August 2, 2012

Religion / State: Where the Separation Lies

Vincent J. Samar, *Chicago-Kent College of Law*

RELIGION / STATE: WHERE THE SEPARATION LIES

Vincent J. Samar*

1. Introduction

Recent U.S. Supreme Court decisions regarding the scope of the Establishment clause have failed to provide a clear framework for determining what government actions are prohibited. Part of the problem concerns what kinds of actions constitute an establishment of religion? What criteria should determines the boundaries of an establishment challenge? Are governmental actions that may only indirectly affect religion (either positively or negatively) prohibited? This article aims to provide a coherent and normatively justified understanding of the Establishment clause to help answer these questions.[1] Where it appears the Establishment clause overlaps the Free Exercise clause or the Establishment clause might interfere with Free Exercise clause, I will

* Vincent J. Samar is an Adjunct Professor of Law at the Illinois Institute of Technology, Chicago-Kent College of Law and also an Adjunct Professor of Philosophy at both Loyola University Chicago and Oakton Community College. He is the author of *Justifying Judgment: Practicing Law and Philosophy* (University Press of Kansas, 1998), *The Right to Privacy: Gays, Lesbians and the Constitution* (Temple University Press, 1991), and editor of *New York Times, 20th Century in Review: Gay Rights Movement* (2001). He has also published numerous articles and review articles on matters of law, philosophy, same-sex marriage, gay rights, and human rights. Samar wants to thank Professor Mark Strasser of Capital University Law School for his close read and very thoughtful comments to an earlier version of this article.

[1] One point to note, the Establishment clause is often tied to the Free Exercise clause in the sense that the former might serve to boaster the latter or the latter might be thought to confine the former. In part this is a matter of the expansiveness of the interpretations offered to these clauses, since both clauses "proscribe governmental involvement with and interference in religious matters." *See Free Exercise of Religion*, FIND LAW, http://caselaw.lp.findlaw.com/data/constitution/amendment01/05.html.

try to draw out the reasons why; otherwise, my focus will be primarily on just the Establishment clause.[2]

Part two looks at the early history of the clause, what the framers thought, and why recent Supreme Court decisions have failed to provide a coherent framework for deciding establishment cases. Part three considers possible alternative philosophical justifications for the clause. Part four considers the problem of determining boundary conditions for interpreting the clause so as to balance the responsibilities of government against the rights of the individual. Included in part four is how the clause might be applied to decide the longstanding controversy of whether creationism should be taught in the public schools, and the Obama administration's recent Health and Human Services directive that insurers providing employer health insurance coverage directly provide contraceptives to employees that seek them at no cost to religiously affiliated hospitals, colleges and universities.

2. History and Recent Cases

The First Amendment to the U.S. Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of a religion, or prohibiting the free exercise thereof..." The First Congress of the United States adopted the amendment in 1789 along with nine others, as part of the *Bill of Rights*, to complete a compromise reached at the Constitutional Convention of 1787 between those members who sought to create a strong central government and those who were concerned to protect states' rights and personal liberties. Thereafter, the amendment was

[2] *See id.* "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n, 397 U.S. 668-69 (1970). "This Court has long recognized that government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment clause." Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987).

ratified by three quarters of the states in 1791. On its face the amendment prohibits, among other things, the federal government from establishing a national religion while at the same time it guarantees the free exercise of religion. But what more the amendment may be interpreted to prohibit with respect to government's involvement with religion and exactly what constitutes an establishment of a national religion, is not clear from the amendment's language.

A. Early History

The early history of the young republic provides clues as to why adoption of the Establishment clause was thought to be necessary as well as what principle it would later come to stand for. Here it is helpful to note the history leading to the creation of the colonies that would eventually make up the United States, since many of their concerns and interests germinated in what finally became the Establishment clause.

> Many of the British North American colonies that eventually formed the United States of America were settled in the seventeenth century by men and women, who, in the face of European persecution, refused to compromise passionately held religious convictions and fled Europe. The New England colonies, New Jersey, Pennsylvania, and Maryland were conceived and established "as plantations of religion.[3]

Interestingly, the founding of these colonies often had less to do with the state establishing an official church and more to do with the fact that the state would then force conformity with and membership in the state religion.

[3] http://www.loc.gov/exhibits/religion/rel01.html.

Although by the time of the founding of the colonies, the crown in England was the head of the Church of England, this by itself was not the reason for religious migration to North America.[4] Rather,

> [t]he religious persecution that drove settlers from Europe to the British North American colonies sprang from the conviction, held by Protestants and Catholics alike, that uniformity of religion must exist in any given society. This conviction rested on the belief that there was one true religion and that it was the duty of the civil authorities to impose it, forcibly if necessary, in the interest of saving the souls of all citizens. Nonconformists could expect no mercy and might be executed as heretics. The dominance of the concept, denounced by Roger Williams as "enforced uniformity of religion," meant majority religious groups who controlled political power punished dissenters in their midst. In some areas Catholics persecuted Protestants, in others Protestants persecuted Catholics, and in still others Catholics and Protestants persecuted wayward coreligionists.[5]

Unfortunately, the intolerance of European societies would not be offset by greater tolerance in the American colonies.

