THE RELIGION CLAUSES AS MUTUALLY REINFORCING MANDATES: WHY THE ARGUMENTS FOR RIGOROUSLY ENFORCING THE FREE EXERCISE CLAUSE AND ESTABLISHMENT CLAUSE ARE STRONGER WHEN BOTH CLAUSES ARE TAKEN SERIOUSLY

Alan Brownstein[*]

INTRODUCTION

There are two Religion Clauses of the First Amendment, the Free Exercise Clause and the Establishment Clause. Both clauses have been the basis for numerous lawsuits and the subject of extensive legal commentary. Much of contemporary scholarship in this area over the last twenty years, however, seems to express a willingness to dispense with or subordinate the requirements of one of the Religion Clauses while calling for the rigorous implementation of the other.

The reasons for this one-sided commitment to the enforcement of one clause or the other are varied. Some scholars who support the meaningful enforcement of free exercise principles, but reject much of conventional Establishment Clause doctrine,[1] argue that Supreme Court

[*] Professor of Law, Boochever and Bird Chair for the Study and Teaching of Freedom and Equality, University of California, Davis. B.A., Antioch College, 1969; J.D., Harvard University, 1977. I wish to acknowledge the help I received from my research assistants, John Selgrath and Elena Miller.

[1] For the purposes of this Essay, I am using terms like the rigorous enforcement of the Free Exercise Clause and the Establishment Clause in a conventional sense. A rigorously enforced Establishment Clause would impose substantial constraints on the government's ability to subsidize religious institutions and activities—what is often described as a "no aid to religion" position. It would also seriously curtail the government's promotion of religious messages through both passive displays and more active offerings of government directed prayer. Within that broader "conventional" understanding, there is considerable room for diversity and debate about exactly what kinds of aid or displays might be permitted.

A rigorously enforced Free Exercise Clause would provide some protection to religious individuals and institutions against substantial burdens on religious exercise imposed by neutral laws of general applicability, although it need not require strict scrutiny review in all such cases. For a discussion of some of my own thinking on this issue, see Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55 (2006). What is critically important for the purposes of this Essay is not the exact contours of either Free Exercise or Establishment

case law reflecting an emphasis on the separation of church and state created an arbitrary, unnecessary, and ultimately counterproductive tension between the two clauses.[2] By prohibiting the government from advancing religion, for example, Establishment Clause doctrine necessarily conflicted with a free exercise mandate providing distinctive protection to religious practices and institutions.[3] To resolve this conflict, these critics maintain that both clauses should be interpreted to serve the same purpose, the protection of religious liberty.[4] While this singular objective may be furthered by each clause in different ways,[5] these constitutional mandates would be best understood as overlapping rather than clashing with each other.

Pursuant to this approach, a substantial part of Establishment Clause doctrine would be jettisoned and formally overruled as contradictory and wrongly decided, while the Free Exercise Clause would be interpreted expansively. There was not always general agreement, however, as to the particular Establishment Clause requirements to be cast aside. Some scholars rejected both Establishment Clause constraints on government aid to religious institutions and activities, and any serious Establishment Clause limits on the government's promotion and sponsorship of religious messages through non-coercive public pronouncements or displays.[6] Other commentators challenged Establishment Clause constraints on government funding, but acknowledged the existence of some constitutional limits on religious displays.[7] Still others supported limits

Clause doctrine. It is the necessity of providing significant substantive content to both clauses, if we are going to assign rigorous meaning to either.

[2] *See, e.g.*, Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 185 (1992) (describing the "contradiction" between current Establishment Clause doctrine limiting government subsidies to religious institutions and the Free Exercise Clause); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 314 (1986) (arguing that the Court's Establishment Clause decisions enforcing the separation of church and state have "led to a doctrinal collision with contemporary understanding of the free exercise clause").

[3] *See, e.g.*, McConnell, *supra* note 2, at 130, 151 (noting that various Establishment Clause tests seemingly prohibit the accommodation of religion required by the Free Exercise Clause).

[4] *See, e.g.*, Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002) (arguing that the primary purpose of the Establishment Clause was to protect religious liberty against government coercion).

[5] *See* Paulsen, *supra* note 2, at 313 ("[T]he establishment clause protects *religious liberty*; it safeguards much the same interests as the free exercise clause, but in a slightly different way." (emphasis added)). In essence, scholars like Paulsen argue that the Religion Clauses have been misinterpreted to suggest that there is a tension between them, but in fact they should be understood to serve the same constitutional purpose.

[6] *See* McConnell, *supra* note 2, at 183-94; Paulsen, *supra* note 2, at 352-62. McConnell rejects religious proselytizing by government, *see* McConnell, *supra* note 2, at 162-65, but it is unclear what distinguishes proselytizing from non-proselytizing government expression.

[7] Carl Esbeck, for example, argues that the Establishment Clause prohibition on government aid to religious institutions and activities burdens religious liberty by preventing believers from

on state financial aid to religious institutions, but rejected doctrine prohibiting the endorsement of religion through passive displays.[8]

The common foundation underlying this scholarship is the identification of doctrinal tension between the two clauses as a problem that needs to be resolved, and the commitment to a substantial reduction in the scope and rigor of Establishment Clause doctrine, while rigorously enforcing free exercise mandates, as a normatively superior solution to the conflict. If the Establishment Clause could be interpreted to impose fewer constraints on government, the other, more important, Religion Clause, the Free Exercise Clause, would not be encumbered or limited by anti-establishment mandates. The meaning of the Establishment Clause would be subsumed by and subordinate to our understanding of the Free Exercise Clause. In many cases, the requirements of the Establishment Clause would be held to be largely

participating "fully and equally with their fellow citizens in America's public life, without being forced either to shed or disguise their religious convictions or character." Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 21 (1997) [hereinafter Esbeck, *Governmental Cooperation*]. His proposed solution to this tension would eliminate Establishment Clause constraints on state aid to religion, while providing special free exercise protection to religious institutions. *Id.* at 21-27. Esbeck recognized, however, that the Establishment Clause placed significant constraints on government speech promoting religion. *Id.* at 23 n.87; *see also* Stephen V. Monsma, *Concluding Observations*, *in* CHURCH-STATE RELATIONS IN CRISIS: DEBATING NEUTRALITY 261, 262-63 (Stephen V. Monsma ed., 2002).

In a more recent article, Esbeck locates the protection of religious institutions from government interference in the Establishment Clause, rather than the Free Exercise Clause. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 78-83 (1998) [hereinafter Esbeck, *Structural Restraint*]. His ultimate conclusion remains the same, however. Religious institutions receive special protection against state interference. Establishment Clause constraints on government providing financial aid to religious institutions under formally neutral criteria are eliminated. *Id.* at 78-83, 87-97.

[8] Noah Feldman argues that the historical understanding of the purpose of both Religion Clauses was to protect liberty of conscience, which included "the liberty of conscience of religious dissenters against paying taxes to support religious beliefs with which they disagreed." Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 675 (2002). Contemporary Establishment Clause doctrine, however, has substituted a commitment to religious equality and the protection of religious minorities for the more generic purpose of protecting freedom of religious conscience. *Id.* at 679-706. A consequence of this shift toward an equality-based interpretation of the Establishment Clause has been the undermining of the liberty-based doctrine prohibiting government funding of religious institutions and activities. *Id.* at 723-30. The appropriate resolution of this conflict between liberty and equality goals, Feldman argues, is to interpret the Establishment Clause more narrowly so that it no longer restricts government from endorsing religion through non-coercive promotions and displays, while rigorously enforcing the prohibition against government funding of religious institutions and activities. NOAH FELDMAN, DIVIDED BY GOD 235-49 (2005). While Feldman's thesis can be conceptualized in part as describing a tension between Free Exercise and Establishment Clause doctrine, its primary contention is that Establishment Clause doctrine is at war with itself.

redundant to the commands of the Free Exercise Clause, and, accordingly, would have little independent meaning.[9]

Not all scholars emphasizing the ascendancy of one of the Religion Clauses over the other[10] favor free exercise principles over Establishment Clause guarantees. Some commentators assign considerable value to Establishment Clause constraints on the government's aid to or promotion of religion, but see danger and discrimination in judicial attempts to protect the exercise of religion against neutral laws of general applicability. From this perspective, the granting of religious exemptions unreasonably sacrificed important public interests without justification[11] and undermined a constitutionally necessary diffusion of power between church and state.[12] Rigorously enforced free exercise rights unfairly privileged religion and discriminated against nonbelievers.[13] Providing special constitutional protection to religious exercise was inconsistent with the epistemological foundation of the Constitution, a commitment to reason and rationality in government decision making.[14] The common

[9] Interpretations of the Establishment Clause that prohibit government from promoting religion only when it does so through coercion constitute one blatant example of reading the Establishment Clause to do little more than remind government actors of what the Free Exercise Clause already forbids. *See, e.g.*, Cnty. of Allegheny v. ACLU, 492 U.S. 573, 663 n.2 (1989) (Kennedy, J., dissenting); Michael Stokes Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993). As Douglas Laycock explains, "[c]oercing citizens to support a religion in which they do not believe will often, and arguably always, violate the Free Exercise Clause. If the Establishment Clause were also confined to coercion, it would be redundant." Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 339-40 (1996); *see also* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 205 (1992).

