who their pastors are)
- That was rejected 9-0
- Now the government wants to limit religious protection only to churches / what you do on Sundays. We can only hope that will fail 9-0 as well.
- But the most troubling thing is that our federal government is even making these arguments.

Dallas Federalist Society (5/5/14)

- Thank Dallas Fed Soc.
- Focus on HHS / Hobby Lobby case; few words about marriage litigation; privileged to be involved in both.
- HHS / Hobby Lobby
    - Mandate basics; exemptions; penalties; "accomm"
    - Litigation history: non-profits / for-profits
    - RFRA: religious exercise; "subs burden"; strict scrutiny
    - US arg: focuses on "attenuation" of burden; 3P interests; compelling int in access to contraceptives
    - *Hobby Lobby* case
        - Background (Greens, religious bus.)
        - District court ("Corporations do not pray")
        - Tenth Circuit (en banc)
            - "persons" include corporations; sole proprietors but not corps?
            - "subs burden": *pressure* on plaintiff, not "theological" inquiry
            - compelling interest? Numerous exemptions
        - Supreme Court
            - USSG argument (shift to 3P burdens); OA
    - Non-profit cases
        - "Accommodation"; "just a form"; *LSOP*
    - Significance of these cases? For-profit cases?
- Marriage cases
    - Widespread litigation
    - *Windsor*: what about federalism?

(Shutterstock)

| SEP. 4, 2013

Health-Care Professionals Encouraged to 'Be Missionaries'

Church teaching inspires physicians to promote life.

JANNEKE PIETERS

NEW ORLEANS — "Be missionaries," John Brehany encouraged participants at a one-day seminar called "The Culture of Life in Medical Practice," on Aug. 10. Like those who traveled to foreign lands to bring Christ to souls, Brehany encouraged health-care professionals to join medical associations and organizations in order to share the pro-life message and help shape life-affirming policies.

More than 250 physicians, other health-care professionals, medical students, lawyers, clergy and religious and practitioners of natural family planning (NFP) attended the seminar at the 32nd annual meeting of the American Academy of Fertility*Care* Professionals.

The seminar presented topics on the status of conscience rights in the United States; how Natural Procreative Technology, or NaPro, can treat infertility; and what options Catholics

Trendin

1. Atheism is the Uncoolest Ch Ever, and I Ca It
2. Cardinal Caffa Satan is Hurli God the "Ultin Terrible Challe
3. Holy Cloth for Custom of Giv Manutergium Renewed by F
4. Archdiocese c Baltimore Spe Ahead of Netf Series on Mur Nun
5. Pope and Tru 'Express Satis Over Joint Commitment of Life
6. Who Killed Sis Cathy? New N

have under Obamacare.

Presenters included Dr. Thomas Hilgers, the founder of NaPro technology, developer of the Creighton Model Fertility*Care* system and the founder of the Pope Paul VI Institute for the Study of Human Reproduction in Omaha, Neb.

Brehany, the executive director and ethicist of the Catholic Medical Association, spoke about ways to advance the cause of pro-life ethics in medicine. The Hippocratic Oath was never morally neutral, he said, but clearly recognized good and evil practice in medicine.

It is safe to say that the vast majority of medical schools today administer an oath or promise that Hippocrates himself would not recognize. A 1993 survey cited by Brehany showed that modern oaths have been revised to eliminate prohibitions against abortion and euthanasia entirely. Yet most patients assume that all doctors take the original oath.

Brehany referenced a poll that showed that 88% of patients want doctors to share their morals, and they also want conscience protections for doctors, Brehany said. Health-care professionals need to engage and educate their patients about the current threats to conscience, since most patients "assume everything is fine," Brehany added.

More Effective Than IVF

NaPro technology was a central topic at the seminar. Dr. Joseph Stanford, professor in the Department of Family and Preventive Medicine at the University of Utah's School of Medicine, spoke about studies that have shown NaPro, which is Church-approved, is more successful than in vitro fertilization (IVF) at achieving live births and at treating the underlying medical factors causing infertility.