> Although they were victims of religious persecution in Europe, the Puritans supported the Old World theory that sanctioned it, the need for uniformity of religion in the state. Once in control in New England, they sought to break "the very neck of Schism and vile opinions." The "business" of the first settlers, a Puritan minister recalled in 1681, "was not Toleration, but [they] were professed enemies of it." Puritans expelled dissenters from their colonies, a fate that in 1636 befell Roger Williams and in 1638 Anne Hutchinson, America's first major female religious leader. Those who defied the Puritans by persistently returning to their jurisdictions risked capital punishment, a penalty imposed on four Quakers between 1659 and 1661. Reflecting on the seventeenth century's intolerance, Thomas Jefferson was unwilling to concede to Virginians any moral superiority to the Puritans [for being more religiously tolerant]. Beginning in 1659 Virginia enacted anti-Quaker laws, including the death penalty for refractory Quakers. Jefferson surmised that "if no capital execution took place here, as did in New England, it was not owing to the moderation of the church, or the spirit of the legislature."[6]

---

[4] FOREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTIO*n* 248 (Lawrence, KS: Kansas University Press, 1985).
[5] http://www.loc.gov/exhibits/religion/rel01.html
[6] *Id.*

There were some exceptions to colonial religious intolerance, although these were few and fairly limited. Jewish settlers that lived in Dutch-held areas of Brazil fled after a Portuguese conquest that threatened to turn them over to the Inquisition.[7] Twenty-three fled by ship to New Amsterdam (which would become New York) and founded the colony of Rhode Island.[8] Similarly, many Quakers who were being persecuted in England fled to the colony of New Jersey and, after becoming entrenched, were able to parlay a debt owed by William II to Quaker leader William Penn's father to charter the colony of Pennsylvania.[9] Eventually, Pennsylvania would become a haven to various German sects who shared similar beliefs to the Quakers.[10] The Stuart Kings did not hate Roman Catholics, although many of their subjects did.[11]

> George Calvert (1580-1632) obtained a charter from Charles I in 1632 for the territory between Pennsylvania and Virginia. This Maryland charter offered no guidelines on religion, although it was assumed that Catholics would not be molested in the new colony.[12]

Contrasting the New England colonies, where the Church of England was regarded with suspicion, Virginia became a bastion of Anglicanism. In 1632, the House of Burgesses passed a law mandating a "uniformitie throughout this colony both in substance and circumstance to the cannons and constitution of the Church of England."[13]

The historian, Forest McDonald notes that one of the "[m]ost revealing of habits of mind" at the time of the American founding

> was the Virginia Declaration of Rights. After declaring that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience," article 16 of the document went on to say "that it is the mutual duty of all to

---

[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*

> practice Christian forbearance, love and charity towards each other." And five states (New Hampshire, Massachusetts, Connecticut, South Carolina, and, partially, Maryland) continued to have tax-supported established religions.[14]

Such views clearly expose a disconnect between claims of religious tolerance on the one hand and assertions of the superior authority of Christian (primarily Protestant) authorities (including a right to taxpayer support) on the other.

While "[t]he Virginia Declaration of Rights had effectively disestablished the Anglican Church", it did not accord full rights Baptists and other religious groups, but rather accompanied a decline in religiosity in Virginia in the 1780s.[15] Growing concern over this decline led Patrick Henry Lee to urge passage in Virginia of a bill to incorporate the Protestant Episcopal Church, which would have also granted landed property to the old Anglican vestries, making them self-supporting.[16] "Another bill, introduced in the same session, would have levied a 'General Assessment'" to "support teachers of Christianity without regard to denomination."[17] To counter these proposed state efforts to reinvigorate religiosity,

> [a]t the suggestion of George Mason, Madison drafted a "Memorial and Remonstrance against Religious Assessments," to be circulated for signatures and presented as a petition to the legislature. It attracted 1,552 signatures, and other petitions based upon different premises attracted 9,377 more; and the bill was defeated. Such were feelings on the subject, however, that Madison found it prudent to keep his authorship a guarded secret.[18]

The concern shown by Madison was not surprising. It reflected a growing concern among some of the founders to protect the liberty of conscience, which they saw as having been eroded both in Europe and more recently in some of the colonies. Law professor Ian Bartrum

---

[14] MCDONALD, NOVUS ORDO SECLORUM, *supra* note 4, at 43.
[15] *Id.* at 44.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 45 (citing Lee to Madison, Nov. 26, 1784, and Editorial Notes, in THE PAPERS OF JAMES MADISON [Robert A. Rutland et al., eds., multiple vols. [Chicago: 1962-), 8:149, 195-97, 295-98, 9:430-31]).

follows Noah Feldman analysis that several founders were particularly concerned to protect the right of conscience by way of the religious clauses.