[10] Of course, not everyone working in the church-state area endorsed a perspective strongly favoring Free Exercise doctrine over Establishment Clause doctrine, or vice versa. I think it is fair to say, however, that those church-state scholars who see substantial normative value in both rigorously protecting religious exercise from state interference and prohibiting the state from promoting religion through financial subsidies or government sponsored displays have found themselves to be part of a dwindling cohort in the legal academy. I include myself within this dwindling group.

[11] MARCI A. HAMILTON, GOD VS. THE GAVEL 3 (2005) ("The purpose of this book is to persuade Americans to take off the rose-colored glasses and to come to terms with the necessity of making religious individuals and institutions accountable to the law so that they do not harm others.").

[12] *See, e.g.*, Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 810-22 (1999) (arguing against religious exemptions and in favor of Establishment Clause constraints on government subsidies of religious institutions as necessary checks on the aggrandizement of religious power).

[13] *See, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 319-23 (1991).

[14] Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473 (1996) (equating the tension between the Establishment Clause and the Free Exercise Clause as a conflict between reason and non-rational beliefs systems that has been resolved in favor of rational beliefs and Establishment Clause values); *see also* Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 180-85 (1990) (arguing for a rigorously enforced Establishment Clause while rejecting the position that religious exercise should receive any

denominator in this literature was the reconciliation of the two Religion Clauses by rejecting free exercise exemptions while insisting on serious limits on government's ability to advance religion.

In this Essay, I argue that there is an additional and important relationship between the two clauses that is often neglected in legal commentary. I suggest that the Free Exercise Clause and Establishment Clause support and reinforce each other in critical ways. The justifications for the rigorous enforcement of one Religion Clause often substantially reinforce the arguments for the rigorous enforcement of the other, and the dilution of one clause may in a corresponding manner undermine the arguments for taking the other clause seriously.[15] More specifically, I think the arguments for a rigorously enforced Establishment Clause doctrine support a reading of the Free Exercise Clause mandating greater protection of religious practice than is provided under *Employment Division v. Smith*. From the alternative perspective, the arguments supporting the limited understanding of the Free Exercise Clause endorsed in *Smith* undermine the justifications for a rigorously enforced Establishment Clause.

The normative attitude supporting this perspective assigns considerable value to the right to practice one's faith free from state interference while acknowledging that the affirmative support of religion by government risks the sacrifice of important liberty and equality interests of both believers and non-believers. Moreover, it doubts the viability of interpretations of the Religion Clauses that subordinate one clause to the other. Ultimately, the result of a quest for constitutional victory for either free exercise rights or Establishment Clause guarantees standing alone may be the rejection of both clauses as a limit on government action—leaving most church-state issues to political resolution and majoritarian control.

If this thesis is correct, commentators supporting a rigorously enforced Free Exercise Clause but a diminished Establishment Clause, or vice versa, are likely to discover that their critiques of one clause

accommodation beyond that provided to secular expressive activities because "the authoritarian and undemocratic nature of religion is inconsistent with the anti-authoritarian and democratic biases of the Constitution").

15 The primary example of how the dilution of one of the Religion Clauses will undermine the arguments for taking the other seriously has been discussed so frequently by other scholars that I see no reason to address it further in the text of this Essay. This analysis explains that the argument for parity or neutrality between the funding of secular and religious institutions for Establishment Clause purposes will result inevitably in "the triumph of the neutrality or 'parity' paradigm in the Free Exercise context, as well." *See, e.g.*, Laura S. Underkuffler, *The Price of Vouchers for Religious Freedom*, 78 U. DET. MERCY L. REV. 463, 476 (2001). Neutrality as a model for Establishment Clause jurisprudence challenges the core idea that there is something distinctive about religion that distinguishes it from secular beliefs and that this difference is reflected in the institutions that support one belief system or the other. Ultimately, it is this core recognition that religion is different that serves as the foundation of both Establishment Clause and Free Exercise doctrine. *Id.* at 476-78.

have severely undermined the other. Rather than promoting the values affirmed by one clause over the interests protected by the other, they risk rendering both clauses dysfunctional. Thus, the correct constitutional choice may not be one between free exercise rights and Establishment Clause mandates, but rather a choice between a rigorously enforced understanding of both of the Religion Clauses or the judiciary's failure to take either clause seriously as a limit on government conduct.

I. JUSTIFYING FREE EXERCISE RIGHTS AND ESTABLISHMENT CLAUSE CONSTRAINTS ON GOVERNMENT

These first examples focus on two commonly asserted justifications for the interpretation of each clause: the role of religion in the formation of private values as a basis for protecting free exercise rights and the liberty interests of taxpayers as a basis for limiting state aid to religious institutions and activities. In both cases, I suggest that the persuasiveness of each justification depends in significant part on how we interpret the other Religion Clause. Thus, the power of the value formation argument for interpreting the Free Exercise Clause depends in important ways on how we understand the Establishment Clause, and the force of the taxpayer liberty argument in justifying a "no aid to religion" interpretation of the Establishment Clause depends in important ways on how we understand the Free Exercise Clause.

A. *The Value Formation Justification for Protecting Free Exercise Rights*

An often repeated argument for rigorously protecting religious liberty, particularly in an institutional setting, is the contention that religion provides an independent source of moral values[16] that can be used to measure the merit of state action. Indeed, because of its nature as a source of private values, religion can, if necessary, operate as a check on government abuses of power.[17] Of course, this instrumental purpose is not the only reason why the free exercise of religion deserves constitutional protection. Certainly, many commentators would argue

16 *See, e.g.*, BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION 37-45, 163-67 (1997); Robert M. Cover, *The Supreme Court 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

17 *See, e.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 33-43 (1993); EVANS, *supra* note 16, at 132-37, 162; Brownstein, *supra* note 1, at 92-93.

that religious liberty is a dignitary right grounded on freedom of conscience.[18] But the instrumental argument has enough traction that it cannot easily be dismissed. The role of religion as a counter to government, for better or worse, resonates throughout American history.

The problem with this argument, standing alone, is that it does not adequately explain why religion should be treated differently than private, secular sources of values in the United States. Secular institutions, and individuals who ground their moral beliefs on non-religious foundations, may argue with considerable force that they play a similar role in value formation and keeping government in check as their religious counterparts.[19] There is nothing about this instrumental function that distinguishes religious from non-religious beliefs, yet only the former receive explicit constitutional protection under the Free Exercise Clause. If free exercise rights are based on this private values formation and checking government foundation, the Free Exercise Clause is unacceptably underinclusive.

Establishment Clause doctrine, however, can reinforce the values formation foundation for vigorously protecting religious liberty under the Free Exercise Clause. Indeed, a rigorously enforced Establishment Clause provides a persuasive counterpoint to the argument that secular sources of values play a similar instrumental role in checking government as religious beliefs and institutions. Religion may not necessarily be a distinctive or superior source of values than secular belief systems, but because of the Establishment Clause it is much more independent of government than its secular counterparts.[20] Government funding of private institutions creates a dependency relationship that can

---

[18] *See, e.g.*, EVANS, *supra* note 16, at 22-28; Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1250-53 (2000).

