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Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause

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MYTHS, MISCUES, AND MISCONCEPTIONS: NO-AID SEPARATIONISM AND THE ESTABLISHMENT CLAUSE

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In neutrality theory the recipients of vouchers, grants, and purchase-of-service contracts are eligible to participate as providers in government social service programs without regard to their religious character. Indeed, religious beliefs and practices are prohibited bases for screening out those who want to be welfare program providers. Notable examples of congressional social service legislation conforming to the rule of religious neutrality are the "charitable choice" feature imbedded in the Welfare Reform Act of 1996[1] and the Community Services Block Grant Act of 1998,[2] as well as the provision allowing issuance of child care vouchers to indigent parents in the Child Care and Development Block Grant Program of 1990.[3] Likewise, federal grants-in-aid programs, for example the Church Arson Prevention Act of 1996,[4] the Telecommunication Act of 1996,[5] and the President's

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1. 42 U.S.C. § 604a (Supp. II 1996). Charitable choice appears as § 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2161 (1996). The Act was signed by President Clinton on August 22, 1996, but its most important provisions did not become effective until July 1, 1997.

2. Pub. L. No. 105-285 §§ 201-02, 112 Stat. 2702, 2728 (1998) (to be codified in scattered sections of 42 U.S.C.). Charitable choice appears as § 679 of the Community Services Block Grant Act, which is Title II of the Coats' Human Services Reauthorization Act of 1998, Pub. L. No. 105-285, 112 Stat. 2702 (1998). The Joint Report of the House and Senate Conference Committee appears at 114 CONG. REC. H9697 to H9719 (daily ed. Oct. 6, 1998) (submission of Rep. Goodling).

3. 42 U.S.C. §§ 9858-9858q (1994). The program permits faith-based child care centers to receive child care certificates (essentially vouchers) without regard to religion. The certificates are issued to an indigent parent who, in turn, selects the child care provider that the parent thinks best meets his or her needs and those of the child.

4. The Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (1996) (codified as amended in scattered sections of U.S.C.). Section 4 of the Act provides for nonprofit organizations exempt under § 501(c)(3) of the Internal Revenue Code, who out of racial or religious animus are victims of arson or terrorism, to obtain federally guaranteed loans

Values-Based Violence Prevention Initiative[6] to reduce youth violence and gang activity, adhere to the principle of religious neutrality.

Various Justices on the Supreme Court have proposed all manner of verbal formulae to encapsule the restraints of the Establishment Clause. The most long-standing test (as well as the most reviled) has the two-fold requirement that "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[7] The test acquired a third prong

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through private lending institutions. This means churches and other houses of worship can obtain the necessary credit to repair or rebuild their buildings, and can do so at reduced interest rates. The Act, quite sensibly, treats churches like all similarly situated exempt nonprofit organizations. The secular purpose is to assist the victims of crime. The federal loan guarantee is a form of direct aid to religion, albeit aid neutrally available to all § 501(c)(3) organizations.

5. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.). Title 47 U.S.C. § 157 (Supp. II 1996) directs the Federal Communications Commission to implement a universal service program to make computer Internet and other network services available in libraries and K-12 schools, including religious schools. Under 47 C.F.R. §§ 54.500 to .516 (1998), interested schools may apply to the FCC for grants. Successful applicants purchase available network services from commercial vendors. A portion of the vendor's bill to the school is discounted. The vendor is reimbursed the difference by the administrator of a fund that is created by a tax on telephone services.

6. The Values-Based Violence Prevention Initiative was announced by President Clinton on July 22, 1998. *Remarks on Crime Prevention Efforts*, 34 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 1450 (July 24, 1998). The initiative makes $2.2 million in grants available to civic, community, and religious organizations in sixteen cities to facilitate the work of these organizations among youth gangs and to enhance collaboration with local law enforcement officials. *See id.* at 1415-81. The effort is modeled after the National Ten Point Leadership Foundation in Boston, a faith-based program led by the Rev. Eugene F. Rivers, III. Community-based and religious organizations work closely with youth to prevent truancy, provide adult mentors, teach moral values, and offer positive alternatives to gangs and drug abuse.

A similar initiative of the Clinton Administration has been created in the U.S. Department of Housing and Urban Development ("HUD"). HUD seeks to collaborate with community and faith-based organizations to help empower the poor in urban centers. Although not a new funding source, the Center for Community and Interfaith Partnerships at HUD provides information and expertise on HUD programs, seeks input on policies and programs, and acts as a problem solver to help overcome barriers to utilization of federal programs. The goal is to collaborate more effectively with faith-based organizations and others toward common development goals. *See The Center for Community and Interfaith Partnerships: About the Center* (visited Mar. 4, 1999) <http://www.hud.gov/cdcintro.html>.

7. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963) (holding that school-sponsored prayer and devotional Bible reading violate the Establishment Clause).

in *Lemon v. Kurtzman*[8] urging the avoidance of "excessive entanglement" between government and religion,[9] only to have entanglement analysis recently absorbed back into the primary-effect prong.[10]

The *Lemon* test is the doctrinal formula most often resorted to in the lower federal and state courts. But rather than a literal application of the precise words of the two-prong test, its application calls for a nuanced interpretation of the Supreme Court's cases decided subsequent to *Lemon*. Within the framework of the test as truly applied, there is little doubt that religiously neutral social service funding programs meet the "secular purpose" requirement. This is because the Court's application of *Lemon*'s first prong is highly deferential to the legislature.[11] For example, the purposes of the aforementioned federal programs are, respectively, welfare assistance to the poor and needy, help for indigent parents to pay for quality child care, assistance for the victims of arson to rebuild following commission of a hate crime, improving Internet access for students in K-12 schools, and reducing gang violence among inner-city juveniles. That Congress also intended faith-based providers to be eligible to com-

8. 403 U.S. 602 (1971) (disallowing salary supplements for private K-12 school teachers, as well as state reimbursement for the expense of instructional materials).

9. *Id.* at 614-22. The three-prong *Lemon* test is as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13 (internal quotation and citation omitted).

10. In *Agostini v. Felton*, 521 U.S. 203 (1997), Justice O'Connor for the majority indicated that it will be "simplest" in future applications of Establishment Clause doctrine to consider entanglement as part of the effect prong:

> Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis. We considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion . . . and as a factor separate and apart from "effect" . . . . Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect" . . . . Thus, it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz* [*v. Tax Comm'n*, 397 U.S. 664 (1970)]—as an aspect of the inquiry into a statute's effect.

Id. at 232-33 (citations omitted).

11. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 602-03 (1988) (stating that legislation had a secular purpose where "on the whole, religious concerns were not the sole motivation behind the Act").

pete for program funding on the same criteria as other recipients does not alter the legislation's secular purpose.[12]

The serious debate, however, is over the second prong of *Lemon*, namely whether the "primary effect" of these social welfare initiatives is to advance religion. Although it is beyond cavil that the ultimate beneficiaries of these social programs are the poor and needy, the intermediate recipients of the government funding are the welfare service providers. Most of these providers are nongovernmental, that is, they are in the independent sector. The overwhelming number in the independent section are not-for-profit, but a few providers are for-profit organizations. Of the nonprofit providers, some are religious in purpose. Of those providers that are religious, there are wide differences in the degree of their overt spirituality or religious fervency.

No-aid separationists[13] argue that *Lemon*'s primary-effect inquiry should focus on whether a service provider is religious in character and if so, how religious. They maintain that a provider found "too religious" is to be dubbed "pervasively sectarian," and thereby disqualified from program eligibility. In contrast, in neutrality theory[14] the primary-effect inquiry is accomplished by

12. *See, e.g., id.* at 606-07 (citations omitted) (The "provisions of the statute reflect at most Congress' considered judgment that religious organizations can help solve the problems to which the [Adolescent Family Life Act] is addressed. Nothing in our previous cases prevents Congress from making such a judgment or from recognizing the important part that religion or religious organizations may play in resolving certain secular problems.").

13. As the term is used here, no-aid separationists hold that most forms of governmental assistance to religious organizations are prohibited by the Establishment Clause. I hold to the separation of church and state and believe that it is codified in the Establishment Clause. Accordingly, I am a separationist. I also believe, as will become evident below, that no-aid separationism is inconsistent with the structural separation of church and state of the Establishment Clause and thus is misguided. The neutrality principle with its equal treatment of all educational and social service providers—including all faith-based providers—is, I believe, true to historic separationism. Whereas structural separationism and neutrality are in harmony, *see* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997), neutrality and no-aid separationism are at odds.

Neutrality theory should not be confused with "accomodationism," a theory more consistent with the results in cases upholding legislative prayer, *see, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983), and municipal-sponsored Christmas nativity scenes, *see, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984). Nor should neutrality be confused with "nonpreferentialism," a theory articulated in *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting), but never adopted by the Supreme Court in any of its cases. I believe that both accomodationism and nonpreferentialism are also misguided.

14. I make no claim that a rule of religious neutrality is substantively neutral, hence, the term "neutrality principle" (or simply "neutrality") is perhaps better described as a rule of "equal treatment," "nondiscrimination," or

examining how a service provider actually spends the federal program monies. The monies are to be spent only for the purposes set out in the service contract or grant. These purposes—having already satisfied *Lemon*'s secular-purpose prong—necessarily exclude use of the monies for inherently religious programming.[15]

The "too religious" versus "secular enough" inquiry insisted upon by no-aid separationists is hopelessly unconstitutional, as will be elaborated upon below. But first, discussion is warranted uncovering no-aid separationism's false assumption about modern American society.

I. THE THEORY OF NO-AID SEPARATIONISM IS NO LONGER PLAUSIBLE; INDEED, IN ITS MODERN SETTING IT IS HOSTILE TO INDIVIDUAL RELIGIOUS CHOICE

Two hundred years ago, when the Republic was small and most acts of public charity took place in the independent sector, no-aid separationism was a plausible ordering of American society. In the decades immediately following the nation's founding, religious organizations were deeply involved in social welfare activities and at the same time largely avoided contact with institutions of government. For government (federal, state and local) to eschew involvement with religious organizations was not a matter of indifference, discrimination, or hostility. Rather, because government likewise had little to do with secular organizations, it was a matter of evenhandedness to have little to do with faith-based organizations. Government left charity to the independent sector. Government was small, and organized charity was mostly religious and privately funded.