> If we believe Feldman, James Madison and Thomas Jefferson inherited an intellectual tradition that traces its lineage from Thomas Aquinas, through Martin Luther, John Calvin, William Perkins, Roger Williams and the dissenting Baptists in New England, and on to John Locke. This tradition began with Aquinas's thoughts about individual human beings' innate ability to comprehend good and bad as reflected in the natural law, and would later form in Luther the basis for a revolutionary defiance of Papal authority: "I am bound by the Scriptures I have quoted and my conscience is captive to the Word of God. I cannot and will not retract anything, since it is neither safe nor right to go against conscience." And it is thus with Luther, and Calvin immediately thereafter, that was born the definitively Protestant conception of an individual conscience that imposes duties upon us prior to any civil or ecclesiastical authority. [19]

Bartrum goes on to suggest that this concern was largely a consequentialist concern over how best to keep the society together.[20]

The Scottish philosopher David Hume saw factions based on religion as destructive.[21] No doubt part of what makes religion so destructive is the tendency of many who affirm a particular religious point of view to believe not only that it is the only correct belief or that any other belief is based in error, but also that Christians have a duty to believe not only that they must proselytize their system of beliefs but failure to achieve conversions will be perceived either as a failure on their part or a sign that evil is taking over. As a consequence discussions of religious tolerance often take on a schizophrenic quality: there ought to be tolerance for one's own religion, but not necessarily for the religion of others, especially if the others' religion is far different from one's own. This can be seen in the history of colonial religious intolerance, and

[19] Ian C. Bartrum, ST. JOHN'S L. REV. (2011); http://works.bepress.com/ian_bartrum/11 (citing Noah Feldman, *The Intellectual Origins of the Establishment clause,* 77 N.Y.U. L. REV. 346 [2002]).
[20] *See id.*
[21] *Id.* at 163.

even in debates between federalists who favored adoption of the Constitution of 1787 and anti-federalists who did not.

According to law professor Laurence Tribe, there were a number of different views concerning religion held among the framers of the Constitution.

> [A]t least three distinct schools of thought…influenced the drafters of the Bill of Rights: first, the evangelical *view* (associated primarily with Roger Williams) that "worldly corruptions…might consume the churches if sturdy fences against the wilderness were not maintained"; second, the Jeffersonian view that the church should be walled off from the state in order to safeguard secular interests (public and private) "against ecclesiastical depredations and incursions"; and, third, the Madisonian view that religious and secular interests alike would be advanced best by diffusing and decentralizing power so as to assure competition among sects rather than dominance by any one.[22]

In *Federalist 10*, where Madison argued for "[t]he Utility of the Union as a Safeguard Against Domestic Faction, he notes "[a] zeal for different opinions concerning religion, concerning government, and many other points…have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good."[23] Madison recognized, as part of his discussion that the new government under the Constitution would provide a proper set of checks and balances to handle different interests and different sects that "security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government."[24] One way

[22] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 3rd ed. 1184 (New York: Aspen Publishing, 2006) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1158-60 [2nd ed. 1988]).
[23] THE FEDERALIST NO. 10 (Madison).
[24] THE FEDERALIST NO. 51 (Madison).

to guarantee security was for the new Constitution to provide that there would be no religious qualification for public office.[25] As a consequence, the new Constitution would provide:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.[26]

Alexander Hamilton went further stating the difference between the American presidency the Constitution would establish and the King of Great Britain was, among other things, that the former would claim "no particle of spiritual jurisdiction", that the President would not be a "supreme head and governor of the national church", that to suggest otherwise is despotism.[27]

Those Anti-Federalists who opposed adoption of the Constitution were also somewhat divided on how to set the relationship of government to religion. Many Anti-Federalists favored tolerance of the Protestant sects but not necessarily of other religious, including other Christian religious sects.[28] However, others would also strengthen church by compelling contribution, but not faith.[29] But there did seem to be agreement against a religious test for public office, as avoiding a possible threat to religion.[30]

What the Federalists and the Anti-Federalists were getting at was not that religion did not embrace virtue or that possession of virtue would be a good for those holding public office, but that the honorable man, the so-called "civic republican" who took pride in his community could be just as virtuous; indeed, that this would be the test for public virtue. At least this would be the

---

[25] THE FEDERALIST NO. 59 (Madison).
[26] U.S. Constitution, art. VI, para. 3.
[27] THE FEDERALIST NO. 70 (Hamilton).
[28] Herbert J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 22 (Chicago: university of Chicago Press, 1981).
[29] *Id.* at 23.
[30] *Id.* at 64.

case provided the civic republican's religious beliefs were not too far off from whatever might be viewed as the mainstream. Indeed, this notion of the republican myth was probably more strongly favored by the Southern agrarian states, which saw it as connected with a wide distribution of landownership, than in the northern industrial New England states where private virtue was more highly touted.[31]