[19] *See* Brownstein, *supra* note 1, at 93. Some scholars argue that religion is a uniquely valuable check on the abuse of government power because of its focus on transcendent authority to which even the state is subordinate. *See, e.g.*, Esbeck, *Structural Restraint*, *supra* note 7, at 67-70. Other scholars maintain that religion is a uniquely unqualified source of political power in a constitutional democracy to check authoritarian government because it is grounded on a commitment to absolute authority that can neither be questioned nor challenged. *See, e.g.*, Gey, *supra* note 14, at 173-74. While a thorough discussion of this issue is beyond the scope of this Essay, I question the suggestion that religious or secular beliefs are in some generic sense a superior or more reliable basis for checking abuses of government power. Both categories of belief systems have roles to play in diffusing power in our society.

[20] *See, e.g.*, Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 798-99 (2002) (explaining that James Madison recognized that if religion could maintain its independence from the state, it could provide "a crucial oppositional force in politics and a vital check on the tyranny of the majority"); Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. REV. 1111, 1121-24 (2002) (explaining how the Establishment Clause guarantees the independence of religion from government so that religion can perform its vital civic function of instilling virtue in citizens).

operate to chill the resolve of private critics of the state.[21] The regulatory controls that necessarily accompany state subsidies may directly restrict the development and teaching of values that are inconsistent with the government's policies.[22] If government can use its powerful voice to promote particular beliefs through displays or officially directed activities and events, groups whose beliefs are endorsed may feel unwilling to criticize their benefactor, or fear that doing so may persuade the government to shift its endorsement to less ungrateful beneficiaries. When government power and resources may be used to promote social, political or philosophical perspectives, applauding the government that affirms one's beliefs may seem more prudent than challenging government policies.[23]

All of these government actions can undermine the independence of secular institutions and the belief systems on which they are based. A rigorously enforced Establishment Clause, however, prevents government from developing similar relationships with religion. By limiting the government's ability to financially support or expressively promote religion, the Establishment Clause guarantees the independence of religious institutions and groups and their values developing functions in a way that has no counterpart for secular beliefs and organizations.[24] Thus, if we justify the protection provided to religion by the Free Exercise Clause in order to protect religion as an *independent* source of values and check on government, the strength of the premise of religion's independence (a premise that distinguishes it from secular value creation activities) depends in significant part on our commitment to a rigorously enforced Establishment Clause.

B. *The Taxpayer Religious Liberty Justification for Interpreting the Establishment Clause to Limit Government Aid to Religious Institutions and Activities*

This analysis demonstrates how free exercise doctrine, such as the rule adopted in *Smith*, may undermine one of the justifications for a

[21] *See, e.g.*, Blasi, *supra* note 20, at 795-98 (describing Madison's "strident" arguments against government support for religion because of the tendency of such aid to corrupt religion by making it dependent on state subsidies).

[22] *See, e.g.*, Alan E. Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871, 891-92, 920-22 (1999); Leo Pfeffer, *Federal Funds for Parochial Schools? No*, 37 NOTRE DAME L. REV. 309, 318-19 (1962).

[23] William P. Marshall, *Remembering the Values of Separatism and State Funding of Religious Organizations (Charitable Choice): To Aid Is Not Necessarily to Protect*, 18 J.L. & POL. 479, 485 (2002) (explaining that an organization dependent upon the government "may lose its moral authority in speaking out against government actions with which it disagrees").

[24] *See* Brownstein, *supra* note 1, at 93.

rigorously enforced Establishment Clause. A widely recognized, although often disputed, argument to support the Establishment Clause prohibition against government subsidies of pervasively religious institutions or religious activities is the claim that it violates a person's religious liberty to require him to contribute funds to promote religious beliefs which violate the tenets of his faith.[25] Thus, compelling a religious taxpayer to subsidize the institutions of other faiths is prohibited by the Establishment Clause in part because it violates the taxpayer's religious liberty. This foundation for the "no aid to religion" Establishment Clause principle extends at least as far back as Thomas Jefferson's Bill for Establishing Religious Liberty, which proclaimed "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."[26]

Of course, there are obvious distinctions that can be drawn between the colonial establishments of Jefferson's time and government grants to religious institutions today.[27] The link connecting the payment of general taxes to the government and the government's grant of financial support to a faith-based provider of social welfare services in modern times is extremely attenuated. Perhaps, more importantly, the goals of government funded programs are explicitly secular and the providers receiving grants are selected through neutral, secular criteria. Thus, the fact that a given individual's taxes ultimately end up supporting a faith-based institution of a religion he rejects is entirely incidental to both the tax laws and the government programs that are alleged to burden the taxpayer's religious liberty. Accordingly, a contemporary defense of the Establishment Clause's "no aid" principle using this argument must maintain that government subsidies to religious organizations unconstitutionally burden the taxpayer's

[25] *See, e.g.*, JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 188-93 (1996) (supporting the taxpayer liberty argument with reservations); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 267-68 (1968) (supporting the taxpayer liberty argument with reservations); Esbeck, *Governmental Cooperation*, *supra* note 7, at 17-19 (identifying, but disputing, the taxpayer liberty argument as a key foundation for Establishment Clause doctrine prohibiting state aid to religious institutions for religious activities); Feldman, *supra* note 4 (supporting the taxpayer liberty argument); McConnell, *supra* note 2, at 185 (describing, but calling for the rejection of, "the central animating idea of modern Establishment Clause analysis: that taxpayers have a constitutional right to insist that none of their taxes be used for religious purposes"); Pfeffer, *supra* note 22, at 310-11, 318-19 (supporting the taxpayer liberty argument).

[26] MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 54 (2d ed. 2006).

[27] *See, e.g.*, Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 388-92 (1999) (cataloguing the differences between religious establishments in colonial America and contemporary mechanisms for providing public subsidies to religious institutions in arguing for the rejection of the "no aid to religion" principle).

religious liberty, notwithstanding the attenuated and incidental nature of their impact.

Under the *Smith* decision, however, incidental compulsions to pay funds in violation of one's faith receive no protection whatsoever under the Free Exercise Clause. For example, several states have adopted legislation that requires employers offering health insurance plans providing coverage for prescription drugs to their employees to include prescription contraceptives within their coverage. Catholic social service organizations (and in some cases similar organizations of other faiths) challenged the application of these laws to the religious organizations of faiths that consider the use of such contraceptives to be sinful. Plaintiffs argued that requiring them to subsidize access to prescription contraceptives compelled them to violate the tenets of their faith.[28] Notwithstanding the sincerity of plaintiffs' beliefs and the burden imposed on them by the challenged law, courts uniformly rejected their federal free exercise claim because "[t]he burden on plaintiffs' religious exercise is the incidental result of a 'neutral law of general applicability.'"[29]

I think there is a strong argument that the religious liberty burden imposed on Catholic social service organizations by these contraceptive coverage laws is more direct and problematic than the burden imposed on taxpayers by state subsidies to faith-based organizations. While it may be true in some abstract sense that the government acts in our name, the contested nature of democratic politics gives most voters and taxpayers some ability to distance themselves from state action they condemn as immoral. The burden on Catholic religious organizations from mandatory contraceptive coverage laws strikes closer to home. "A religious institution cannot communicate an effective message that conduct is sinful at the same time that it pays for that conduct to occur."[30]

Even if these burdens are deemed equivalent, the impact of *Smith* and lower court cases applying it on the taxpayer liberty justification for "no aid" Establishment Clause doctrine should be apparent. It is difficult to explain why incidental burdens on religious liberty can be ignored for free exercise purposes, but must be taken into account in interpreting the Establishment Clause. Similarly, if the right of religious minorities to be free from incidental, but substantial, regulatory burdens on their ability to practice their faith can be safely entrusted to the political majority and its representatives, as Justice

[28] *See* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004); Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006).

[29] *Serio*, 859 N.E.2d at 464.

[30] Susan J. Stabile, *When Conscience Clashes with State Law & Policy: Catholic Institutions*, 46 J. CATH. LEGAL STUD. 137, 150 (2007).

Scalia argues in *Smith*,[31] one might reasonably argue that the rights of taxpayers to be free from the incidental consequences on their conscience resulting from the government's use of public resources can be entrusted to the political branches of government as well. Thus, it is hard to avoid the conclusion that *Smith* undercuts the religious liberty of taxpayers' justification for a rigorously enforced Establishment Clause.

II. RELIGION AND THE MARKETPLACE OF IDEAS

Religion generally, and as the expression of specific faiths, is a formidable participant in the marketplace of ideas. While some people may regret the role that religion plays in shaping private and public morality and its influence in public policy and political debates, few would dispute the reality that religious voices are a powerful part of our public discourse. Religious voices will rarely be harmonious. The extraordinary diversity of religious beliefs accepted by Americans guarantees some discordant opinions. But they will be heard.