NaPro seeks to restore the natural reproductive cycle with a respect for life, Stanford pointed out. IVF, on the other hand, seeks to replicate the reproductive system in the lab. IVF views the embryo as a means to an end, which is pregnancy at all costs, he said.

"NaPro is based on ethics and science," Stanford explained. "The ethics ground the science."

Gabriel Fuselier, a Louisiana State University undergraduate who is applying to medical schools, said he was impressed by "how well developed a science NaPro is." Fuselier observed that the Creighton Model uses a specific language that women can share with future generations. "Once women learn the method, they can pass it on to their daughters," he reflected.

Dr. Charles Aycock, a physician from Baton Rouge, La., said he first heard about NaPro from his patients. "It would be good to be able to offer it to patients who are looking for it," he said.

"NaPro is the biological counterpart to the theology of the body," explained Dr. George Delgado, a pro-life physician, during his presentation. He explained how NaPro has been shown to successfully treat premenstrual syndrome, ovarian cysts, repetitive miscarriage, endometriosis, postpartum depression and other issues.

Series Alleges Cover-Up

7. As God Show Catherine of S Mercy Melts ' Sin'

8. Shockingly Su Collegiate Gu Makes It Big V York Knicks

9. Pope Francis Consistory to New Cardinal

10. 3 Ways Many Catholics Are Receiving the Eucharist Wro Rights vs. Tru More Great Li

Duncan Attach 0444

Conscience Protection

Kyle Duncan, a lawyer with the Becket Fund for Religious Liberty, spoke about the status of conscience protection in the United States. (Duncan and the Becket Fund represent EWTN in its lawsuit against the Department of Health and Human Services' contraception mandate. The Register is a service of EWTN.) Duncan said that the government claims it has "a compelling interest" in increasing access to contraception and sterilization.

"When the government has a compelling interest in something, it generally has a great deal of leeway in what it does. It can usually overcome objections, even conscience objections, to its laws and regulations," he explained.

"We should all take note that the federal government thinks that it is pursuing objectives of the very highest order," Duncan said. "It will probably stop at nothing to succeed."

There currently are 37 lawsuits filed against the HHS mandate on behalf of businesses owned by religious individuals, according to the Becket Fund website. In these cases, the federal government actually has argued that, "if you are in the commercial realm, you don't have any religious rights at all. Any kind of business has no right to make a claim under the First Amendment or under the Religious Freedom Restoration Act," Duncan explained, which he called "a striking position."

In several of these cases, including Hobby Lobby's, the courts have disagreed with the federal government and have granted injunctions (temporary relief from the mandate) to the businesses while their cases move through the justice system.

The Obama administration's "accommodation" for religious organizations under the HHS mandate is an example of the government stepping in to try and define moral matters, Duncan explained.

"The government has said, 'You are sufficiently separated from contraception and abortion.' The problem with that position is that the government doesn't get to decide what the proper degree of complicity is. Religious believers do," Duncan stated.

A Pro-Life Practice

A seminar highlight was Dr. Kim Hardey's story. Hardey is a physician who converted to a pro-life practice after living with a self-described "contraceptive, anti-life mentality."

As a young physician focused on building his practice, Hardey briefly thought about aborting his son when he first learned of his wife's unexpected pregnancy. After losing this same child several years later in a car accident, Hardey and his wife realized that their contraceptive behavior had been selfish and wrong. They immediately decided to be open to whatever children God would give them.

As a physician, though, Hardey continued to prescribe contraception to his patients. His heart changed when he read *Humanae Vitae (The Regulation of Birth)* and the writings of Blessed Pope John Paul II.

"It changed my life," Hardey shared. "I wept because I had seen this lived out, day after day, in my practice — all these nice patients who had been living with their past sins of abortions and sexually transmitted diseases and divorces."

"I realized the Church had the truth," he shared. "I was empowered because I realized this is the best thing for women."

Hardey converted his practice to Catholic teachings on openness to life — he no longer prescribed artificial birth control or performed sterilizations. His colleagues at the time wanted nothing to do with him, and Hardey took a significant pay cut in order to practice medicine as his conscience led him.

His advice to students and medical residents was to heed Sirach 2:1: "When you come to serve the Lord, prepare yourselves for trials."