> Agrarian republicanism was therefore essentially negative in the focus of its militance: it demanded vigilance only in regard to certain kinds of men and institutions which, as its adherents viewed history, had proved inimical or fatal to liberty. The version of history that was involved was what had been described as the Anglo-Saxon myth. Free institutions, according to this myth, had originated among the ancient Teutonic tribes, who planted them in Britain during the sixth and seventh centuries. From then until the Norman Conquest, England was an agrarian paradise. Society and the minimal government that was necessary were organized among farmers, great and small, whose landholdings were absolutely free and around powerful heads of families, either nuclear or extended. No coercion was necessary in such a society, relations were governed by tradition and consent, and every man was free to worship God as he saw fit. Any dispute that might arise was settled by established custom and the common law, which all men understood and revered. When foreign invaders threatened, the heads of families mustered in militia companies and repulsed the intruder.[32]

Forest McDonald provides this clue to understanding George Washington, who had served as president of the Constitutional Convention after serving as Commander in Chief of the Continental Army during the revolutionary war and before becoming America's first and only non-party aligned president. Borrowing from Joseph Addison's play *Cato* (where Cato the Younger holds together the remnants of the Roman republican Senate), Addison says:

> What some men are prompted to by conscience, duty, or religion, which are only different names for the same thing, others are prompted to by honour." …. True honor, he says, "though it be a different principle from religion, is that which produces the same effects…. Religion embraces virtue, as it is enjoined by the

[31] MCDONALD, NOVUS ORDO SECLORUM, *supra* note 4, at 75.
[32] *Id.* at 76 (citing HAROLD TREVOR COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION [Chapel Hill, N.C.: 1965]; RODGER D. PARKER, THE GOSPEL OF OPPOSITION: A STUDY OF EIGHTEENTH-CENTURY ANGLO-AMERICAN IDEOLOGY [Ph.D. diss., Wayne State University, 1975]).

> laws of God; honour, as it is graceful and ornamental to human nature. The religious man *fears*, the man of honour *scorns* to do an ill action." The one considers vice as offensive to the Divine Being, the other as something beneath him; the one as something forbidden, the other as what is unbecoming.[33]

What McDonald is suggesting here is that a new notion of civic republicanism was beginning to take hold in the American political landscape. This new virtue would eventually come to replace some of the values previously left to religious virtue, presumably without imposing the old problems cause by requiring religious conformity.

B. Recent Cases

For purposes of this discussion, which concerns the current Supreme Court understanding of Establishment clause, I will only briefly note how the clause came to be incorporated against the states, as that goes to different constitutional question. Suffice it to note that there were few establishment cases prior to 1879 when, in *Reynolds v. United States*,[34] the U.S. Supreme Court upheld a federal law prohibiting polygamy in the then territory of Utah. Mormons had asserted that this law violated their religious faith. Although ultimately upholding the law, the Court per Justice Sutherland, cited Thomas Jefferson wall of separation between church and state for a proposition that "may be accepted almost as an authoritative declaration of the scope and effect of the [First] Amendment."[35] Subsequently, in *Emerson v. Board of Education*, a case involving state reimbursements to parents for transportation of children attending public and parochial schools, Justice Hugo Black, while upholding the New Jersey law, held that the Establishment

[33] MCDONALD, NOVUS ORDO SECLORUM, *supra* note 4, at198 (citing THE WORKS OF JOSEPH ADDISON [Richard Hurd, ed., 6 vols. London: 1881], at 4:308).
[34] 98 U.S. (8 Otto.) 145 (1878).
[35] *Id.* at 164.

clause apples against the states via the Fourteenth Amendment due process clause.[36] Since the time of its initial incorporation against the states, however, scores of cases have come about testing the limits of state actions effecting religion. Indeed, it is fair to say that the Court's current understanding of those limits has evolved over the course of deciding these many cases. It is also fair to say that the Court has not settled on a single approach, as the justices seem to be influx over what approach provides the best constructive interpretation of what the Establishment clause is about. What will become evident in this section is the way the justices have, in setting our alternative interpretations, tried to fit some of the above referenced concerns of the founders into their decision-making.