A. *The Clash Between Free Speech and Religion Clause Doctrine*

The expressive nature of many religious activities and the expressive role of religious institutions raise significant problems for Religion Clause jurisprudence. A serious Free Exercise or Establishment Clause jurisprudence will necessarily conflict sharply with conventional free speech doctrine. Put simply, the free speech paradigm is flatly inconsistent with conventional Religion Clause requirements. For free speech purposes, there are no constitutional limits on government speech, and no constraints on government's exercise of its spending power to communicate its messages either directly through its own agents or through private intermediaries.[32] The Establishment Clause, of course, at least to some extent, restricts both what government can say regarding religion and its ability to subsidize religious messages and beliefs.[33]

---

[31] Emp't Div. v. Smith, 494 U.S. 872, 890 (1990). Justice Scalia concedes that minority faiths will be placed at "a relative disadvantage" as a result of the Court's holding in *Smith*, but he also argues that "a society that believes in the negative [constitutional] protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." *Id.*

[32] *See, e.g.*, Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."); Rust v. Sullivan, 500 U.S. 173, 194 (1991).

[33] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 590-92 (1992) (explaining that unlike the Free Speech Clause, which presupposes that private speakers may persuade government to adopt and

Similarly, for free speech purposes, government regulations must be meticulously viewpoint neutral. Debate cannot be distorted by regulations that magnify one voice or suppress its opposition. Further, at least for expressive activities that occur on private property or in a traditional public forum, government restrictions on the content or subject of discussions must be justified under rigorous review. The Free Exercise Clause challenges this regime of content and viewpoint neutrality. When the Free Exercise Clause provides distinctive protection to religious practices that serve an expressive function, it favors religious communicative activities over activities that communicate a secular message.[34] In addition, by relieving religious institutions of regulatory burdens that directly or indirectly impede an institution's ability to project its voice to its members or the general public, free exercise protection facilitates religious institutional communications to the relative disadvantage of their secular competitors.[35]

One important difficulty created by the functional overlap and conflicting demands of the Religion Clauses and the Free Speech Clause of the First Amendment involves the drawing of doctrinal demarcation lines that separate the application of free speech requirements from those imposed by the Religion Clauses. This is a formidable problem that is not amenable to any simple solution. It is hard to avoid the conclusion that expressive religious activities such as preaching sermons, offering prayers, singing hymns, and reciting Bible

reinforce their positions, the Establishment Clause operates to prevent government from acting as a "prime participant" in religious debate).

[34] *See, e.g.*, William P. Marshall, *The Case Against Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 389 (1990). The holding of *Employment Division v. Smith* avoids this problem, of course, since it provides little if any distinctive protection to expressive religious practices. Under *Smith*, free exercise doctrine parallels free speech and freedom of association doctrine and is largely redundant to these other constitutional guarantees. *See, e.g.*, Daniel O. Conkle, *The Free Exercise Clause: How Redundant, and Why?*, 33 LOY. U. CHI. L.J. 95 (2001); Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71 (2001).

[35] As I explained in a previous article:

> Freedom from regulatory burdens empowers institutions. It reduces their costs, and increases their ability to exercise control over their members, attract new adherents, fulfill their normative mission and, perhaps most importantly, maintain their sense of continuous and distinct identity. The ability to engage in conduct that satisfies moral requirements and to perform rituals that demonstrate allegiance to a belief system or deity without state interference reinforces viewpoints and demonstrates their force and authority. These rights have substantial utility for speakers in competition with conflicting viewpoints.

Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 271-74 (1999) (footnotes omitted); *see also* Steven K. Green, *The Ambiguity of Neutrality*, 86 CORNELL L. REV. 692, 715-16 (2001) (reviewing CHARLES L. GLENN, THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES (2000)); Marshall, *supra* note 13, at 321-22.

stories are both religion and speech. Assigning the review of government action that restricts or promotes these activities and others to either free speech or Religion Clause doctrine may be explained in terms of particular constitutional goals and visions. But these determinations cannot be based on the assertion that these activities are by their natures more speech than religion or religion than speech. They are both.[36]

The Supreme Court has not only failed to confront and address this dilemma. It has blindly exacerbated the problem with its growing line of authority characterizing as prohibited viewpoint discrimination the exclusion of religious activities with an expressive dimension (such as a religious club conducting worship services) from nonpublic and limited public forums.[37] The Court's repeated commitment to adjudicating the constitutionality of these access restrictions under free speech auspices is not a necessary foundation for striking them down. Because these exclusions single out religious expressive activities for disadvantageous treatment, they would be susceptible to rigorous review even under the truncated version of the Free Exercise Clause described in *Smith*. Thus, characterizing these activities as the exercise of religion rather than speech could still support protecting the activities against discriminatory treatment.

While characterizing expressive religious activities as either speech or the exercise of religion would not change the ultimate result of cases adjudicating the exclusion of such activities from public property, the results would be far different when courts review government action that provides such activities some form of preferential accommodation—as opposed to discriminating against them. From a Religion Clause perspective, any preferential treatment provided to such religious activities should be reviewed under the Establishment Clause to determine whether they are constitutionally permissible.[38] Establishment Clause review of religious accommodations does have some bite to it,[39] but many accommodations will be upheld as legitimate under this analysis.[40] Certainly, the mere fact that religion is being provided an accommodation and special protection would not require invalidation or rigorous review.[41]

---

[36] *See* Alan Brownstein, *Why Conservatives, and Others, Have Trouble Supporting the Meaningful Enforcement of Free Exercise Rights*, 33 HARV. J.L. & PUB. POL'Y 925, 932 n.27 (2010).

[37] *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

[38] *See, e.g.*, Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

[39] *See, e.g.*, *id.*; Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

[40] *See, e.g.*, Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).

[41] *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709 (2005).

If the expressive religious activity is characterized as speech, however, preferential protection for religious expressive activities would be as viewpoint discriminatory as exclusionary restrictions against religion—and subject to equally rigorous review.[42] Few viewpoint discriminatory regulations survive this stringent level of review. Thus, if religious activity that serves expressive functions receives favorable accommodations, there are substantial doctrinal consequences that turn at least in part on whether these activities are conceptualized as speech or religious exercise.[43]

The drawing of adequate, albeit arbitrary, doctrinal demarcation lines between speech and religion will only solve part of the problem, however. By adopting a doctrinal rule that construes worship services, for example, as religion rather than speech, courts can avoid inconsistent decisions that emphasize either the religious or the expressive nature of this activity. Such a rule would also avoid having to evaluate laws that provide special accommodations to houses of worship and other religious assemblies, but not secular assemblies, as viewpoint discriminatory favoritism for religion. But there is no escaping the reality that religion is a competitive player in the marketplace of ideas and that religious accommodations may facilitate its ability to influence public discourse. Even if worship services are consistently construed to be the exercise of religion rather than speech, the fact remains that such services involve the communication of messages about the answer to transcendent questions, upon which opinions vary dramatically, as well as commentary about morality and ethical conduct—much of which has significant political overtones. Accordingly, a law accommodating institutions that provide and promote worship services advantages the development and communication of religious ideas. Defining worship as religion rather than speech for constitutional purposes provides a foundation for defending the granting of these advantages against a Free Speech Clause challenge. It does not alter the practical impact of the accommodation or prevent it from distorting the marketplace of ideas.

A similar form of analysis applies to Establishment Clause constraints on the government's promotion of religion. As noted

---

[42] *See* Brownstein, *Interpreting the Religion Clauses*, *supra* note 35, at 268-78; Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 164-69 (2002). It remains puzzling to me how some commentators ignore this doctrinal conflict. Proponents of "neutrality theory," for example, argue that free speech doctrine mandating content and viewpoint neutrality strongly supports their contention that religious institutions should not be denied state financial support offered to their secular counterparts. However, these commentators ignore the relevance of these same free speech requirements to free exercise exemptions and discretionary legislative accommodations that relieve religious institutions of regulatory demands that their secular counterparts must obey. *See* Esbeck, *Governmental Cooperation*, *supra* note 7, at 22-27.