This no-aid separationism of the eighteenth century can continue to be applied to conditions at the end of the twentieth century only by clinging to the myth that the modern nation-state exercises limited control over the resources available for devotion to the social welfare needs of Americans.[16] Holding to this myth, no-aid separationists insist it is fair to ask religious citizens

"evenhandedness." Nonetheless, the Justices of the Supreme Court are using the term "neutrality principle" and variations thereof, so I will follow their lead.

15. *See, e.g.*, 42 U.S.C. § 604a(j) (Supp. II 1996), a provision in "charitable choice" expressly prohibiting service contract monies from being "expended for sectarian worship, instruction, or proselytization." Monies from nongovernmental sources may, of course, be spent at a provider's discretion, including being spent on programming that is inherently religious.

16. *See* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 522-26 (1968).

to support their faith-based charities via sacrificial giving and to also pay taxes for the support of the secular providers now receiving substantial government funding.

Reality, of course, is that "big government," with its high taxes and pervasive regulation, has a near monopoly over the resources available for social welfare spending. With the advent of the welfare/regulatory state in the middle third of this century, continuing to enforce a strict rule of no aid has the effect of confining religious social ministries to ever smaller enclaves of private life. If the charities of faith-based groups are to participate along with secular organizations in meaningfully serving civil society, they are put to a cruel choice. No-aid separationism demands that religious ministries either secularize and thereby qualify for government aid, or close their doors for lack of funding. Thus, in its present-day impact, no-aid separationism is hostile toward faith-based charities. The changed circumstances work such unfairness that denial of all aid is no longer a plausible ordering of church/state relations. The absence of evenhandedness not only suffocates social and religious pluralism by creating a monolithic, secular-dominated structure for the delivery of welfare services, but the no-aid view eliminates a fuller range of provider choices for the poor and needy.

Since *Widmar v. Vincent*,[17] the general trajectory of the Supreme Court's Establishment Clause cases has moved away from no-aid separationism and toward the neutrality principle.[18] The Court's most recent pronouncements addressing the issue

17. 454 U.S. 263 (1981) (striking down as violative of the Free Speech Clause a state university's discriminatory restrictions on religious groups meeting in classrooms and other campus buildings).

18. I have discussed elsewhere the evolution of the law away from no-aid separationism and in the direction of neutrality theory. *See* Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 20-39 (1997). Several scholars have traversed the same ground and concluded that the Court's march, however tentative, is in the direction of neutrality. *See, e.g.*, Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 703-07 (1997); John H. Garvey, *What's Next After Separationism?*, 46 EMORY L.J. 75 (1997); Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1089-94 (1996); Laycock, *supra* note 13, at 45-46; Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 364-66, 369, 371-73 (1996); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 175-94 (1992); Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 710-17 (1996).

are *Agostini v. Felton*[19] and *Rosenberger v. Rector and Visitors of the University of Virginia.*[20] Although the *Agostini* and *Rosenberger* majorities did not embrace the neutrality principle without qualification, the law today is far closer to neutrality than to the no-aid separationism of the 1970s and mid-1980s. The *Agostini* Court, for example, was no longer willing to assume that direct aid to religious schools would be diverted to the inculcation of religion by authorities at Roman Catholic K-12 schools.[21] *Agostini* upheld assistance to "pervasively sectarian" schools provided that the overall program was religiously neutral. Additionally, because the aid was conveyed directly to service providers, the *Agostini* Court required sufficient regulatory controls so that officials could be assured that the assistance was not misdirected.[22] In *Agostini,* the Court found additional safeguards in the form of the aid (government employees providing remedial educational services) and in the administrative oversight that attended the delivery of the aid (unannounced inspections by supervisors). Because the Court discourages facial challenges to comprehensive spending programs,[23] future challengers to neutral social service programs will have to introduce evidence that proves inherently religious beliefs or practices are actually being advanced with the use of program monies.

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19. 521 U.S. 203 (1997) (upholding federal education program where government employees deliver remedial services to students at the campus of the students' primary or secondary school, including religious schools deemed "pervasively sectarian").

20. 515 U.S. 819 (1995) (holding university's denial of funding for printing of student newspaper, because of paper's religious viewpoint, was discrimination contrary to Free Speech Clause).

21. *See Agostini,* 521 U.S. at 234.

22. *See id.* at 222-36. The law has never been that direct funding of "pervasively sectarian" providers is *per se* violative of the Establishment Clause. That would be a rule of form over substance, and the Supreme Court long ago rejected such formalism. For example, in *Committee for Public Education v. Regan,* 444 U.S. 646 (1980), the Court upheld direct cash payments to religious K-12 schools, explaining, "[w]e decline to embrace a formalistic dichotomy that bears so little relationship either to common sense or the realities of school finance. None of our cases requires us to invalidate these reimbursements simply because they involve [direct] payments in cash." *Id.* at 658.

23. *See, e.g.,* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2175 (1998) (quotations and citations omitted) ("Facial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort."). Accordingly, lawsuits over religiously neutral programs will likely have to be provider-specific (or "as applied") challenges to particular contract awards.

II. DISTINGUISHING BETWEEN PERVASIVELY AND NON-PERVASIVELY SECTARIAN PROVIDERS IS ITSELF VIOLATIVE OF THE SUPREME COURT'S CASE LAW

No-aid separationists concede that the Supreme Court's cases permit direct funding of faith-based social service providers, but only so long as the providers are not "pervasively sectarian."[24] The daunting task of screening out "pervasively sectarian" providers means that state officials will have to apply a religious test to all religiously affiliated providers, culling those eventually determined to be "too religious." Merely to draw the "pervasively sectarian" distinction, however, requires state social service bureaucracies—and ultimately the courts—to probe into the nature and practices of religious charities and to attribute meaning to their beliefs, words, and actions. Such inquiries into the significance of religious tenets and observances violates the most fundamental aim of church/state separation, which is to keep these two centers of authority—God and Caesar, so to speak—within their respective spheres of competence.[25]

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24. The principal case on which no-aid separationists rely is *Bowen v. Kendrick*, 487 U.S. 589 (1988). It is ironic that no-aid separationists fought vigorously against the result in *Kendrick*, but now they cling to it. What was a loss for them in 1988 is today the best they can do when pressed to marshal their authorities. But that just goes to show that in the 1990s the Supreme Court has been moving away from no-aid separationism and toward neutrality. It is a freeze-frame view of constitutional doctrine to argue, as no-aid separationists do, that the *Kendrick* majority states the law of the Establishment Clause today. *Kendrick* was a great victory for religious liberty in 1988, for the case was a rejection of no-aid separationism. That *Kendrick* did not embrace neutrality in 1988 is not a deterrent to the Court's strides to do so a decade later. The rule of no-direct-aid to "pervasively sectarian" organizations—successfully evaded by the Court majority in *Kendrick* so as to facially uphold congressional funding—began to break down with *Zobrest v. Catalina Foothills Scool District*, 509 U.S. 1 (1993), and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), and has totally unraveled with *Agostini v. Felton*, 521 U.S. 203, 225 (1997) ("We have departed from the rule relied on in *[Grand Rapids v.] Ball*, that all government aid that directly aids the educational function of religious schools is invalid.").

No-aid separationists argue that *Kendrick* is controlling because it is the last Supreme Court case to deal with social services. This makes no sense. The Supreme Court does not have "school cases" and "social service" cases. Rather, the Supreme Court has Establishment Clause cases. So one must look to the Court's latest word on what the Establishment Clause means. That is why the three cases in the 1990s (*Zobrest*, *Rosenberger*, and *Agostini*) supersede cases from the 1980s (such as *Kendrick*).

25. William Clancy aptly frames the constitutional settlement embodied in the Establishment Clause this way:

> [T]he "wall of separation" metaphor is an unfortunate and inexact description of the American Church-State situation. What we have constitutionally is not a "wall" but a logical distinction between two

To be "pervasively sectarian," explained a much earlier Supreme Court, means that a faith-based provider's "secular activities cannot be separated from [its] sectarian ones."[26] This, of course, just rephrases the question. Now the test requires government officials to ask what is "secular" and what is "sectarian" about each specific provider, and when are the two so blended that the "secular alone" cannot be separately funded. Further complicating the matter, this inquiry is to operate in the context of a wide variety of government-supported social services[27] and in the face of a broad and complex diversity of methodologies employed by these independent sector providers.

The Supreme Court has refused to permit state bureaucracies to probe into the meaning ("secular" versus "sectarian") of a religious organization's words, practices, and events.[28] A parallel

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orders of competence. Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God's. (Surely this is one of history's more encouraging examples of secular modesty.) The State realistically admits that there are severe limits on its authority and leaves the churches free to perform their work in society.

William Clancy, *Religion as a Source of Tension, in* RELIGION AND THE FREE SOCIETY 23, 27-28 (1958).

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

27. A list of types of social service providers would include community development organizations, preschools, and child day care centers; temporary shelters for abused children; foster homes and adoption placement agencies; residential care or group care homes for abused or neglected children and adjudicated juvenile offenders; adolescent or teen counseling centers; crisis pregnancy counseling centers; maternity homes for women with crisis pregnancies; temporary shelters for battered women; rehabilitation centers for alcoholics, drug abusers, and the unemployed; AIDS hospices; prison ministries, police and prison chaplaincies; halfway houses for adults convicted of crimes; storehouses of free (or reduced-price) food, used clothing, and household items; centers for free meals (soup kitchens) and temporary shelters for the homeless (rescue missions); low-income housing renovation programs; refugee aid and resettlement; disaster relief; clearinghouses for volunteers rendering home-based care to the disabled; long-term care facilities for the disabled, retarded, and mentally ill; long-term care facilities for the elderly (retirement, nursing, and invalid homes); elderly day care centers; centers for vocational training or employment of the disabled; literacy and English-as-a-second-language programs; hospitals and community health clinics; dispute resolution and legal aid centers; abstinence counseling centers for teenagers; financial counseling centers; marital and family counseling centers; recreational programs, summer camps, and retreat centers for youth and adults; and, support groups of every stripe for persons suffering from life's many vicissitudes.

28. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 844-45 (1995) (cautioning state university to avoid having to distinguish between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); Corporation of Presiding Bishop of the Church

concern over restraining governmental power is behind the Supreme Court's determination that it lacks subject matter jurisdiction over disputes internal to an ecclesiastical organization.[29] This jurisdictional bar to deciding intrachurch issues is not limited to conflicts implicating ownership of church real estate. The bar extends as well to all civil and criminal litigation whenever a dispute turns on matters that are inherently religious, including

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of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987) (recognizing a problem when government attempts to divine which ecclesiastical appointments are sufficiently related to the "core" of a religious organization to merit exemption from statutory duties); *id.* at 344-45 (Brennan, J., concurring) (same); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (avoiding potentially entangling inquiry into religious practice is desirable); Widmar v. Vincent, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981) (holding that inquiries into significance of religious words or events are to be avoided); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs); Cantwell v. Connecticut, 310 U.S. 296, 305-07 (1940) (noting that petty officials are not to be given discretion to determine what is a legitimate "religion" for purposes of issuing permit); *see also* Rusk v. Espinosa, 456 U.S. 951 (1982) (mem.), *aff'g* 634 F.2d 477 (10th Cir. 1980) (striking down charitable solicitation ordinance that required officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations); United States v. Christian Echoes Ministry, 404 U.S. 561, 564-65 (1972) (per curiam) (holding that IRS could not appeal directly to Supreme Court the ruling of a federal district court to the effect that the IRS's redetermination of § 501(c)(3) exempt status was done in a manner violative of rights of admittedly religious organization; IRS had sought to examine all of religious organization's activities and characterize them as either "religious" or "political" and, if political, then "non-religious").

29. Concerning disputes over doctrine, ecclesiastical polity, the selection or promotion of clerics, and dismissal from church membership, the Supreme Court has said that civil courts are without subject matter jurisdiction. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-24 (1976) (civil courts may not probe into church polity); Maryland & Va. Eldership of the Churches of God v. Church at Sharpsburg, 396 U.S. 367, 368 (1970) (per curiam) (desiring to avoid doctrinal disputes); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451 (1969) (indicating civil courts forbidden to interpret and weigh church doctrine); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960) (per curiam) (indicating that the First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952) (noting that the First Amendment prevents legislature from interfering in ecclesiastical governance of Russian Orthodox Church); Watson v. Jones, 80 U.S. (13 Wall.) 679, 725-33 (1872) (rejecting implied trust rule because of its departure-from-doctrine inquiry). These subject matter jurisdiction dismissals do not reference Article III of the Constitution, for there is nothing in Article III that limits federal court jurisdiction concerning these matters. Rather, the cases reference the Establishment Clause and the necessity for keeping at a proper distance the institutions of church and state.

torts,[30] contracts,[31] civil rights employment legislation,[32] and criminal fraud.[33]

The Court has similarly held that legislative classifications based on denominational affiliation are not constitutionally permitted.[34] The Court wants to avoid making church membership of legal significance for two reasons. First, membership, as well as denial of or removal from membership, are inherently religious decisions. Second, if this was not the rule of law, then merely holding religious membership could result in a civic

30. *See, e.g.*, Farley v. Wisconsin Evangelical Lutheran Synod, 821 F. Supp. 1286 (D. Minn. 1993) (dismissing defamation action against church where the offensive statements arose out of church controversy); Downs v. Roman Catholic Archbishop, 683 A.2d 808, 810-12 (Md. Ct. Spec. App. 1996) (holding that trial court lacked subject matter jurisdiction over defamation claim against church hierarchy); Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997) (dismissing claim against Roman Catholic Diocese for negligent supervision of priest); Tidman v. Salvation Army, No. 01-A-01-9708-CV00380, 1998 WL 391765, at *1 (Tenn. Ct. App. July 15, 1998) (dismissing privacy and outrageous conduct tort claims brought by former employee of faith-based organization discharged for having extramarital affair); Korean Presbyterian Church v. Lee, 880 P.2d 565 (Wash. Ct. App. 1994) (holding that ecclesiastical abstention doctrine precluded recovery for tort of outrage); L.L.N. v. Clauder, 563 N.W.2d 434, 440-41 (Wis. 1997) (holding that the First Amendment prohibited negligent supervision claim).

31. *See, e.g.*, Gabriel v. Immanuel Evangelical Lutheran Church, Inc., 640 N.E.2d 681 (Ill. App. Ct. 1994) (holding that breach of contract complaint was properly dismissed on First Amendment grounds since the matter of whether to employ plaintiff as a parochial school teacher was an ecclesiastical issue into which civil court may not inquire); Basich v. Board of Pensions, 540 N.W.2d 82 (Minn. Ct. App. 1995) (holding that First Amendment prevented district court from exercising jurisdiction over action for breach of pension contract and breach of fiduciary duty); Pearson v. Church of God, 458 S.E.2d 68, 71 (S.C. Ct. App. 1995) (holding that trial court did not have constitutional authority to decide claim for breach of contract).

32. *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455, 464-65 (D.C. Cir. 1996) (finding EEOC investigation into Catholic nun's gender discrimination Title VII claim was barred by Establishment Clause); Himaka v. Buddhist Churches of Am., 917 F. Supp. 698, 707-09 (N.D. Cal. 1995) (holding that minister's Title VII retaliation claim should be dismissed based upon excessive governmental entanglement with religion in violation of Establishment Clause); Van Osdol v. Vogt, 908 P.2d 1122, 1130-32 (Colo. 1996) (holding that Establishment Clause insulated a religious institution's choice of minister from judicial review; Title VII claim against church was properly dismissed); Geraci v. Eckankar, 526 N.W.2d 391, 399-400 (Minn. Ct. App. 1995) (gender discrimination claim against church is barred by Establishment Clause).

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

34. *See* Kiryas Joel Bd. of Educ. v. Grumet, 512 U.S. 687, 702-08 (1994); Gillette v. United States, 401 U.S. 437, 448-51 (1971); *cf.* Larson v. Valente, 456 U.S. 228, 246 n.23 (1982) (distinguishing and explaining *Gillette*).

advantage.[35] Judge-made classifications along the lines of pervasively and non-pervasively sectarian are no less hazardous, for the inevitable result is that theologically liberal providers of social services will be deemed "secular enough" and thus funded, whereas religiously conservative providers will be found "too religious" and thus funding denied.[36] A more theologically discriminatory rule could hardly be devised.

The foregoing are Establishment Clause cases. Ancillary to deciding free exercise cases, the Supreme Court has likewise held that a religious belief or practice need not be central to

35. If Congress were to confer conscientious objector draft status "on all Quakers," that may induce conversions (real or *pseudo*) to Quakerism. On the other hand, the government purposefully may utilize classifications based on a person's religious belief or practice—as distinct from denominational affiliation—to lift civil burdens from those individuals. For example, Congress may confer conscientious objector draft status "on religious pacifists who oppose war in any form." *See Grumet*, 512 U.S. at 715-16 (O'Connor, J., concurring in part and concurring in the judgment); *Gillette*, 401 U.S. at 448-60. This is consistent with the rule that government can either treat all alike, not concerning itself with unintended effects, or government can purposefully lift civic burdens from individuals based on their religious practices. What is impermissible is to lift such burdens based on an individual's denominational or religious affiliation.

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

The Establishment Clause was included in the Bill of Rights partly because in the newly formed states (where there were still many church establishments) the legislators were forever intervening with their own view of "good" as opposed to "sectarian" religion. The authors of the Establishment Clause did not want the newly formed federal government to have the power to also oversee religion in this way. Such interventions did more harm than good: harm to both the civil state and to genuine religion. We do not honor such a clause by a "pervasively sectarian" test that forces the government (welfare administrators and eventually the courts) to award some religions and discourage others.

(and therefore more important to) a claimant's faith as a prerequisite to receiving the protection of the clause.[37] This is because civil magistrates are not competent to decide which practices are at the "core" of a given religion and which are peripheral to its faithful practice. Moreover, the Court has said that a religious claimant may disagree with co-religionists, or be unsure or wavering, and still receive full free exercise protection.[38] This is because a civil magistrate has no judicially intelligible means for gauging the relative degree of a claimant's religious fervency. State welfare officials trying to administer the "pervasively sectarian" test will face the same difficulties.

The problem illustrated by these cases is not that government officials are, without more, interacting with religious organizations. Some regulatory interaction between government and religious associations is inevitable, more so as government has gotten bigger and society more complex. Thus, the argument is not that governmental factfinding into religious matters is in some sense an invasion of ecclesiastical "privacy" or freedom of association, or that the net increase in administrative probing will "entangle" government with faith-based providers beyond some threshold thought "excessive." Rather, the problem is that the government is being asked to adjudicate matters beyond its constitutional competence, that is, those subject matters reserved for the realm of religion. That explains why the Supreme Court states the foregoing rules, not as an individual right to free exercise, but in terms of the civil courts lacking subject matter jurisdiction: "[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their com-

37. *See* Employment Div. v. Smith, 494 U.S. 872, 886-87 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims."); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 449-51, 457-58 (1988) (rejecting Free Exercise Clause test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); United States v. Lee, 455 U.S. 252, 257 (1982) (rejecting government's argument that free exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance").

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

38. *See* Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981) ("Courts are not arbiters of scriptural interpretation.").

mon faith."[39] The problem of exceeding limited delegated powers arises when government is called on to weigh doctrinal questions or to otherwise intrude into that sphere of inherently religious matters reserved to religion and religious organizations.