Erwin Chemerinsky has stated: "There are three major competing approaches to the Establishment clause" that various Supreme Court Justices have discussed: strict separation, neutrality theory and accommodation/equality."[37] In addition to attempting to interpret the language of the clause, each approach also seems to represent a difference in point of view of some justices about the proper role of government and religion in society. This shouldn't be surprising, however, given that what constitutes an establishment of religion itself is not at all clear from the language of the amendment. What fears were the framers most concerned about? Are these the same fears that evoke fear today about government being in too close a relationship with religion? The clause simply doesn't provide much guidance toward answering these questions. What guidance it does provide seems to be tied to its sister provision guaranteeing the free exercise of religion. In effect, the clauses, when read together, mandate that the Court walk a tightrope between non-establishment on the one hand, while at the same time guaranteeing free exercise of religion on the other. And it is the attempt to walk this tightrope that probably more

[36] 330 U.S. 1, 5 (1947).
[37] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 22, at 1192 .

than anything else explains the different approaches. That said, and given that the factual setting of the various cases will likely throw the different judicial understandings into conflict, it would certainly be helpful if a more overarching approach could be provided to add clarity to the situation. But first it is important to see how the different approaches emerged and how their contents are likely to lead to different decision results. Especially did this show itself to be true after the Establishment and Free Exercise clauses were incorporated under the Fourteenth Amendment due process clause to apply against the states, since state governments, more than the national government, effect areas of life that religion and religious institutions are particularly concerned about.

The first approach demands a strict separation between government and religion with "no-aid" whatsoever, while the third approach allows government to accommodate religion to achieve the purposes of the Free Exercise clause.[38] The strict separation "approach says that to the greatest extent possible government and religion should be separated."[39] In *Everson v. Board of Education*, the Supreme Court, citing the words of Thomas Jefferson, declared: "The First Amendment has erected a wall between church and state. That wall must be high and impregnable."[40] The case concerned a New Jersey statute authorizing school districts to provide transportation for children attending parochial as well as public schools. A taxpayer challenged reimbursement payments to parents of Roman Catholic parochial school children. (The case was the first to apply the Establishment clause against the states via the due process clause of the Fourteenth Amendment.) A divided Court found the New Jersey law to be constitutional

[38] http://en.wikipedia.org/wiki/Establishment_Clause
[39] *Id.* at 1192.
[40] 330 U.S. 1, 18 (1947).

because the payments were made to parents regardless of religion and not to any religious organization. However, Justice Rutledge wrote a strong dissent, claiming:

> The funds used here were raised by taxation. The Court does not dispute nor could it that their use does in fact give aid and encouragement to religious instruction. It only concludes that this aid is not 'support' in law. But Madison and Jefferson were concerned with aid and support in fact not as a legal conclusion 'entangled in precedents.' Here parents pay money to send their children to parochial schools and funds raised by taxation are used to reimburse them. This not only helps the children to get to school and the parents to send them. It aids them in a substantial way to get the very thing[,] which they are sent to the particular school to secure, namely, religious training and teaching.[41]

Still, notwithstanding the dissent's strong argument that taxpayer funds were being used to "aid and support in fact" religion, the majority of justices took the more narrow view, as stated by Justice Black, that the

> "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[42]

Although the Court's own use of the phrase "at least" suggested that the clause might mean more than this, nevertheless, it seemed content with the idea that unless government actually erected a church, declared one church to be the only true one, or required church attendance, or specific religious beliefs, the Establishment clause was not violated. In effect, the majority seemed to be speaking to a larger separation while, in fact, holding to far narrower one.

[41] 330 U.S. at 45 (Rutledge, J., dissenting).
[42] 330 U.S. at 18.

Perhaps, this was because they saw the Free Exercise clause as strong enough to ensure that what is on the prohibited side are only a limited set of overt governmental actions.

More recently, in *Marsh v. Chambers*, "the Supreme Court upheld the constitutionality of a state legislature employing a Presbyterian minister for 18 years to begin each session with a prayer" noting "the long history and tradition of religious invocations before legislative sessions."[43] In that case, Justice Brennan identified four specific purposes behind the Establishment clause that would seem to support neutrality toward separation thesis:

> The first, which is most closely related to the more general conceptions of liberty found in the remainder of the First Amendment, is to guarantee the individual right to conscience….The second purpose of separation and neutrality is to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions and officials. The third purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government…. Finally, the principles of separation and neutrality help assure that essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena.[44]

Here the Court speaks in general language for the importance of the religious clauses without providing too much concrete specification for how they might be implemented or exactly what neutrality they demand. Obviously religious institutions cannot be completely divorced from governmental support, at least in such forms such as police, fire, or sanitation, for example; of course, the difficulty is where exactly to draw the line.[45]

Under a less separation focused "neutrality theory", as espoused by Professor Phillip Kurland, "the clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses [the establishment and Free

---

[43] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 22, at 1225.
[44] *Id.* (citing 463 U.S. 783, 803-805 [1983][Brennan, J., dissenting]).
[45] *Id.* at 1193.