[43] *See* Brownstein, *supra* note 42, at 164-69.

previously, under Free Speech Clause doctrine, government speech is largely unrestricted.[44] Government, at its discretion, can endorse or subsidize a seemingly endless range of values and ideas, without regard to their secular or religious content. For free speech purposes, there is no basis for restricting government expression or promotion of religious messages. The Establishment Clause, on the other hand, imposes constraints on the government's ability to endorse or subsidize religion.[45] Accordingly, when government subsidized or sponsored expressive activities include a religious dimension, some doctrinal demarcation lines need to be drawn to distinguish permitted government speech under the Free Speech Clause from prohibited promotion of religion under the Establishment Clause.

Demarcation lines differentiating the prohibited promotion and subsidy of religion from permissible government support of ideas and values can be drawn in a variety of ways, of course. Depending on the clarity of the line, courts will be able to distinguish cases involving the prohibited promotion of religion from permissible government speech and spending with more or less accuracy. As long as some subsidies to religious institutions for expressive purposes or some government messages about religion are construed to constitute an unconstitutional establishment of religion, however, some government speech and spending that serves religious expressive purposes will be constrained while government spending and messages that further secular values and beliefs will be unhindered.[46] Because government voices are so powerful and pervasive in our society, this constitutional barrier to government spending and speech promoting religion disadvantages religion and distorts the marketplace of ideas.[47]

---

[44] *See supra* note 32.

[45] *See, e.g.*, Laycock, *supra* note 9, at 351-52; Sullivan, *supra* note 9, at 206-07.

[46] William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 861 (1993) (recognizing that the institutional separation of church and state results in "special constraints on the way religious ideas are presented in the public square").

[47] *See, e.g.*, McConnell, *supra* note 2, at 188-95. The impact of Establishment Clause mandates on the marketplace of ideas is arguably more indirect than the influence of free exercise exemptions and accommodations. Prohibitions restricting state financial support to religious institutions and activities and limiting the government's own messages endorsing religious beliefs do not distort debate by freeing certain speakers from regulatory burdens that their expressive opponents must obey. The weight of government's one-sided financial support to secular institutions and government endorsement of non-religious messages, however, will both empower non-religious ideas and reinforce their message. *See* Steven D. Smith, *Barnette's Big Blunder*, 78 CHI.-KENT L. REV. 625, 636-40, 652-58 (2003) (describing some of the various ways that government influences public discourse, including discussions relating to religious beliefs). It is hard to deny that these Establishment Clause requirements have competitive cultural consequences.

Moreover, there is no clear line between private and public speech that neatly differentiates between these two spheres of expression. Some speech, such as a student speaker's message at a high school graduation ceremony, will have both public and private dimensions to it. In these "grey area" settings, Establishment Clause doctrine will necessarily restrict some religious speech

This is the heart of the problem. Even if we draw doctrinal lines to clarify the scope of free exercise accommodations for religious expressive activities and Establishment Clause restrictions on the subsidy and expression of religious messages, the impact of both accommodations and limits on promotion cannot be avoided. Accommodating religious institutions and beliefs, but not their secular counterparts, empowers and advantages religious messages, and prohibiting subsidies and displays promoting religion, while allowing support for secular ideas, disables and disadvantages religious messages relative to secular voices. Doctrinal confusion and complexity is not the only problem. The reality of the role that religion plays in public discourse and the effect that accommodations and anti-establishment restrictions have on the relative power of religious messages is the issue.

B. *Offsetting Advantages and Disadvantages to Avoid Distortion of the Marketplace of Ideas*

Legal commentary recognizing the relationship between Religion Clause doctrine and values and Free Speech Clause doctrine and values is hardly uncommon. Scholars have regularly commented on the relative disadvantaging of religious ideas that results from Establishment Clause constraints on state subsidies of religion and direct expression of religious messages through public displays and prayer.[48]

Less frequently, but no less persuasively, other scholars have noted the comparative advantage constitutionally mandated or discretionary legislative accommodations provide to religious perspectives and beliefs in American culture. William Marshall was an early and notable exponent of this position. In 1990, Marshall wrote that free exercise

> favoritism toward religious organizations, of course, violates the central principle in speech jurisprudence that every idea has equal dignity in the competition for acceptance in the marketplace of ideas. Providing greater protection for religious speakers suggests, in direct opposition to this principle, that there exists a constitutional hierarchy in which religious ideas occupy a higher position than secular ideas.[49]

if it is going to accomplish its non-endorsement and non-coercion purposes. *See* Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 FORDHAM L. REV. 1147 (2002).

[48] *See, e.g.*, McConnell, *supra* note 2, at 120-27, 152-54, 183-94; Monsma, *supra* note 7, at 268-70.

[49] Marshall, *The Case Against Constitutionally Compelled Free Exercise Exemption*, *supra* note 34, at 389 (footnote omitted).

For the most part, these commentators looked at the consequences of Religion Clause doctrine on free speech values from the perspective of one clause or the other, either the Free Exercise Clause or the Establishment Clause. The focus of their discussion was often the problematic impact of doctrine interpreting a particular clause on constitutionally recognized interests and values. The goal of their analysis was to demonstrate why accepted doctrine for the clause at issue should be reduced in rigor or diminished in scope in order to promote the purposes of the other Religion Clause.

The great competing series of articles by William Marshall and Michael McConnell, two of the leading church-state scholars of my generation, in the early 1990's illustrate these contrary perspectives. Thus, for example, Marshall argued that "a constitutional preference for religious belief cuts at the heart of the central principle of the Free Speech Clause—that every idea is of equal dignity and status in the marketplace of ideas."[50] Moreover, Marshall explained, "free exercise exemption[s] also offend[] Establishment Clause principles. Special treatment for religion connotes sponsorship and endorsement; providing relative benefits for religion over non-religion may have the impermissible effect of advancing religion."[51] What Marshall did not address, however, are Establishment Clause ramifications for religious speech and beliefs in the marketplace of ideas.[52]

McConnell, on the other hand, viewed Marshall's commitment to a diminished Free Exercise Clause and a vigorously enforced Establishment Clause as blatant disfavoring of religion in American culture. He argued that this "singling out" of religion for disadvantageous treatment under the Establishment Clause, while insisting on the equal treatment of religion and non-religion under the Free Exercise Clause, would turn the Constitution into "a powerful

50 Marshall, *supra* note 13, at 320.

51 *Id.* (footnote omitted).

52 Marshall does confront the abstract dissonance between his support for an equality of ideas model for interpreting the Free Exercise Clause and his commitment to the unequal treatment of religion and secular institutions and ideas under Establishment Clause doctrine. William P. Marshall, *The Inequality of Anti-Establishment*, 1993 BYU L. REV. 63. He does not focus on the consequences for culture and public policy debate of an equality-based Free Exercise Clause and an Establishment Clause that restricts government advancement of religious ideas, but not secular beliefs. In more recent writings, Marshall suggests a greater willingness to support an equality-based approach to interpreting both the Free Exercise Clause and the Establishment Clause. *See* William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193 (2000). Under this analysis, the enforcement of both clauses would be reduced in scope and rigor. Marshall makes it clear, however, that there are many circumstances in which the Establishment Clause should still require distinctive treatment of religion, *id.* at 201-05, 213-16, while such distinctive treatment is almost always inappropriate for Free Exercise Clause purposes.

instrument for the secularization of society."[53] While McConnell claimed to offer a more evenhanded approach, his analysis represents the converse of Marshall's approach: the "singling" out of religion for protection against regulatory interference while insisting on the equal treatment of religion and non-religion with regard to state aid or the expressive promotion of beliefs.[54] In direct contrast to Marshall, McConnell critically evaluated the impact of Establishment Clause constraints on the ability of religion to compete as a belief system in American society, but ignored the competitive advantages that would accrue to religious voices as a result of religious exemptions and accommodations.[55]

An occasional scholar, such as Abner Greene, recognized the need to take both Religion Clauses into consideration to evaluate their consequences on public discourse and political debate. Greene argued that "the Establishment Clause should be read to forbid enacting legislation for the express purpose of advancing the values believed to be commanded by religion."[56] The reason for this expansive understanding of a secular purpose test was that the act of grounding law on religious beliefs "effectively excludes those who don't share the relevant religious faith from meaningful participation in the political process."[57] While this Establishment Clause mandate opened the door to political participation to members of minority faiths and non-believers, Greene recognized that the mandate also imposed a disability on the political role of individuals whose public policy decisions were

53 Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329, 330 (1991).