The "pervasively sectarian" test requires administrative discovery into the self-understanding, creed, ecclesiology (form of polity), missionary vision, charitable motivation, and other beliefs and activities of the "too fervent" providers and differentiating them from the "secular enough" providers. Government simply is not competent to scour the organic documents and mission statements of a faith-based provider and place its own gloss on what those documents mean. Such bureaucratic rummagings will unmask all manner of ecclesiastical "facts" over which social service personnel will be the first to admit they have no training, no experience, and no theological insight. The possibilities for misunderstandings, spiritual insensitivity, and outright sectarian bigotry wrought by the "pervasively sectarian" test is breathtaking. Bureaucratic divining into the "pervasively sectarian" question will trample any notion that God and Caesar must stay—for the benefit of both—within their respective spheres.

Unlike no-aid separationism, neutrality in program funding avoids the problem of lack of competency by placing the focus on how the government aid is actually spent.[40] In this manner,

39. *Id.* at 716. *See also Smith*, 494 U.S. at 887; *Lyng*, 485 U.S. at 457-58; United States v. Lee, 455 U.S. 252, 257 (1982); Lee v. Weisman, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring) (rejecting nonpreferentialism because its application "invite[s] the courts to engage in comparative theology"); County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (courts are "ill equipped to sit as a national theology board").

Each of these Court-made rules of law is far easier to explain when attributed to the restraints of constitutional structure (*i.e.*, the Establishment Clause) than to individual religious rights (*i.e.*, the Free Exercise Clause). Indeed, in some cases it is the religious rights claimant inviting the Court to make the inquiry into religious doctrine and it is the Court refusing to do so. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (avoiding entangling inquiry). Thus, the rule applied could not be vindicating a free exercise right. Any such right could be waived by the claimant. But if the operative rule of law is a constitutional limit on the Court's power, then the objection to judicial inquiry into religious doctrine cannot be waived. It can be inferred, therefore, that the rule of law in these cases is a structural restraint on the government's power set down by the Establishment Clause.

40. What a faith-based provider (indeed, any provider) may not do is use government-source monies to pay for programming that is inherently religious. But such programming is, in any event, outside the scope of the secular purpose of the government's social service program. Inherently religious programming may be separately provided by a faith-based provider, but only if paid for by monies from a nongovernmental source.

the government keeps its eye on whether the poor and needy are actually being helped and thus whether the secular purpose of the program is being fulfilled.[41] Neutrality also empowers the ultimate beneficiaries (the poor and needy) by offering them a broader choice of welfare providers, including the choice of a faith-based provider.

The Supreme Court's "pervasively sectarian" test was misconceived from the outset.[42] No-aid separationists carry a heavy burden if they persist in asserting the test's applicability to neutral social service programming.[43] It should be rejected by the pres-

41. Although still in its early stages, the available empirical evidence indicates that faith-based social service providers are more effective than their secular counterparts. *See* John J. DiIulio, Jr., *Jeremiah's Call*, PRISM, March/April 1998, at 19 (summarizing early findings of social science studies). Yet, the "pervasively sectarian" test requires that government ignore these "bottom line" successes entirely. A result that so promotes ineffective policy choices over effective policy directions ought to give the courts additional reason to question the validity of the "pervasively sectarian" test.

42. The "pervasively sectarian" test first surfaced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The last case where the Court struck down governmental aid using the test was *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985). However, *Ball* was recently discredited and partly overruled in *Agostini v. Felton*, 521 U.S. 203, 219-23 (1997). Therefore, the last occasion for the Court to apply the "pervasively sectarian" test that is still good law today was *New York v. Cathedral Academy*, 434 U.S. 125 (1977). That means that the period of dominance of the "pervasively sectarian" test was a mere six years (1971 to 1977), and that period is now over twenty years past.

43. The aforementioned neutral funding programs (*see supra* notes 1-6) are actions of the federal government. In the 210-year history of the Supreme Court, the Court has never struck down a federal regulation or found the actions of a federal official violative of the Establishment Clause, and only once has the Court held that an act of Congress violated the Establishment Clause. *See* Aguilar v. Felton, 473 U.S. 402 (1985). However, the result in *Aguilar* was expressly overruled in *Agostini*, 521 U.S. 203 (1997). Accordingly, the Court has never held, in the final analysis, an act of Congress violative of the Establishment Clause. Therefore, a claim that an act of Congress is violative of the Establishment Clause is going against the weight of history. Moreover, the Court has never struck down a governmental funding program, state or federal, as violative of the Establishment Clause where the program was directed to the needs of social services, health care, or higher education. Such has occurred only with respect to state programs directed to the needs of K-12 schooling. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971). Prior to the Court's ruling in *Lemon*, aid to K-12 religious schools was consistently upheld. *See* Central Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (upholding loan of secular textbooks to parents of school-age children, including children attending religious schools); Everson v. Board of Educ., 330 U.S. 1 (1947) (upholding state law providing reimbursement to parents for expense of transporting children by bus to school, including parochial schools); Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930) (upholding state loans of textbooks to parents with students enrolled in school, whether public, private nonsectarian, or religious).

ent Supreme Court at the next opportunity if the Court hopes to bring coherence and consistency to Establishment Clause doctrine.

III. ARGUMENTS THAT THE ESTABLISHMENT CLAUSE CONFLICTS WITH AND OVERRIDES BOTH THE FREE SPEECH CLAUSE AND THE FREE EXERCISE CLAUSE MAKE NO SENSE

The exclusion of certain faith-based social service providers from program eligibility simply because of what they believe, or because of how they practice and express what they believe, is discriminatory on the bases of religious speech and religious exercise. Such intentional discrimination is *prima facie* violative of the Free Speech and Free Exercise Clauses. No-aid separationists, however, insist such discrimination is required by the Establishment Clause. Accordingly, no-aid separationists posit a clash between the clauses internal to the First Amendment, with the Establishment Clause overriding free speech and free exercise rights. The neutrality principle, however, sensibly posits that these three clauses be read in harmony.

During the 1980s and 1990s, in an unbroken line of victories for freedom of speech, the Supreme Court held that religious expression by individuals and religious organizations was entitled to the same high protection accorded nonreligious expression (*e.g.*, speech of political, artistic, or educational content).[44] No-aid separationists framed their contention as a clash of two First Amendment clauses: a right under the Free Speech Clause to freedom of religious expression without discrimination versus an Establishment Clause right to a government which does not aid religion (the aid taking the form of the use of government property to convey a religious message). With the issue so framed, no-aid separationists invited the Court to "balance" the conflicting clauses hoping to tip the scale in the direction of their bias for a public square denuded of all religion. They lost. However, as no-aid separationists had urged, the Court did frame the issue in such a way that Establishment Clause compliance could, in the-

44. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (finding viewpoint discrimination in university's denial of printing costs for student-initiated religious publication); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (finding content-based discrimination against religious speech in public forum not justified by Establishment Clause); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (finding viewpoint discrimination); Widmar v. Vincent, 454 U.S. 263 (1981) (finding content discrimination); *see also* Westside Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (upholding Equal Access Act, legislation that prohibits discrimination against religious speech at public secondary schools).

ory at least, supply a compelling interest for overriding the Free Speech Clause.

Capitol Square Review and Advisory Board v. Pinette[45] is a recent illustration of the Supreme Court's framing of the issue in a manner that erroneously creates this tension between the Free Speech Clause and the Establishment Clause. In *Pinette,* the State of Ohio created a public forum in a park by allowing citizens to erect temporary displays symbolizing their groups' message. But when the Ku Klux Klan sought permission to erect a Latin cross during the Christmas season, state officials balked. The Klan then sued for impairment of its free speech rights and ultimately won.

The *Pinette* Court held that the Establishment Clause was not violated by the presence of the Latin cross in the park. Accordingly, the state was ordered to permit the religious display on the same basis as all other displays allowed in the park. However, in the course of holding that private religious speech is protected by the Free Speech Clause from content and viewpoint discrimination, the Court indicated that on different facts the Establishment Clause could require suppressing the private speech.[46] This makes no sense. There is nothing in the text of the First Amendment that suggests that when these clauses ostensibly conflict, the Establishment Clause supersedes the Free Speech Clause.[47] One could just as arbitrarily assume that the Free Speech Clause preempts the Establishment Clause. What the Court ought to conclude from this apparent tension is that it has miscued when interpreting one or both clauses.[48]

The Free Exercise Clause prohibits intentional discrimination against religion, as well as against religious belief and prac-

45. 515 U.S. 753 (1995).

46. *See id.* at 761-62; *id.* at 783 (O'Connor, J., concurring in the judgment).

47. *See* Valley Forge Christian College v. Americans United, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values.").

48. The clauses-in-conflict problem goes away when the Establishment Clause is conceptualized as a structural restraint on government power. If the speaker is private rather than governmental, then the Free Speech Clause supplies a right of equal access to the forum and the expression cannot be suppressed simply because it is religious. There is never any "tension" with the Establishment Clause, real or apparent, for that clause is a restraint on government rather than private actors. Hence, the task in cases like *Pinette* is to first determine if the speaker is private or governmental. If private, then the Establishment Clause is irrelevant. If the speaker is governmental, then the individual-rights orientation of the Free Speech Clause is irrelevant. One First Amendment clause never need be "balanced" against the other.

tice.[49] Yet the "pervasively sectarian" test necessarily causes state welfare bureaucracies to discriminate against[50] the religious beliefs and practices of providers dubbed "pervasively sectarian." Such discrimination puts tremendous pressure on these providers to compromise their spirituality so as not to lose program opportunities.[51] "The current system makes government grant programs relentless engines of secularization."[52] This reduces the variety of providers, destroying innovation and pluralism. The secularization will, in turn, render some providers willing to water down their programs causing them to become little different from the ineffectual state-operated programs. This is ironic, for it was the search for more effective programs that caused government to look to voluntary sector programs in the first place.