Exercise clauses], read together as they should be, prohibit classification in terms of religion either to confer a benefit or impose a burden."[46] Following this approach, "[in] recent years several Supreme Court Justices have advanced a 'symbolic endorsement' test in evaluating the neutrality of government action."[47] According to Justice O'Connor,

> [a]s a theoretical matter, the endorsement test captures the essential command of the Establishment clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.' If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.[48]

In *Capitol Square Review and Advisory Board v. Pinette*, the Court considered whether the state of Ohio could prohibit the Ku Klux Klan from erecting a large Latin cross in the state park across from the Statehouse. Although there was no majority opinion, applying the symbolic endorsement test, seven of the Justices felt that preventing the erection of the cross would not violate the Establishment clause as a reasonable observer would not perceive it as a state endorsement of religion. Justices Stevens and Ginsberg dissented arguing that symbolic endorsement did exist by the mere fact the state *is* permitting the erection on its property.[49] Justice Scalia objected to using symbolic endorsement at all where the issue involved private speech on government property.[50]

---

[46] *Id.* (citing Phillip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 [1961]).
[47] *Id.* at 1194.
[48] County of Allegheny v. American Civil Liberties Union Greater Oittsburg Chapter, 492 U.S. 573, 627 (O'Connor, J., concurring, 1989).
[49] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 22, at 1195 (citing 463 U.S. 799-800 [Stevens, J. , dissenting]).
[50] *Id.*

In a related decision, *Van Orden v. Perry*, the Court ruled that a three-foot wide, six-foot tall monument of the Ten Commandments located on the grounds of the Texas Supreme Court and the State Capitol did not offend the Establishment clause.[51] Although in this case, Justices Stevens, O'Connor and Breyer dissented, Justice Souter did not believe the monument offended the Establishment clause because of the presence of many other secular monuments on the grounds "and because the monument had been there for over 40 years without challenge."[52] Was this a subtle way of saying that what might constitute a symbolic endorsement cannot change as people come to see a situation differently, or perhaps may see what previously had been accepted as neutral now as a pretense for hidden religious support now also seen as offensive?

> The third major theory, the Accommodation/Equality approach, holds that
>
> > the Court should interpret the Establishment clause to recognize the importance of religion in society and accommodate its presence in government. Specifically, under the accommodation approach the government violates the Establishment clause only if it literally establishes a church, coerces religious participation, or favors one religion over others.[53]

Justices taking this approach in recent decisions "have described it in terms of the need for government to treat religious beliefs and groups equally with nonreligious ones."[54] This seems to be a give to the importance of the Free Exercise clause over the Establishment clause. An establishment violation occurs only if government "establishes a church, coerces religious participation, or favors some religions over others. …. Several Justices discussed this in *Lee v. Weisman*, where the Court declared unconstitutional clergy-delivered prayers at public school graduations."[55]

---

[51] *Id.* at 1196 (citing 125 S. Ct. 2854 [2005]).
[52] *Id.*
[53] *Id.*
[54] *Id.* at 1197 (citing Mitchell v. Helms, 530 U.S. 793 [2000]).
[55] *Id.*

But if this approach really represents a shift in emphasis toward the Free Exercise clause, it may be a shift free exercise should repel. Professor Michael McConnell has stated that the approach "is desirable because it makes 'religion…a welcome element in the mix of beliefs and associations present in the community."[56] But couldn't it just as much make the religious beliefs of some dominate over those of others especially if it also places government on the side of supporting doctrines with little to no basis in empirical fact? As I hope to show below, this is perhaps the least satisfactory test taking account of recent philosophical justifications for the Establishment clause and also utilizing Thomas Kuhn's incommensurability argument as a way to distinguish between different worldviews.

To provide more concrete support for the above approaches, the Supreme Court has applied four different tests to determine if an establishment violation has occurred, each of which arguably falls within one of the above three general approaches. The first test, referred to as the Lemon test, because it was first articulated in the case *Lemon v. Kurtzman*,[57] determines if an establishment violation has occurred along three separate prongs. The first prong requires that "the statute must have a secular purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[58] Justices taking the strict separationist and neutrality approaches often use the test because it no doubt seems to meet the kinds of concerns Justice Brennan discussed in *Marsh v. Chambers*.[59] Because the test eliminates both the intention to affect religion and any substantial consequence for religion, these justices believe it erects a wall

[56] *Id.* at 1197-98.
[57] *Id.* at 1202 (citing 403 U.S. 602 [1971]).
[58] *Id.* (citing 403 U.S. 602 [1971]).
[59] *Id.* (citing Lynch v. Donnelly, 465 U.S. at 690 [O'Connor, J., concurring]).

of separation between government and religion.[60] Whereas, "[j]ustices favoring the accommodationist approach [such as Justice Scalia] urge the overruling of the *Lemon* test."[61] These justices believe the purposes requirement of *Lemon* effectively eliminates any deliberate accommodation with religion in that legislative purposes are hard to discern, and that administrative entanglement will occur even when one seeks to keep government and religion separate.[62] These justices also seem concerned that the *Lemon test* places too strong a bar on the

---

[60] Utilizing the first prong of the *Lemon* test, the requirement of a secular purpose, the Supreme Court held unconstitutional a Kentucky law in *Stone v. Graham* requiring placement of a copy of the Ten Commandments on the wall of all public school classrooms, and in *McCreary County, Ky. v. ACLU*, 125 S. Ct. 2722 (2005), a similar requirement for placement of the Ten Commandments in all county buildings. This contrasts with an earlier case, *McGowan v. Maryland*, 366 U.S. 420 (1966), where a state law requiring business closures on Sunday was held to be constitutional. In *McCreary* the Court clearly saw the placement to have a sectarian purpose; whereas, in *McGowan* it could be argued that the purpose was secular, to limit a too long workweek in a manner most would find conducive.