54 McConnell's position on government sponsorship of religious displays is that such displays are constitutional if they "mirrored the culture as a whole" and reflected the religious diversity of the community. McConnell, *supra* note 2, at 193. This principle is superficially evenhanded in the abstract, but would almost certainly be much less so in practice. Douglas Laycock describes the approach as "practically disastrous" and argues it "would lead to predominant government expression of majoritarian religious views . . . indistinguishable from those of a relatively tolerant government with an established church." Laycock, *supra* note 9, at 351.

55 In his seminal article, *Religious Freedom at a Crossroads*, McConnell also argues aggressively that it represents a clear bias against religion for Establishment Clause doctrine to prohibit government messages that endorse religion, while permitting government expression that contradicts religious beliefs. McConnell, *supra* note 2, at 152-53. His criticism of the inequality inherent in doctrine prohibiting state financial support for religion is equally pointed. Thus, McConnell writes, "[t]o tax everyone, but to dispense money only to secular organizations, is to use government's coercive power to disadvantage religion." *Id.* at 186. Yet McConnell never directly confronts the myriad ways in which rigorously enforced Free Exercise doctrine provides religious institutions, activities, and beliefs substantial relative advantages over secular institutions and beliefs.

56 Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1613 (1993). Under his analysis, Greene explains a law that "is religious on its face," "a law . . . enacted for an expressly religious purpose," and "a law . . . enacted for an expressly secular purpose that appears to be a pretext for the real [religious] purpose" would all violate the Establishment Clause. *Id.* at 1623.

57 *Id.* at 1619.

grounded on their religious beliefs. That consequence needed to be offset by some constitutionally required compensatory mechanism. Free exercise accommodations and exemptions that preclude government from interfering with religious practice accomplished the necessary quid pro quo. Thus, the "Free Exercise Clause [serves as a] . . . political counterweight to the Establishment Clause."[58] In return for keeping religion out of politics and government, politics and government are barred from interfering with religion.[59]

Many scholars would disagree with Greene's broad proscription against religion-based legislation.[60] I do. What is significant to me about Greene's analysis is his recognition that each of the Religion Clauses taken separately distorts the operation of the political process. While the impact of either distortion considered by itself would seem unacceptable, taken together there is a sense in which they balance and offset each other.

I believe that the distortions in the marketplace of ideas, political debate, and cultural values created by a rigorously described Free Exercise and Establishment Clause are different and more broadly defined than the political participation concerns that Greene described. But I think his analysis recognizes a critical relationship that controls the interpretation and operation of each clause. If they are taken seriously, each clause substantially distorts the marketplace of ideas in favor of or against religious beliefs and ideas. If we are committed to the constitutional ideal of undistorted and evenhanded rules governing the ability of individuals and groups to influence public discourse, the Religion Clauses cannot be interpreted to rig the system in a way that advantages or disadvantages religious arguments and values. The issue cannot be more straightforward. If one agrees with my contention that the rigorous enforcement of either clause standing alone distorts the competition of public discourse, we have only two choices available to us. We can insist that both clauses be enforced in a way that balances out these distorting impacts, or we can repudiate a rigorous understanding of both clauses. With regard to their impact on public discourse and cultural values, the Religion Clauses stand and fall together.

---

58 *Id.* at 1634.

59 *Id.* at 1635.

60 *See, e.g.*, Choper, *supra* note 25 (arguing that religious or secular purpose of law must be determined solely by examining whether the law serves an independent secular effect, not by directly examining the purpose of legislators in enacting the law); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 116 n.100 (2002) (suggesting that Greene's analysis of secular purpose may unacceptably result in the disenfranchising of religious members of the polity).

C. *The Political Equation of Cancelling Out Privileging and Discrimination*

Given the Symposium organizers' suggestion that participants write essays rather than research articles, let me add some entirely unverified and anecdotal evidence to the discussion. I have been giving talks about the Religion Clauses to non-academic audiences (civic organizations, church groups, fraternal organizations, etc.) for the last twenty years or so. During the same period, I have also lobbied elected officials and testified at state legislative hearings for or against legislation that either protected religious liberty or offended Establishment Clause principles. Over the course of these two decades, there has been at least one recurrent theme that is continually expressed in critical questioning, although it is typically stated from alternative perspectives. People who oppose religious exemptions and accommodations want to know why religious beliefs, individuals, activities or institutions should be privileged by being excused from requirements that everyone else has to obey. People who oppose Establishment Clause constraints on government want to know why government should have to treat the financing of religious organizations or the display of religious messages differently and less favorably than secular organizations or messages.

I give various answers to these questions depending in part on the specific issue that is under discussion. But I also offer one generic response across the board. When people ask about the singling out and privileging of religion for accommodation purposes, I always point out that when I defend Establishment Clause principles I receive similar questions about the unfair singling out of religion for discriminatory treatment. When people ask about the singling out and discriminatory treatment of religion under Establishment Clause requirements, I always point out that when I defend free exercise rights and religious accommodations, I receive similar questions about the unfair singling out and privileging of religion. These answers usually result in the questioner stopping and thinking about what I said. Sometimes I even get a nod or a "yeah, I see your point."

I do not believe that the people asking me these questions are thinking about religion explicitly as a competitive perspective in the marketplace of ideas. Nor do I think they are particularly bothered by the idea that religion is understood to be something distinctive that may sometimes require different treatment than non-religious activities and organizations. It is not the distinctiveness of religion but rather the partiality toward or against religion that is troubling to them. I think people recognize intuitively that religion generally or as manifested by a

specific faith represents one of several competitive alternatives for believing and living that should not be unfairly favored or disfavored. They may disagree with the specifics on any proposed accommodation or constraint, but they accept the idea that offsetting benefits and burdens allows us to distinguish religion at the same time that we insist on some sort of balance in the constitutional ledger recording its treatment by the state.[61] Accordingly, they are more willing to accept broader and more demanding free exercise rights (or discretionary legislative accommodations) and more serious Establishment Clause constraints on subsidies and displays when they are tied together as a constitutional package than they would be willing to accept if the operation of either clause is discussed in isolation, standing alone.

III. BALANCING, SUBJECTIVITY, AND INDETERMINACY

One of the reasons offered by Justice Scalia in defense of the holding of *Employment Division v. Smith* was that the alternative constitutional regime, requiring all laws that substantially burden religious exercise to be subjected to strict scrutiny review, would be unacceptable. The rigorous review of such laws would require the federal courts to engage in subjective, value laden, indeterminate balancing of an individual's or group's free exercise rights against the importance of the state interest alleged to necessitate the substantial burdening of religious practice. In often quoted words, Scalia argued, "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[62]

Of course, strict scrutiny is not entirely, or even primarily, an ad hoc balancing test. It operates initially through an analysis of whether the state's action constitutes the least restrictive alternative available to achieve its goals as a way of testing the authenticity of the state's alleged purpose. Laws that poorly serve the state's goals, or that do not appear to advance them at all, cast doubts on the veracity of the state's alleged goals. Further, because only a compelling state interest can satisfy this rigorous level of review, strict scrutiny is in some sense a form of definitional balancing. State interests that are not compelling, such as aesthetic concerns, need not be balanced against religious liberty. They may be rejected out of hand as inadequate to the task of

---

[61] *See, e.g.*, Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555, 570 (1998) ("It seems intuitively appropriate that religion might be granted special protection under the Free Exercise Clause as compensation for special disabilities imposed under the Establishment Clause . . . .").

[62] Emp't Div. v. Smith, 494 U.S. 872, 889 n.5 (1990).

justifying the challenged law. Still Scalia is surely correct that there will be some cases, where the state's interest is authentic and substantial, which will require balancing.

The problem with balancing is that it is indeterminate and unpredictable on the one hand and subjective and value laden on the other. Unpredictability is costly because it fails to provide governmental actors with the guidance they need to avoid violating constitutional requirements and exposing themselves to litigation. Subjectivity imposes more abstract costs. It transgresses separation of powers constraints and requires judges to make public policy and value-based decisions that are appropriately reserved for the political branches of government.

The strongest response to the balancing problem, of course, is the argument that these costs, while certainly not negligible, are simply the price we have to pay to protect fundamental rights such as freedom of religion. Who ever said that fundamental rights are inexpensive political goods? The question is not whether there is a price to be paid. There almost always is. It is whether the political goods we are buying are worth what we are paying for them.