No-aid separationists also put the Free Exercise Clause at war with the Establishment Clause when they seek to deny "pervasively sectarian" providers the same program eligibility opportunities as other independent sector providers.[53] Once again, they

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49. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (city ordinance regulating ritual sacrifice of animals was intentionally discriminatory); Employment Div. v. Smith, 494 U.S. 872, 884 (1990) (not rejecting *Sherbert v. Verner*, 374 U.S. 398 (1963), insofar as *Sherbert* held that whenever government makes individualized determinations, officials must not purposefully discriminate against claims of religious exemption); McDaniel v. Paty, 435 U.S. 618 (1978) (striking down a law disqualifying clergy from holding public office). When the government's discrimination is intentional, no substantial burden on religion need be shown by the religious claimant. *See* Brown v. Borough of Mahaffey, 35 F.3d 846, 849-50 (3d Cir. 1994) (refusing to apply substantial-burden requirement "to non-neutral government action [because such] would make petty harassment of religious institutions . . . immune from the protection of the First Amendment").

50. Use of the word "against" is intentional. As *Church of Lukumi* indicated, the government cannot intentionally favor secular activity over religious activity. However, in certain situations government can refrain from burdening religious activity when secular groups are being burdened. *See infra* notes 99-107 and accompanying text.

51. *See* CHARLES L. GLENN, THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES (forthcoming 1999); STEPHEN V. MONSMA, WHEN SACRED & SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS & PUBLIC MONEY 109-46 (1996).

52. Michael W. McConnell, *Equal Treatment and Religious Discrimination, in* EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY 48 (Stephen V. Monsma & J. Christopher Soper eds., 1998).

53. Additional cases demonstrate this needless clauses-in-conflict problem. *See, e.g.*, Peter v. Wedl, 155 F.3d 992, 996-97 (8th Cir. 1998) (affirming lower court's ruling that both Free Exercise and Free Speech Clauses are violated by Minnesota regulation that provided aid to special education students unless the student was enrolled in a religious school; the regulation was purposefully discriminatory on the basis of religion and found not required by the Establishment Clause); Hartman v. Stone, 68 F.3d 973 (6th Cir. 1995)

do so by arguing clauses-in-conflict and that the no-establishment principle should override free exercise. The argument would have our nation's founding generation drafting a constitutional amendment that contradicts itself. This imagined conflict is brought about by conceptualizing the Establishment Clause as securing a freedom *from* religion, and the Free Exercise Clause doubtlessly secures some right to exercise religion. With the issue so framed, then of course the two clauses will be on a collision course.[54] The resulting "conflict," no-aid separationists propose, is to be relieved by tipping the "balance" in the direction of their view of the Establishment Clause. Again, this makes no sense. It is neither consistent with the First Amendment's text (neither clause has primacy over the other), nor are such conflicts intrinsic to the religion clauses and thereby logically unavoidable.[55]

(striking down, as violative of the Free Exercise Clause, a U.S. Army regulation that extended benefits to secular day care centers but discriminated against faith-based centers chosen by the parents; the government's discrimination was found not required by the Establishment Clause).

54. Alexander Meiklejohn notes the analytical difficulty when a single constitutional clause tries to do service as both protecting personal religious liberty and affording a freedom from religion: "[A]ll discussions of the First Amendment are tormented by the fact that the term 'freedom of religion' must be used to cover 'freedom of nonreligion' as well. Such a paradoxical usage cannot fail to cause serious difficulties, both theoretical and practical." Alexander Meiklejohn, *Educational Cooperation Between Church and State*, 14 LAW & CONTEMP. PROBS. 61, 71 (1949).

55. The analytics of the problem still leads a few academics into thinking that the "conflict" between the Free Exercise and Establishment Clauses is inherent and irreconcilable. *See, e.g.*, Suzanna Sherry, Lee v. Weisman*: Paradox Redux*, 1992 SUP. CT. REV. 123, 123-25, 129-30. However, when "freedom from religion" is removed as an individual right under the First Amendment, the "tension" falls away. Such a move does not leave "freedom from religion" without constitutional protection. It does mean, however, that to the extent that the First Amendment protects a "freedom from religion," it does so as a by-product of the structural restraint on governmental power found in the Establishment Clause.

Proper relations between religion and government (or "church and state") make of the Establishment Clause a structural restraint on government power. The clause is in the role of a boundary keeper. In setting out to locate that boundary, it is a useful reminder that the "keeper's" task is to restrain government—not private individuals, not churches, and not religion. Thus the task of the Establishment Clause is not to protect people from other people. Nor is it to protect minority religions from majority religions. Nor is it to protect the nonreligious from the religious. Nor is it to protect the government from the church. Rather, the purpose of the Establishment Clause is to limit government, including any decisions by the government to improperly ally with religion.

The Establishment Clause understood as embodying the neutrality principle eliminates these ersatz conflicts among the clauses of the First Amendment. By not intentionally discriminating against "pervasively sectarian" providers, the Free Speech Clause is no longer in tension with the no-establishment principle. Similarly, when social service programs are neutral in relation to religion, the Free Exercise Clause is no longer in conflict with the Establishment Clause. Achieving harmony among these three clauses is, without more, a strong commendation for the neutrality principle.

IV. ENTANGLEMENT ANALYSIS MASKS WHAT IS REALLY AN INQUIRY CONCERNING GOVERNMENTAL INTRUSION INTO INHERENTLY RELIGIOUS MATTERS

As previously noted, the second prong of the Supreme Court's Establishment Clause test requires that the "primary effect" of a law not be the advancement of religion. The test first acquired a third prong in 1971 called "excessive entanglement,"[56] only to have entanglement analysis recently absorbed back into the effect prong.[57] Although entanglement is once again just a factor to consider as part of the overall primary-effect inquiry, the Court has never said that such analysis is to be abandoned altogether. Thus, this Part addresses what is really going on with the Court's inquiry into administrative entanglement.

Entanglement analysis appears to be wildly uneven, strictly scrutinized by the Supreme Court on some occasions[58] while receiving only summary review on others.[59] Clearly these cases are not turning on the aggregate number of administrative contacts with religion, or even on the intensity of such contacts. Rather, the Court appears to alter its entanglement analysis to reach results based on whether the regulatory intrusion is (or is not) into matters that are inherently religious. Before showing how this is borne out in the cases, I note the inevitability of some regulatory oversight by government in the context of social service programs.

Whenever government appropriates tax monies, it has a duty to reasonably account for how the funds are utilized. Regulatory controls that "trace" funds appropriated under social ser-

56. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

57. *See supra* note 10.

58. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 409-14 (1985); *Lemon*, 403 U.S. at 614-22.

59. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 233-34 (1997); Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 305-06 (1985).

vice programs via purchase-of-service contracts, grants, or vouchers are entirely proper in order that the monies actually benefit the poor and needy as intended. The required accounting should be evenhanded for all providers, whether religious or secular, so that no class of providers is singled out for heightened scrutiny. For faith-based providers, it is especially important that the fiscal controls be restricted to a focus on how the government funds are actually spent. Such "tracing" of funds will result in some interaction between government administrators and faith-based organizations. These resulting interactions, however, are not violative of the Establishment Clause so long as the regulations do not intrude into inherently religious matters.

The Supreme Court's inquiry into administrative entanglement is asking the wrong question. In a modern, complex nation with pervasive regulation and massive subsidization of the independent social service sector, some interaction between government and religion is inevitable, often useful, and sometimes in the interest of both. Even in the absence of government funding, the state can and does impose reasonable regulation on the educational and charitable activities of religious organizations.[60] If entanglement *vel non* was the real concern of the Supreme Court, there would be entanglement analysis regardless of the presence (or absence) of funding any time a religious organization claimed excessive regulation. Instead, entanglement analysis is rarely done when government regulates but does not fund religious organizations. The right question to be asking is whether the regulatory oversight brought about by the legislation in question causes government to intrude into that sphere of activities which the Establishment Clause consigns to religion and religious organizations. This is the boundary-keeping task of separating church and state.

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

60. Consider, for example, the venerable case of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Pierce* is regarded as a charter of religious liberty, not only for the freedom of religious communities to operate religious schools but also for the freedom of parents to direct the religious upbringing of their children. *See id.* at 535-36. Nonetheless, before acknowledging these freedoms, the Court in *Pierce* took care to first stake out the government's power to regulate religious schools and their teachers, as well as reserve some governmental interests in the content of what is taught. *See id.* at 534.

ently religious matters.[61] In parallel with this line of cases, when upholding legislation that exempts religion from a regulatory burden that would otherwise interfere with inherently religious matters, the Court has welcomed the exemption as a means of preventing entanglement from occurring.[62] Conversely, when the subject being regulated does not touch upon inherently religious matters, the Supreme Court plays down the importance of entanglement analysis. The Court has thereby found entanglement less than excessive when the legislation being reviewed addresses commercial, public health, or other matters unrelated to inherently religious subjects.[63] In parallel with the foregoing

61. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976) (holding that courts are without competence to adjudicate essentially doctrinal disputes for, *inter alia*, avoidance of entanglement); Rusk v. Espinosa, 456 U.S. 951 (1982) (mem.), *aff'g* 634 F.2d 477 (10th Cir. 1980) (striking down charitable solicitation ordinance that required officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations).

Until the Supreme Court's inclination in the 1990s to follow the neutrality principle, the Court viewed the activities of K-12 religious schools as pervasively religious. Accordingly, the regulation attendant to the funding of such schools would, in the Court's pre-1990s view, have intruded on inherently religious matters. Consequently, the cases in the 1970s and 1980s that follow the practice of intense entanglement analysis when dealing with matters inherently religious are K-12 religious school cases. *See, e.g.*, *Aguilar*, 473 U.S. at 409-14; New York v. Cathedral Academy, 434 U.S. 125, 132-33 (1977); Wolman v. Walter, 433 U.S. 229, 254 (1977); Meek v. Pittenger, 421 U.S. 349, 370-72 (1975); Lemon v. Kurtzman, 403 U.S. 602, 614-22 (1971); *cf.* Mueller v. Allen, 463 U.S. 388, 403 (1983) (holding entanglement not excessive when the only governmental task is review of secular instructional materials); Committee for Pub. Educ. v. Regan, 444 U.S. 646, 660-61 (1980) (upholding reimbursement to religious schools of the cost of state-mandated tests because tests were wholly secular and not part of regular teaching program, hence entanglement not excessive).