Utilizing the second prong of the *Lemon* test, the requirement for a secular effect, the Court in *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), held unconstitutional a Connecticut statute that "provided that no person may be required by law to work on his or her Sabbath." The Court felt that the law "favored religion over all other interests." Similarly, in *Corporation of Presiding Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), the Court upheld a Congressional exemption "from Title VII's prohibition against discrimination in employment based on religion."

Regarding the final prong of the *Lemon* test, the prohibition of excessive government entanglement in religion, the Supreme Court, in *Mitchell v. Helms*,

> held, without a majority opinion, that the government may give instructional equipment to parochial school so long as it was not used for religious instruction. Actually, four Justices would have allowed the instructional equipment—computers, audio visual equipment, and the like—to be used for religious education so long as all religions are treated equally. Three Justices would have prohibited the government from giving such aid to parochial schools because it would be used for religious purposes. Two Justices said that such aid is allowed so long as it is not actually used for religious instruction. It is not clear how *Mitchell* affects the no-entanglement prong of the *Lemon* test. The Court did not explicitly overrule or disavow of the entanglement inquiry.

530 U.S. 793 (2000). *See* CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 22, at 1192-93.

[61] *Id.*

[62] *See* KATHLEEN M. SULLIVAN AND GERALD GUNTHER, CONSTITUTIONAL LAW, 15th ed, 1547 (New York Foundation Press, 2004).

Free Exercise clause thereby shifting the emphasis too much toward none-establishment. Between these two different sets of concerns lies the view of Justice Breyer, who "may be willing to abandon or modify the last prong of *Lemon* based on his vote in *Mitchell v.* Helms."[63] The case allowed government to give instructional equipment—computers, audio visual, and the like—to parochial schools provided it wasn't used for religious education. Justice Beyer vote to give the equipment, along with that Justice O'Connor, appeared unconcerned with how this "affects the no-entanglement prong of the *Lemon* test."[64]

Another important establishment area concerns religion and free speech where the content of the speech involved religion. Generally, these cases involve government attempting to avoid raising establishment issues by restricting "private religious speech on government property or with government funds."[65]

---

[63] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 22, at 1206.
[64] *Id.*
[65] *See* KATHLEEN M. SULLIVAN AND GERALD GUNTHER, CONSTITUTIONAL LAW, 15th ed, 1547 (New York Foundation Press, 2004). In *Widmar v. Vincent*, the Supreme Court held unconstitutional a public university's policy prohibiting religious student groups from using its facilities for worship or discussion when other groups could use the facilities. *Id.* at 1207 (citing 454 U.S. 263 [1981]). In *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court declared "unconstitutional a state university's refusal to give student activity funds to a Christian group that published an expressly religious magazine" because the restriction was a content based limitation and the government program did not violate the Establishment clause because it was "neutral toward religion." *Id.* at 1211 (citing 515 U.S. 819, 834, 840 [1995]). By contrast, in *Santa Fe Independent School District v. Doe*, the Court found unconstitutional a policy of allowing "student-delivered prayers at high school football games." *Id.* at 1213-14 (citing 530 U.S. 290 [2000]). More confusing seem the Court's decisions concern school release programs. Although in *McCollum v. Board of Education*, the Court did not allow "students to be released, with parental permission, to religious instruction classes conducted during regular school hours in in the school building by outside teachers, *Id.* at 1215 (citing 333 U.S. 203 [1948]). the Court did allow, in *Zorach v.* Clauson, decided a few years later, "students to be released, during the school day, for religious instruction outside the school." *Id.* at 1216 (citing 343 U.S. 306 [1952]). The Court also did not allow in *Wallace v. Jaffree*, an Alabama law to stand that "authorized a moment of silence in public schools for 'meditation or voluntary prayer.'" *Id.* at 1217 (citing 472 U.S. 38 [1985]).

The Christmas holiday presents a particular time where speech and establishment run into one another. It is in this area, in particular, that some members of the Court have sought a second test to insure neutrality by invoking the *endorsement test* to determine if an establishment has occurred. Chemerinsky has noted that in *Lynch v. Donnelly*,[66] "the Supreme Court upheld the constitutionality of a nativity scene" and other holiday displays, including a Santa Claus house and reindeer pulling Santa's sleigh in a park maintained by a nonprofit organization.[67] The idea here is to ask whether a particular government action amounts to an endorsement of religion in violation of the Establishment clause. In these cases one looks carefully at how the action is

---

[66] 465 U.S. 668 (1984).