Here it might be noted that strict scrutiny review is employed to review alleged abridgments of many other liberty rights (including the right marry, the right to vote, the right to determine the membership of an expressive association, and the right not to be compelled to speak) and equality rights (including the right not be discriminated against on the basis of one's race or nationality). So sometimes the Court seems to have concluded that the value of the right exceeds the cost of protecting it with balancing tests. Moreover, there are other liberty and equality rights that are subject to far more ad hoc, subjective and indeterminate balancing than exists under strict scrutiny review. The multi-factor balancing test applied to content-neutral speech regulations[63], and the intermediate level scrutiny standard of review applied to gender classifications, are two obvious examples.[64] Thus, the Court's concern about unpredictability and subjectivity in constitutional adjudication seems to be arbitrarily asserted to undercut certain rights but not others.

If the above arguments are not sufficient to cast doubt on the proposition that concerns about indeterminacy and value laden decision-making must preclude the serious review of laws that substantially burden religious exercise, there is one other argument to add to the list.

---

63 *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43 (1994) (striking down content-neutral ordinance under intermediate level scrutiny); Frisby v. Schultz, 487 U.S. 474 (1988) (upholding content-neutral speech regulation against free speech challenge).

64 *See, e.g.*, Nguyen v. INS, 533 U.S. 53 (2001) (upholding gender discriminatory law against equal protection challenge); Craig v. Boren, 429 U.S. 190 (1976) (striking down gender discriminatory law under equal protection review).

It is impossible to rigorously enforce the Establishment Clause unless we are willing to accept a comparable degree of uncertainty and subjectivity in constitutional adjudication. Although the Establishment Clause case law does not involve "balancing" as it is generally understood, no serious standard for implementing a "no aid" principle for religious institutions and activities and no framework for evaluating the constitutionality of government sponsored religious displays can avoid the same problems condemned as unacceptable in *Smith* and which arguably justified the Court's holding in that case.

The uncertainty inherent in the Court's Establishment Clause doctrine is so generally acknowledged that I will not belabor the argument here. Even the Supreme Court Justices that sometimes supported the enforcement of a "no aid" principle acknowledged the lack of order in the case law.[65] Nor have they offered doctrinal frameworks to mitigate the problem. Justice Souter's dissent in *Mitchell v. Helms*,[66] a case that only avoided the complete repudiation of the "no aid" principle by Justice O'Connor's more limited concurrence,[67] lists eleven factors the Court considers in determining whether state aid programs violate the Establishment Clause.[68] No doctrine implicating so many factors and values can produce predictable and consistent results.[69]

Similarly, the adjudication of religious display cases has resulted in unpredictable, and sometimes incoherent, decisions. Justice O'Connor's endorsement test, predicated as it was on the observations of a neutral, reasonable, objective observer, was subject to considerable criticism on these grounds.[70] I suspect that some of the challenges to the endorsement test may have reflected more of an unwillingness to accept its results than uncertainty as to what the results would be. That is, what offended some critics was the idea that the endorsement of religion would be constitutionally problematic, not the problem of determining whether a display endorsed a religious message. Still, even with that caveat, the application of the test in many cases yielded uncertain results. The alternative multi-factor analysis Justice Breyer

65 *See* Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring) (conceding that case law in this area "must seem arbitrary" and that it lacked "analytic tidiness").

66 530 U.S. 793 (2000).

67 *Id.* at 836.

68 Alan Brownstein, *The Souter Dissent: Correct but Inadequate*, *in* CHURCH-STATE RELATIONS IN CRISIS: DEBATING NEUTRALITY, *supra* note 7, at 151, 163-64.

69 *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 200 (2007) (describing the Court's "no aid to religion" cases as "a shambles, with largely arbitrary lists of those benefits which government was permitted to confer on religion and those which it was not").

70 *See* McConnell, *supra* note 2, at 188-95; Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987).

employed in his concurrence in *Van Orden v. Perry*[71] may have provided more specificity as to the factors to be taken into account than Justice O'Connor's endorsement test, but it added little clarity as to how particular cases should be resolved.

Let me emphasize that there may be good reasons for arguing that constitutional doctrine in some areas, such as the Religion Clauses, will not be susceptible to clear and predictable rules of decision. I believe that the Religion Clauses subsume numerous important constitutional values. These include personal and institutional liberty and autonomy, equality of treatment and equal respect for individuals and groups, freedom of speech and belief and the opportunity to compete fairly in the marketplace of idea, and the need to diffuse power to avoid its centralization and abuse.[72] The importance of assigning due weight to all of these values may outweigh the unavoidable cost in uncertainty and subjectivity that is inherent in doing so. That conclusion does not negate the reality that the cost is still there, however.

Those who assess the cost of unpredictability and subjectivity to be unacceptably high for both Free Exercise and Establishment Clause doctrine may conclude that neither clause should be rigorously enforced. Both clauses should be interpreted to do no more than can be accomplished with bright line rules—which means that neither clause will be interpreted to do very much of anything. I disagree with that conclusion, but it is consistent with the thesis of this Essay. The Free Exercise Clause and the Establishment Clause will stand or fall together. What cannot be argued plausibly is that the Establishment Clause can be rigorously enforced, but the Free Exercise Clause cannot, because only the rigorous enforcement of the Free Exercise Clause requires indeterminate and value laden decision making by the federal courts. Similarly, it cannot be maintained that "no aid" requirements and restrictions on government sponsorship of religious displays are too indeterminate and subjective to be tolerated as Establishment Clause mandates, while the rigorous enforcement of free exercise rights presents an appropriate task for federal judges to perform because doing so would not incur similar costs.

IV. POLITICAL PROCESS CONCERNS

One of the alleged goals of both of the Religion Clauses is the protection of religious minorities. The Free Exercise Clause accomplishes this goal by protecting religious minorities from

[71] 545 U.S. 677, 698 (2005).

[72] *See* Brownstein, *supra* note 22, at 886-88; Brownstein, *supra* note 68, at 153-54.

persecution for practicing their faith. Even the *Smith* decision prohibits invidious discrimination against particular beliefs and practices. An invigorated Free Exercise Clause would also shield smaller religions from the consequences of majoritarian insensitivity to their needs.[73] The Establishment Clause requires equal treatment of religious groups and individuals with regard to material burdens and benefits. It also serves to prevent government from assigning more or less favorable status to different religious communities—guaranteeing some level of civil respect to believers and nonbelievers alike.

Underlying this concern about protecting minorities is a core understanding of the way that the political process works; numbers matter in political decision-making. Larger faiths are less likely to require judicial intervention on their behalf under the auspices of constitutional guarantees because they have sufficient political clout to protect many of their own interests from state interference. Less popular religions are more vulnerable to having their interests ignored or subordinated to the majority's discretionary policies. Even Justice Scalia recognized this reality in *Smith* when he wrote that "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[74]

Given the recognition that both clauses operate to at least some extent to protect minorities, we can ask the same question for each clause: Can the interests of minority faiths or nonbelievers be safely lodged with the political branches of government, or is it necessary to provide them extra protection through judicially enforced constitutional guarantees? Here again, I suggest that the political process arguments for each of the Religion Clauses have important implications for the other. If the right of religious minorities to be free from incidental, but substantial, regulatory burdens on their ability to practice their faith can be safely entrusted to the political branches of government, as the Court ultimately concludes in *Smith*, it is more difficult to argue that the rights of minority faiths to equal treatment and respect from government with

73 *See, e.g.*, JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 147 (2000) ("The free exercise clause is designed to provide remedies for individuals and groups with insufficient political strength to have their religious views or practices reflected in or protected by statutes.").

74 Emp't Div. v. Smith, 494 U.S. 872, 890 (1990). I do not suggest that smaller faiths are never successful in using the political process to protect their practices from interference or their status from disrespect. They will win some political battles. That success may come at a high cost in political capital, however. Members of minority faiths that are forced to spend their political influence on protecting their right to practice their faith or to be treated with respect by the state may end up spending their political reserves to achieve a level of security and status that is typically provided to majoritarian religions at little or no cost. Political capital, like other resources, is not infinite. When it is used up, it has to be developed again over time before it is available for new projects.

regard to state subsidies to religious institutions and state sponsorship of religious displays cannot be safely entrusted to majoritarian political institutions as well. Similarly, if one insists that government cannot be trusted to protect and respect the practices of religious minorities for free exercise purposes, it is difficult to understand why one would think that government can be trusted to treat minority faiths fairly and respectfully with regard to financial subsidies or the promotion of religious messages. The argument operates in reverse as well of course. If we cannot trust the political branches when the government uses its funds and voice to promote religion, why should we trust them to recognize and protect the interests of minority faiths against unnecessarily burdensome regulations that interfere with their religious practices?