62. *See, e.g.*, Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335-36 (1987) (religious exemption from regulatory burden is permissible legislative means to alleviate significant governmental interference with ability of religious organizations to define and carry out their religious mission); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (property tax exemption for religious organizations has the laudable effect of avoiding entanglement when tax authorities evaluate the worth to the community of faith-based social welfare programs). *See also* St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 787-88 (1981) (construing as unclear a religious exemption in tax legislation in a manner that broadened the scope of the exemption and thereby avoiding First Amendment issue administrative entanglement); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501-04 (1979) (desiring to avoid significant risk of entanglement, Court employed unusual rule of construction that thereby exempted religious schools from federal regulation).

63. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 615-18 (1988) (holding that because faith-based social services are not inherently religious, some regulation attendant to administration of program does not amount to excessive

line of cases, when upholding ordinary commercial or labor law legislation that has no exemption for religious organizations or practices, the Court may remark that the absence of an exemption is a good thing because it avoids the regulatory entanglement that administering such an exemption would entail.[64]

Entanglement analysis has thus been masking what is really an inquiry by the Court concerning governmental intrusion (or lack thereof) into inherently religious matters. The focus on subject matters that are "inherently religious" exists because the Supreme Court has said that government does not exceed the restraints of the Establishment Clause unless it is acting on (or intruding into) such matters.[65] The Court has found that prayer,[66] devotional Bible reading,[67] veneration of the Ten Commandments,[68] classes in confessional religion,[69] and the biblical story of creation presented as science[70] are all inherently reli-

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entanglement); *Tony & Susan Alamo Found.*, 471 U.S. at 305-06 (holding that regulation of commercial operations of religious organization undertaken for a commercial purpose does not amount to excessive entanglement); Roemer v. Board of Pub. Works, 426 U.S. 736, 762-65 (1976) (plurality opinion) (holding that because religious colleges are not pervasively religious, regulatory entanglement attendant to state funding is not excessive); Hunt v. McNair, 413 U.S. 734, 745-49 (1973) (same); Tilton v. Richardson, 403 U.S. 672, 684-89 (1971) (same).

64. *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680, 696 (1989) (rejecting interpretation of statute requiring the government to distinguish between secular and religious benefits as fraught with entanglement); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (holding that uniform application of statute to all religious schools avoids entangling inquiry by IRS officials); *see also* Westside Bd. of Educ. v. Mergens, 496 U.S. 226, 252-53 (1990) (upholding Equal Access Act because, *inter alia*, attempting to exclude religious speech would create greater entanglement problems); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 20 (1989) (plurality opinion) (overturning religious exemption is a laudable rule of law because it reduces possible entanglement); Widmar v. Vincent, 454 U.S. 263, 270 n.6, 272 n.11 (1981) (preventing public university from excluding religious worship or religious speech from designated public fora is a laudable rule of law because it reduces possible entanglement); Jones v. Wolf, 443 U.S. 595, 603 (1979) (employing, whenever possible, neutral-principles approach to resolve religious disputes avoids entanglement with religious doctrine, polity, or practice).

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

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

67. *See Schempp*, 374 U.S. 203 (1963).

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

69. *See* McCollum v. Board of Educ., 333 U.S. 203 (1948).

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

gious. Hence, by virtue of the Establishment Clause, these topics are off-limits as objects of legislation or any other purposeful action by officials. Likewise, when government is called on to resolve doctrinal questions, or related matters bearing on ecclesiastical polity, clerical office, or church discipline and membership, these subject matters are outside the competence of government.[71] Finally, the Court has acknowledged as outside the competence of government issues that involve the meaning of religious words, practices, and events,[72] as well as questions concerning the centrality of a particular belief or practice to a given religion.[73]

Parallel to these case-by-case designations of what is inherently religious is the corollary that the Establishment Clause is not violated when a legal restriction (or social welfare program) merely reflects a moral judgment, shared by some religions, about activity thought harmful (or beneficial) to society.[74] Accordingly, overlap between a law's purpose and rules of morality derived from various well-known religions does not render the law one "respecting an establishment of religion." Legislation concerning Sunday closing laws[75] and teenage sexuality counseling,[76] laws that limit the availability of abortion,[77] and rules on interracial dating[78] and civil marriage[79] are subject matters that the Court has not deemed inherently religious.[80] Hence, so far

71. *See* cases collected *supra* note 29.

72. *See* cases collected *supra* note 28.

73. *See* cases collected *supra* note 37.

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

75. *See* Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Hennington v. Georgia, 163 U.S. 299 (1896).

76. *See* Bowen v. Kendrick, 487 U.S. 589 (1988).

77. *See* Harris v. McRae, 448 U.S. 297 (1980).

78. *See Bob Jones Univ.*, 461 U.S. at 604 n.30 (interracial dating).

79. *See* Reynolds v. United States, 98 U.S. 145, 162-67 (1878) (antipolygamy law regulates the civil law of marriage).

80. *See* Bowers v. Hardwick, 478 U.S. 186 (1986); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). Although not referencing the Establishment Clause,

as the Establishment Clause is concerned, these are appropriate topics for legislation.

When drawing the Establishment Clause boundary between government and religion, the Court has not set out to separate government from all that could be said to be religious. Rather, the separation is of government from matters inherently religious. A separation of government from all that is arguably religious (or arguably has a religious foundation) would result in a secular public square, one that is hostile rather than neutral to the influence of religion on society.[81] The Founders intended no such regime.[82] There are extreme voices on the left claiming that the Establishment Clause established a new secular order,[83]

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it is implicit in *Bowers* that the Court does not consider the regulation of intimate sexual relations inherently religious. In *Larkin*, the Court struck down an ordinance giving ecclesiastical control over a valuable business license. Matters of ordinary commerce are not inherently religious, but are subject to regulation by the states pursuant to their police power.

81. *See* Westside Bd. of Educ. v. Mergens, 496 U.S. 226, 248 (1990) (stating "the message [of the Equal Access Act] is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion").

82. Historian Mark A. Noll writes:

> [T]he founders' desire for the separation of the institutions of church and state reflected a desire to respect not only religion but also the moral choice of citizens. It was not a provision to remove religion as such from public life. In the context of the times it was more a device for purifying the religious impact on politics than removing it.
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> . . . .
>
> The authors of the [Constitution] seemed to be saying that religion and politics occupied two different "spheres." This was not secular in the modern sense. As we have seen, there was every expectation that Christian principles would continue to play a large role in strengthening the population and even in providing a moral context for legislation. Yet the Constitution, without ever spelling it out precisely, nonetheless still acknowledges that the functions of government in society have a different role than the functions of religion. Both are important, and important to each other. But they are different.

MARK A. NOLL, ONE NATION UNDER GOD? CHRISTIAN FAITH AND POLITICAL ACTION IN AMERICA 67-69 (1988).

83. *See* Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 483-89 (1996) (arguing that secular rationalism is constitutionally preferred over religion); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197-214, 222 (1992) (contending that the First Amendment's negative bar against an establishment of religion implies an affirmative establishment of a secular public order); *see also* Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 LA. L. REV. 1057, 1059 (1989) (referencing projects born of liberalism, such as those of John Rawls, Bruce Ackerman, and Richard Rorty, to "privatize" religion). The multi-century tradition of American politics being rooted in

one that would thereby force religion into the "private" confines of home and house of worship. Still others lament that the Court has promulgated a right to a "freedom from religion."[84] But the cases will not support either of these readings. Rather, the Court has steered a neutral course and properly so.

Various Justices of the Supreme Court, in short statements, have sought to encapsulate a definition of the boundary between government and the inherently religious. Justice Brennan wrote that the common thread in the Court's analysis of whether legislation transgresses the Establishment Clause restraint "is whether the statutes involve government in the 'essentially religious activities' of religious institutions."[85] Just a few years earlier, Justice Harlan expressed the opinion "that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State so significantly and directly in the realm of the sectarian,"[86] then the restraints of the First Amendment are not exceeded. As a final example, Justice Frankfurter set the church/state boundary in terms of a structural restraint on legislative power:

> The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country.[87]

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contrasting theological persuasions is so well-documented as to make silly claims such as Sherry's and Sullivan's that the Establishment Clause rendered religion a force only in the "privacy" of home and church. *See, e.g.*, JAMES L. GUTH ET AL., THE BULLY PULPIT: THE POLITICS OF PROTESTANT CLERGY (1997).

84. *See* Michael W. McConnell, *Freedom from Religion?*, AM. ENTER., Jan.-Feb. 1993, at 34, 36.

85. *Lemon*, 403 U.S. at 658 (Brennan, J., concurring).

86. Central Bd. of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) (internal quotation omitted).

87. McGowan v. Maryland, 366 U.S. 420, 465-66 (1961) (Frankfurter, J., concurring in the judgment); *see also id.* at 465 (1961) (Frankfurter, J., concurring) ("The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation."); Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 381 (1992) ("What the Establishment Clause separates from government is theology, worship, and ritual, the aspects of religion that relate only to things outside the jurisdiction of government. Questions of morality, of right conduct, of proper treatment of

Each of these formulations will do, for they point to the same basic distinction between subjects that are familiar to the realm of civic morals and social welfare (hence, appropriate objects of government legislation) and the inherently religious (hence, beyond government's legislative power).[88]

V. THERE IS NO PERSONAL RIGHT AGAINST HAVING ONE'S TAXES (PAID INTO GENERAL REVENUES AND LATER APPROPRIATED BY CONGRESS AS PART OF A NEUTRAL PROGRAM) GO TO A RELIGIOUS ORGANIZATION

It is all too commonly claimed that federal taxpayers have a personal right against having their taxes, which are paid into the nation's general revenue fund, later go to a religious organization.[89] The claimed "injury" is that, as taxpayers, the plaintiffs

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our fellow humans, are questions to which both church and state have historically spoken.").