"You know this life we're choosing is correct, but nobody should tell you it's going to be very easy," Hardey said. "God is very patient with us, and he will give everyone what they

need in their life to change. And how we respond along the way will determine the very state of our souls at the hour of our death."

Janneke Pieters is based in New Orleans.

View Comments

Duncan Attach 0446

Experts warn of troubling mindset behind conscience threats

By Adelaide Darling

Washington D.C., Mar 5, 2013 / 06:05 am (EWTN News)

Kyle Duncan, General Counsel of the Becket Fund for Religious Liberty, speaks on religious liberty at the Catholic Information Center Feb. 28, 2013. Credit: Addie Mena/CNA.

Related news:

- Kentucky religious liberty bill moves forward
- Lawmakers pen letter insisting on conscience protections
- Canada appoints Catholic to religious freedom office
- Religious freedom is foundational for society, says Rick Warren

Advocates of liberty should be concerned by recent trends viewing the "right" to free contraception and abortion as a justification for coercion, said religious freedom experts.

"We should be disturbed when government ranks religious liberty based upon how religious the government hinks their organization is," said Kyle Duncan, who serves as general counsel for the Becket Fund for Religious Liberty.

Duncan spoke at he Ca holic Information Center in Washington, D.C., alongside Charmaine Yoest, CEO of Americans United for Life, on Feb. 28.

He warned of the "grave threat" posed by government policies and attitudes that infringe upon Americans' freedom of conscience.

Among these policies is a mandate issued by the Department of Health and Human Services requiring employers to offer health insurance plans covering contraception, sterilization and some early abortion drugs, even if doing so violates their most deeply-held beliefs.

According to Duncan, the government treats contraceptives as "the sacrament of our modern life," necessary for "the good life," health and economic success of society, particularly women.

In the opinion of the government, he explained, economic opportunity and women's equality are dependent upon the ability to use contraceptive measures.

However, he added, the government already spends "millions upon millions upon millions upon millions of dollars" to provide contraceptives at no cost to women who cannot easily afford them. Therefore, even poor women already had access to contraceptives without forcing employers to violate their consciences.

Nonetheless, Duncan continued, a "disturbing" phenomenon is growing in America as free contraception is coming to be seen as a "right" that is more important than freedom of conscience.

Furthermore, the government has now ranked religious freedom, separating the kinds of bodies who have access to religious liberty into "tiers," he said. Religious orders and houses of worship receive generous accommodations to obey their conscience, while non-profit religious organizations are given a much more restricted dose of religious freedom.

A third category, consisting of privately owned business owners, is granted "coach-class religious liberty," he added.

While private businesses such as Hobby Lobby make obviously "religious decisions," the government claims that "you don't have any right to practice your religion if you're in a business," he observed.

This decision is "out of step with the way our government has treated conscience throughout the years," Duncan said, explaining that since the early days of the country, the government has welcomed groups such as the Jehovah's Witnesses and Quakers.

"We gave them space" to protect their conscience and live in accordance with their religious objections, he said. But now, the government threatens to reduce religious freedom to a mere "façade."

Despite these grave concerns, Duncan remains hopeful over the HHS mandate, no ing that the government's view has lost in court 12 times and only secured victories in four cases.

Charmaine Yoest added hat there is a troubling connection growing between government coercion and abortion-inducing procedures.

She explained that pro-life activists have seen success in making abortion "an unsavory career trajectory," and as a result, abortion activists working through the government are "moving from choice to coercion."

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Abortion clinics "don't have doctors" to perform abortions anymore, Yoest observed, and they have therefore moved towards chemical abortions, which are "easier to dispense to women."

The goal of "big abortion" is to "normalize" over-the-counter and self-administered chemical abortions, she said, adding that the HHS mandate is helping to do this through its inclusion of "life-ending drugs" as "contraceptives."

She clarified that a big part of the concern is the redefinition of abortion based on the redefinition of pregnancy to begin at implantation, leaving unborn embryos in their first days of life unprotected.

"Having the FDA define an abortifacient - something that ends life - as a contraceptive: that's the problem," Yoest said.

"This is a really alarming trend that we're watching," she stressed.