One may argue in response that there are political differences that distinguish the operation of the two clauses. It may be that there is a greater likelihood that majorities will ignore the concerns of minority religions in cases involving the promotion of their own faith through state subsidies and religious displays than that they will reject claims for exemptions from small faiths that are burdened by neutral laws of general applicability. I think it is difficult to generalize about this comparison, but there may be some merit to the argument. Disputes about government directed prayer and religious displays may constitute circumstances in which majorities are uniquely insensitive to minority concerns.

Even if this is so for display and public prayer cases, there are still other areas where the political process parallels between the two clauses are especially persuasive. For example, proponents of government subsidies to religious institutions may argue that there is little reason to fear that funds will be unfairly distributed to larger faiths if the constitution only requires that the subsidy criteria be formally neutral. The challenge to this position maintains that because religious groups are not similarly situated with regard to their beliefs and practices, formally neutral criteria may disproportionately favor certain faiths with regard to their eligibility for grants while disfavoring others.[75] Proponents of subsidies may respond that the political branches of government can be trusted with regard to their use of formally neutral and general criteria for the award of funds. Neutral criteria that demonstrably stacks the deck against the eligibility of particular religions will be modified to accommodate the concerns of minority faiths. If political decision-making can be relied on to make appropriate accommodations in funding criteria, however, one might assume that it can also be relied on to provide suitable accommodations for minority

[75] *See, e.g.*, Brownstein, *supra* note 22, at 891-92, 920-22.

faiths that are burdened by neutral laws of general applicability regulating religious practice.

Moreover, if religious display and public prayer cases are those in which majoritarian insensitivity to minority concerns is most prevalent and emphatic, trust in the political branches even in this worst case scenario should extend to free exercise disputes as well. If the majority can be relied on to restrain its tendency to promote its own religious beliefs, out of respect for the equal status and civil worth of minority faiths, there are strong grounds for arguing that it also can be trusted to respect the predicament of minority religions when neutral laws of general applicability burden the practice of their faith.

V. CONSTITUTIONAL CAPS ON RELIGIOUS ACCOMMODATIONS

My last example does not directly involve the reinforcement or dilution of one clause by the justifications or operation of the other. The connection it describes is more attenuated and reaches beyond constitutionally mandated exemptions to focus on discretionary legislative accommodations of religious practice. The key point is that it is doubtful that any system of constitutionally mandated exemptions will exhaust the universe of disputes in which religious institutions and individuals challenge government action alleged to burden the practices of their faith. Free exercise rights may be limited to obligatory practices[76] and exclude religiously motivated but supernumerary conduct. On some occasions, the burden on religious practice may be considered too insubstantial or indirect to invoke serious constitutional review.[77] In some cases, a particular government interest, such as the way the government utilizes its own land or organizes its internal affairs, may not be subject to mandatory free exercise accommodations.[78] Even when a rigorous standard of review is purportedly applied to evaluate laws that substantially burden the exercise of religion, there will be some situations in which the balance weighs against the religious liberty claimant.[79] Thus, there will always

[76] *See, e.g.*, Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990). In *Swaggart*, the Court held that the imposition of a sales and use tax on the distribution of petitioner's religious materials did not violate its free exercise rights because petitioner's "religious beliefs do not forbid payment of the sales and use tax." *Id.* at 391. Accordingly, this case could be distinguished from *Sherbert v. Verner*, where the state's action required a religious individual to engage in conduct proscribed by her faith: working on the Sabbath. *Id.* at 391-92.

[77] *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961).

[78] *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). *See generally* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

[79] *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982).

be a need for discretionary legislative accommodations to supplement the protection that the Constitution provides. An understanding of free exercise that is more robust than *Smith* provides may be necessary to meaningfully protect religious liberty in our society. But constitutional protection, standing alone, will probably not be sufficient to do the job.

While the need for and value of discretionary religious accommodations may be clear, the risks created by allowing government to grant such accommodations are also obvious. Some accommodations go too far. They unfairly favor some faiths over others.[80] By exempting religious institutions and individuals from regulations that burden the practice of their faith or otherwise accommodating religious practice, a law may provide its religious beneficiaries substantial secular material benefits unavailable to non-believers or members of other faiths.[81] The cost of an accommodation may fall unfairly and disproportionately on a small group rather than being spread among the larger community.[82]

The risk of unfair and preferential accommodations of religion by political actors may be sufficiently high that the availability and scope of discretionary accommodations must be limited if such accommodations are to be permitted at all. The likelihood that the political branches of government may abuse the power to accommodate religion requires a constitutional response. The Free Exercise Clause is obviously ill suited to serve this function. Like most rights, it provides a floor of protected activity that the state cannot abridge rather than a ceiling on the state's ability to facilitate the exercise of the protected activity. The Establishment Clause, however, can be, and has been, understood to constrain the scope of discretionary accommodations.[83]

The argument here is not simply that the Establishment Clause serves the salutary and important goal of policing the ability of the political branches of government to formally take religion into account in making legislative and executive decisions. The prevention of abuses may be the more obvious purpose of this application of the constitutional guarantee, but it is not the only effect of interpreting the Establishment Clause to monitor accommodations. It may be that Establishment Clause constraints on accommodations are a necessary and intrinsic component of a constitutional system that permits discretionary accommodations in the first place. Without a framework for judicially reviewing allegedly unacceptable consequences of

---

[80] *See, e.g.*, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

[81] *See* Brownstein, *supra* note 1, at 70-81.

[82] Alan E. Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. (forthcoming 2011), *available at* http://ssrn.com/abstract=1725610.

[83] *See, e.g.*, Larson v. Valente, 456 U.S. 228 (1982).

accommodations, it might be much more difficult to justify entrusting the political branches with the authority to provide distinctive treatment to religious individuals and institutions to further religious liberty goals.

CONCLUSION

Over time, the Religion Clauses of the First Amendment have been interpreted to further numerous values through a mix of constitutional standards and tests. Political and scholarly debate over the meaning of the Free Exercise Clause and the Establishment Clause has been as conflict ridden and acrimonious as any area of constitutional law. Much of that discussion has focused on the comparative value and utility of one clause or the other. Proponents of a rigorously enforced Free Exercise Clause, but a limited and marginalized Establishment Clause, can count numerous followers, as can those who support a rigorously enforced Establishment Clause, but a limited and marginalized Free Exercise Clause. Church-state scholars supporting the rigorous enforcement of both clauses, and I include myself in this group, are far fewer in number today. The contested relationship between the two clauses may have contributed to the relatively sparse discussion of the way in which the two clauses may reinforce each other, or the way in which the dilution of one clause may influence and undermine our understanding of the other. I hope I have demonstrated in this Essay that these relationships between the two clauses are more common and important than is typically noted.

As I look to the future, however, I admit that my conclusion that the Religion Clauses may stand or fall together may well be vindicated, but in a way that is far different than I would have hoped. The trajectory of the Supreme Court's decisions interpreting the Free Exercise Clause and the Establishment Clause over the last two decades challenges the perspective of scholars who supported a rigorous interpretation of one clause but not the other, as I do—but it does so by interpreting both the Free Exercise Clause and the Establishment Clause to mean as little as possible. Despite the repeated references to religion in the Constitution's text, constitutional doctrine is withdrawing from the field and leaving the resolution of church-state disputes to political decision-making. When the Constitution will be invoked to adjudicate these disputes in times to come, it may be through the prism of other constitutional provisions, such as the Free Speech Clause of the First Amendment, or freedom of association doctrine, rather than the Religion Clauses. We will not reach that result tomorrow or next year. Constitutional law moves incrementally. But the direction of doctrine seems clear, at least to me.

The Free Exercise Clause was the first to fall. The demise of the Establishment Clause as a serious constraint on government is accelerating. The Court's decision in *Employment Division v. Smith* did not require the dismantling of Establishment Clause doctrine, but it has surely facilitated that result. As the Establishment Clause is diminished in scope and meaning in the years to come, the commitment to the *Smith* regime will become all the more solidified. As is often the case with the constitutional law predictions I make these days, I usually hope that I am wrong. But I do not think that I am.