88. This approach, of course, unapologetically draws from Western civilization. I say unapologetically, for there is no other world view the Founders (specifically, the Congress of 1789-90) could have been relying upon but that tradition in which they were totally immersed in their day.

A critic might complain that this view of religion, for purposes of the Establishment Clause, favors Western (or traditional) conceptions of religion. Others might be expected to complain that the view favors new religious movements over the historic world religions. *Compare* Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 834-35 (1984) (nontheistic religious ideologies "could have it both ways" if the Establishment Clause is applicable only to practices thought inherently religious by traditional standards) *with* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1187 (2d ed. 1988) (opining that prayer is religiously significant to most people but preservation of eagle feathers is not; hence, Establishment Clause permits the government to promote the latter but not the former). Both complaints have an element of truth. But in drawing a clear and consistent boundary between church and state—as the Establishment Clause requires of the Supreme Court—it is impossible to be substantively neutral. Nor is that the task. Rather, the task is to be true to the text and meaning of the Establishment Clause, and then to apply this substantive meaning consistently. That substantive meaning is rooted in Western civilization as received on this side of the Atlantic. *See* Clifford Goldstein, *The Theology of a Godless Constitution*, LIBERTY, May/June 1998, at 30, 30-31. That there are those outside the Western tradition displeased with this location of the church/state boundary is cause for sensitivity and (when prudent) accommodation; but it is not a reason to relocate that boundary under the guise of judicial "updating" of the Establishment Clause. Any judicial shifting of the church/state boundary will just create new grievants, for, again, there is no substantively neutral location for the boundary between church and state.

89. *See, e.g.*, Derek H. Davis, *Equal Treatment: A Christian Separationist Perspective*, *in* EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY 146-47 (Stephen V. Monsma & J. Christopher Soper eds., 1998).

(whether religious or nonreligious) have a right not to be coerced against conscience or to otherwise be "offended" when general tax revenues are appropriated in support of a neutral program involving faith-based organizations.[90] These claimants misconceive the law.

The Supreme Court has refused to recognize a federal taxpayer claim of religious coercion or other religious injury. The plaintiffs in *Flast v. Cohen*[91] claimed that payment of a general federal tax, the monies of which were subsequently appropriated to, *inter alia*, faith-based schools, caused them religious coercion in violation of the Free Exercise Clause.[92] The *Flast* Court chose to defer whether that averment stated a claim, indeed whether a federal taxpayer even had standing to raise a free exercise cause of action. The Court returned to the issue in *Tilton v. Richardson*.[93] Finding no plausible evidence of compulsion, the *Tilton* Court held that a federal taxpayer's cause of action for religious coercion failed to state a claim under the Free Exercise Clause.[94] In *Valley Forge Christian College v. Americans United*,[95] claimants challenged as violative of the Establishment Clause the transfer

90. There is no dispute between no-aid separationists and neutrality theorists over whether the Establishment Clause prohibits a tax or user fee specially earmarked for a religious purpose. It does. Justice Thomas in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), noted that history indicates the Founders intended the Establishment Clause to prevent earmarked taxes for the support of religion. *Id.* at 853-55, 853-54 n.1 (1995) (Thomas, J., concurring); *see also* Kiryas Joel Bd. of Educ. v. Grumet, 512 U.S. 687 (1994) (holding, *inter alia*, that government may not enact a law that extends a benefit to a single religious sect as opposed to religion generally). What is disputed is whether monies collected by general taxation and appropriated to support a comprehensive welfare program, one that does not discriminate against the participation of faith-based social service providers, is violative of the Establishment Clause.

91. 392 U.S. 83 (1968). Although passing over the free exercise claim, *Flast* went on to permit federal taxpayer standing to challenge federal spending as violative of Establishment Clause restraints on congressional power. The standing allowed in *Flast* was not for redress of spiritual or religious injury. Neither was it for individual redress in the form of a tax refund. Rather, the "pocketbook" injury of a federal taxpayer was a mere surrogate in order that the Court could entertain a "case or controversy" to correct a structural violation involving the boundary between government and religion.

92. *See id.* at 103, 104 n.25.

93. 403 U.S. 672 (1971).

94. *See id.* at 689; *see also* United States v. Lee, 455 U.S. 252, 257 (1982) (requiring Amish employer to pay Social Security tax in violation of his religious beliefs); United States v. American Friends Serv. Comm., 419 U.S. 7 (1974) (per curiam) (holding that Quakers, facing federal income tax liability, did not have a free exercise right that overrode a provision in anti-injunction act barring claimants from suing to enjoin government from collecting tax).

95. 454 U.S. 464 (1982).

of government surplus property to a religious college. Several asserted bases for standing were all rebuffed by the Court because the claimants lacked the requisite "injury in fact." One of the rejected claims was that the *Valley Forge* plaintiffs had a "spiritual stake" in not having their government give away property for a religious purpose or to otherwise act in a manner contrary to no-establishment values. The Court rejected that argument and held that a spiritual stake in having one's government comply with the Establishment Clause is not a cognizable injury.[96]

As citizens, we are taxed to support with general federal revenues all manner of policies and programs with which we disagree. Tax dollars pay for weapons of mass destruction that some believe are evil. Taxes pay for abortions and the execution of capital offenders that others believe are acts of murder by the government. Taxes pay the salaries of public officials whose policies we despise and oppose at every opportunity. None of these complaints give rise to constitutionally cognizable "harms" to federal taxpayers. There is no reason that a taxpayer's claim averring "religious coercion" or being "religiously offended" is any different.

VI. NEUTRALITY IN SOCIAL SERVICE BENEFITS IS CONSISTENT WITH RELIGIOUS EXEMPTIONS FROM REGULATORY BURDENS

Critics have argued that if religious neutrality is the rule of decision (*i.e.*, "equal treatment" or "evenhandedness" or "nondiscrimination") when it comes to the constitutionality of governmental funding of social service programs, then equal treatment must also be the rule when it comes to regulatory or tax burdens.[97] Therefore, they reason, there can be no religious exemptions from regulatory burdens because any such exemptions would result in unequal treatment. This is mistaken. The criticism imposes a false symmetry on the operation of the Establishment Clause. The clause does not—nor should it—regard a

96. *See id.* at 486 n.22.

97. *See, e.g.*, Alan Brownstein, *Constitutional Questions About Charitable Choice, in* WELFARE REFORM & FAITH-BASED ORGANIZATIONS 219, 246-47 (Derek Davis & Barry Hankins eds., 1999). Professor Brownstein assumes that religious exemptions are based on the Free Exercise Clause. *Id.* at 246 n.112. This is not the case. Rather, religious exemptions are rooted in the structural restraint imposed on governmental power by the Establishment Clause. As discussed below (*see* text accompanying notes 99-107), such exemptions reduce governmental intrusion into inherently religious matters and, consequently, expand individual religious choice.

governmental benefit in the same manner in which the clause regards a regulatory burden.[98]

When imposing regulatory and tax burdens, the Supreme Court has held that government may refrain from imposing these burdens on religion and religious organizations.[99] Thus, it

98. Another false symmetry advanced by scholars is the claim that to accept neutrality theory as proper Establishment Clause doctrine for analyzing governmental benefit programs, means that one also has to accept equal treatment as the proper rule of decision in Free Exercise Clause cases (as the Court did in *Employment Division v. Smith*, 494 U.S. 872 (1990)). *See, e.g.*, Brownstein, *supra* note 97, at 247-48; Angela C. Carmella, Everson *and Its Progeny: Separation and Nondiscrimination in Tension, in* EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS 103, 116-17 (Jo Renée Formicola & Hubert Morken eds., 1997). This is mistaken. Each religion clause operates independent of the other. Free Exercise Clause claims are cognizable only upon a showing of individual religious harm and, after *Smith*, only upon a showing of intentional discrimination. A violation of the Establishment Clause, however, does not require a showing of religious coercion. The lesson is that the rule of decision in free exercise cases is distinct and independent from the operation of the Establishment Clause.

99. *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), is the leading case. *Amos* upheld a religious discrimination exemption for religious organizations in federal civil rights legislation. "[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their missions." *Id.* at 335; *see also* Trans World Airlines v. Hardison, 432 U.S. 63 (1977) (sustaining constitutionality of statutory requirement that the religious practices of employees reasonably be accommodated); Wisconsin v. Yoder, 406 U.S. 205, 234 n.22 (1972) (sustaining constitutionality of requirement that the religious practices of parents of school-aged children be accommodated); Gillette v. United States, 401 U.S. 437 (1971) (religious exemption from military draft for those who oppose all war does not violate Establishment Clause); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding property tax exemption for religious organizations); Arlan's Dep't Store v. Kentucky, 371 U.S. 218 (1962) (mem.) (holding that religious exemption from Sunday Closing Law not violative of Establishment Clause); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding release-time program for students to be excused from compulsory education law to attend religious exercises off public school grounds); The Selective Draft Law Cases, 245 U.S. 366 (1918) (upholding, *inter alia*, military service exemptions for clergy and theology students). The distinction between a benefit (such as a grant) and lifting a regulatory burden (in the form of a tax exemption), first set out explicitly in *Walz*, was recently reaffirmed by the Supreme Court in *Camps Newfound/Owatonna, Inc., v. Town of Harrison*, 520 U.S. 564, 590-91 (1997).

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), is not contrary to the principle stated in the text. In *Thornton*, the Court struck down a state law favoring Sabbath observance for employees working in the private sector. First, the law conferred a benefit; it was not an exemption from a state-imposed burden. Second, as explained in *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 n.11 (1987), the Sabbath law in *Thornton* was struck down because the state cannot utilize classifications that single out a specific religious practice, as opposed to language inclusive of a general category of religious

is now commonplace that religious exemptions from regulatory burdens do not violate the Establishment Clause.[100] This is because to establish a religion connotes that government must take some affirmative step ("Congress shall *make* no law . . . .") in furtherance of the prohibited result. Conversely, for government to passively leave religion "where it found it" logically cannot be a law respecting an establishment. Professor Laycock stated the common sense of the matter when he wrote, "The state does not support or establish religion by leaving it alone."[101] The Supreme Court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*[102] made this crucial point concerning government passivity when it said:

> [R]eligious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster: for example, the property tax exemption at issue in *Walz* . . . . A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence.[103]

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observances, thereby favoring that particular practice. For example, if Saturday as a day of rest is legislatively required to be accommodated by employers, all religious practices (including all religious days of rest) must be required to be accommodated. If a Kosher diet is required to be accommodated by commercial airlines, then all religious practices (including all religious dietary requirements) must be accommodated. If a student absence from school is excused for Good Friday, then so must absences for all religious holy days be accommodated. The special needs of national defense make *Gillette* distinguishable from *Thornton*. In *Gillette*, Congress was permitted to accommodate "all war" pacifists but not "just war" inductees because to broaden the exemption invited increased church/state entanglements and would render almost impossible the fair and uniform administration of the selective service system. *See Gillette*, 401 U.S. at 450.

100. *See, e.g.*, Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church, 846 F.2d 260 (4th Cir. 1988) (upholding the constitutionality of religious exemption in state licensure of faith-based child care facilities); Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308, 311-12 (9th Cir. 1974) (upholding the constitutionality of congressional amendment to Hill-Burton Act granting exemption to certain practices of faith-based hospitals).

101. *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 COLUM. L. REV. 1373, 1416 (1981).

102. 483 U.S. 327 (1987) (upholding a religious exemption in Title VII of the 1964 Civil Rights Act).

103. *Id.* at 336-37.

It is not a difficult concept to see that a legislature may elect to not constrict religious liberty.[104] This reduces civic/religious tensions and minimizes governmental intrusion into religious matters, both objectives that help maintain the separate spheres of competence sought by the Establishment Clause.[105]

By sparing individuals of regulatory burdens on their religious practice, the government no more unconstitutionally favors religion than the Free Exercise Clause unconstitutionally favors religion. As Justice White reminded us in *Welsh v. United States*,[106] the Free Exercise Clause is itself a law that by its express terms exempts religion from certain civic burdens. Laws that exempt religion from civic duties borne by others—such as the Free Exercise Clause does—cannot possibly violate the Establishment Clause, for then the latter clause would cancel out the former![107]

As argued in the foregoing Parts I-III, neutrality should be the Supreme Court's operative rule when analyzing participation in governmental benefit programs. Exemptions from regulatory burdens and neutrality as to benefits are not inconsistent positions. The common thread is the minimization of governmental influence over individual religious choices. In following a rule of neutrality, the equal treatment of religious and nonreligious providers of social services is not an end in itself. Rather, neutrality is a means to minimizing the government's influence over personal choices concerning religious beliefs and practices. Minimization is realized when governmental programs are neutral regarding the individual choices (whether religious or secular) of the poor and needy served by these programs.

Whether we are pondering the constitutionality of exemptions from regulatory burdens or of neutrality in benefit programs, the integrating principle is to minimize the impact of

104. *Amos* also makes it clear that for a government to "refrain from imposing a new burden" is logically no different from "lifting a burden" imposed in the past. In *Amos*, a burden first imposed in 1964 was lifted in 1972. *Id.* at 329; *see also* Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring in the judgment).

105. *See* Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970) (it is desirable when government refrains from imposing a burden on religion so as "to complement and reinforce the desired separation insulating each from the other").

106. 398 U.S. 333, 372 (1970) (White, J., dissenting).

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

governmental action on individual religious choices.[108] From that common baseline,[109] it makes sense to fully align with the Supreme Court in cases such as *Amos*, when it holds that religious exemptions from legislative burdens are consistent with the Establishment Clause, and, on the other hand, to align with cases such as *Agostini*[110] and *Zobrest*,[111] when they hold that the Establishment Clause permits the equal treatment of religion when it comes to government benefit programs.[112]

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108. Leaving unimpeded religion and personal religious choice as the values integrating the Establishment Clause's treatment of regulatory burdens and social service benefits is not elevated here as good theology, just good jurisprudence. I say good jurisprudence because religious choice, as a value, allows each religion to flourish or wither according to its own appeal. Choice as the controlling legal standard maximizes liberty of both the individual and the religious community while neutralizing the impact of governmental action on religion and religious life. In these respects, it is biased toward a Western conception of individual rights and limited government. This bias, however, is cause for neither surprise nor apology. It is the Founders' legacy, and they were decidedly Western.

Good theology is another matter. For observant Jews and Christians, religious liberty consists not in doing what one chooses but in the liberty to do what one ought. Religious belief and practice are understood in terms of truth, not choice. But it should not be troubling that religious choice is a constitutional value when interpreting the Establishment Clause. There is no reason that law and theology must converge on this point. It is sufficient that law affords individuals the freedom to pursue a direction indicated by his or her theology. This is a matter on which liberalism, upholding the value of autonomy, and traditional religions, upholding obedience to their God, converge on the desired end. *See* John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 277, 279, 289-91 (1996).

109. As I shift analysis from benefits to burdens, a critic might complain that I am moving the baseline from which I measure the constitutionality of the government's action. Not so. I have drawn a single baseline, one not rooted in history or the point in time when the legislation is enacted. Rather, the baseline is rooted in the principle of minimizing government's impact on religion and personal religious choice. I make no claim that this choice of baseline is substantively neutral, *see supra* notes 14, 88, and 108, for there is no such thing as substantive neutrality in church/state relations. I do claim that it is the baseline implicit in *Amos* and *Walz*, on the one hand, and in neutrality theory, on the other.

110. 521 U.S. 203 (1997) (holding that remedial educational services provided to students at their religious schools pursuant to neutral governmental program is not violative of Establishment Clause).

111. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that sign language interpreter provided to student in religious school pursuant to neutral governmental program is not violative of Establishment Clause).

112. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality opinion), is not to the contrary. In *Bullock*, a three-judge plurality struck down a state sales tax exemption available on purchases of sacred and other literature promulgating religious faith as violative of the "secular purpose" requirement of the Establishment Clause. *See id.* at 17 (Brennan, J., joined by Marshall and

CONCLUSION

No one need apologize for a model of church/state relations that maximizes individual religious choice and organizational autonomy (subject, of course, to the reasonable demands

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Stevens, JJ.). Justice White wrote separately because he believed that the law was a content-based discrimination violative of the Free Press Clause. *See id.* at 26. Justice Blackmun also wrote separately, joined by Justice O'Connor, holding narrowly that "a tax exemption limited to the sale of religious literature by religious organizations violates the Establishment Clause." *Id.* at 28.

Portions of the three-judge plurality suggest the unconstitutionality of religious exemptions from regulatory and tax burdens unless the scope of the exemption is broadened to include a number of nonreligious groups that provide similar charitable or beneficent services. *See id.* at 11-12. I do not think this states the law. First, the rationale of a three-judge plurality is not controlling. Plurality opinions of the Supreme Court are not binding on lower federal and state courts except on the narrow question decided. *See, e.g.*, Transouth Fin. Corp. v. Bell, 149 F.3d 1292, 1296-97 (11th Cir. 1998). Indeed, just one year later a majority of the Court in *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), invited the unsuccessful litigants to seek religion-specific exemptions from general regulatory laws by going to the legislature. It would be disingenuous to commend legislative exemptions as an avenue of relief for religious claimants if such exemptions were unconstitutional.

Second, the three-judge plurality went out of its way to say that the opinion was not contrary to two important cases generally upholding religious exemptions: *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) and *Zorach v. Clauson*, 343 U.S. 306 (1952). *See Bullock*, 489 U.S. at 18 n.8. The plurality even opined that it would be constitutional if the U.S. Air Force adopted a religious exemption from the military's rule on the wearing of official head gear, albeit, such a rule is not required by the Free Exercise Clause. *Id.*

Third, at one point the three-judge plurality suggests that the problem with the exemption is that it was too narrow. *See id.* at 15 n.5, 16 n.6. The sales tax exemption favored sacred writings and "writings promulgating the teaching of the faith," as opposed to all religious writings. A religious exemption can be unconstitutionally narrow by favoring some religious beliefs or practices over others. *See* Kiryas Joel Bd. of Educ. v. Grumet, 512 U.S. 687, 702-05 (1994) (striking down a law, *inter alia*, because it sought to relieve a burden from a single religious sect); Estate of Thornton v. Caldor, 472 U.S. 703 (1985). *See supra* note 99, for a discussion of the Court's explanation of *Thornton* in *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 n.11 (1987). If confined to this issue, the *Bullock* plurality is consistent with the Court's case law elsewhere.

Fourth, at times the three-judge plurality characterized the sales tax as an exemption from a tax burden (as was the property tax exemption in *Walz*) and at other times as a benefit or subsidy for the purchasers of these materials (*see Bullock*, 489 U.S. at 18). If the tax exemption is indeed properly characterized as a benefit or subsidy, one specially extended to purchasers of religious materials alone, then I agree that the law is violative of the Establishment Clause. Such a law would not be a neutral benefit program. Rather, it would be as if the legislature enacted a social service program that was only available to faith-based providers. That is not permitted by the Establishment Clause. *See supra* note 90.

of organized society to protect against real and substantial threats to public health and safety) while restraining the power of the modern regulatory/welfare state, including limiting the power of the sovereign's purse to influence religious choice. This combination of individual liberty, institutional autonomy, and limited government is what the religion clauses of the First Amendment were designed to promote. After all, it was the First Amendment that expressly singled out religion as an enduring attribute of the human condition that called for unique handling. May the Supreme Court make it so.