[67] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 22, at 1222-23. In this context, Chief Justice Burger wrote that Pawtucket's purpose was secular because the city's sought to depict the origins of the holiday. *Id.* Justice O'Connor's concurring opinion noted:

> The Establishment clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principle ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not full shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. ….
>
> The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the crèche. …. The proper inquiry under the purpose prong of Lemon, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion. …. Although the religious and indeed sectarian significance of the crèche is not neutralized by the setting, the overall holiday setting changes what viewers my fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.

465 U.S. at 687-92 (O'Connor, J. concurring). Justice O'Connor's is compatible with the Court's subsequent decision in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). There the Court considered two holiday displays: one involving a nativity scene; the other involving a menorah accompanied by a Christmas tree and a sign saluting liberty. *Id.* The Court invalidated the nativity scene but allowed the menorah as it was accompanied by other religious and secular symbols. *Id.* *See* CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 22, at 1223.

likely to be perceived. Is it likely to be perceived by the public as an endorsement of religion? "The endorsement test is often invoked in situations where the government is engaged in expressive activities, such as graduation prayers, religious signs on government property, or religion in the curriculum."[68] The question in these situations is twofold: Has the endorsement benefited or harmed the religious institution? Second, how will the public most likely perceived the government's action? Will the public most likely perceive it as an endorsement of religion? Put another way, will members of the public who do adhere to a particular religious doctrine or tradition feel excluded by the government's action? Because people's perceptions are often graduated along a spectrum, the endorsement test can be seen to occupy a kind of middle position between strict separation and neutrality.

A third, more recent, test, the coercion test, asks whether the government's action is likely to coerce either directly or indirectly participation "in a state-sponsored religious exercise."[69] In *Lee v. Weisman*, the Supreme Court, in a 5-4 decision, invalidated a requirement that a nondenominational prayer be delivered at a Rhode Island high school graduation ceremony.[70] Among the concerns Justice Kennedy expressed fear that the attempt to keep the prayer nondenominational by the principal giving the rabbi chosen to deliver the prayer a pamphlet on composing nondenominational prayers would impact the religion content. As Kennedy wrote, "no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard."[71] The presenter would want to be invited back and keep a good reputation in the community. Perhaps

[68] http://en.wikipedia.org/wiki/Endorsement_test.
[69] http://en.wikipedia.org/wiki/Lee_v._Weisman.
[70] 505 U.S. 577 (1992).
[71] 505 U.S. at 588.

more importantly was how the presentation of the prayer would likely affect the students attending. As Justice Kennedy noted,

> To say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone knows that, in our society and in our culture, high school graduation is one of life's most significant occasions.[72]

The coercion test presents a position between neutrality and accommodation that draws attention to the importance of giving voice to the indirect affects governmental action can have on those who feel vulnerable because the accommodation is placing pressure on them to act in a conforming way. And therein lies its ability to identify an establishment violation.

Finally, I want to draw attention to a fourth test, a so-called new neutrality test. This is different from the broader neutrality approach discussed above. Although bearing the same name as the second of three previously described approaches, I want to suggest that this approach is actually more accommodationist and less neutral than the neutrality approach. This test originates in *Mitchell v. Helms*, which made use of only the first two prongs of the Lemon test, at least when the matter concerned governmental aid to parochial schools.[73] It will be remembered that the case concerned the Elementary and Secondary Education Act of 1965,[74] under which federal education funds would be given to state and local governmental agencies that would then loan such educational materials as library, and media and computing equipment, to public and private schools. The justices' decision to uphold the law failed to afford a majority rationale for why this should be allowed. The various plurality opinions suggest that aid to religious groups is now allowed so long as it both furthers a legitimate *secular* governmental

[72] 505 U.S. at 595.
[73] 530 U.S. 793 (2000).
[74] 20 U.S.C.A. §§ 7301-7373 (1965).

purpose and the aid is granted in the same way to a non-religious organization.[75] In other words, under what might now be described as a new neutrality test, government financial support of religious institutions is fine when it serves a secular purpose and does not distinguish among religious institutions. But, as three justices dissented in *Mitchell*—Stevens, Souter, and Ginsburg—it would be difficult to insure that this type of support could not be used for religious purposes.[76] Indeed, one could raise the question, even if the specific supports were kept separate from religious education, would this government involvement free up monies of the school, which would then be available for religious instruction?

In sum, it is worth noting that in the area of public aid to parochial schools, the Supreme Court has basically adopted a two-pronged approach. First, the aid must not be *only* given to nonpublic schools and their students" but to students attending public schools as well.[77] Second, there is a presumption against providing aid *directly* to nonpublic schools unless the aid is "provided directly to the students."[78] Needless to say, what the above cases show is how difficult a task it is to navigate over whether a particular governmental action affecting religion will be found to violate the Establishment clause or not even when these two conditions are met. I suspect in large part this is because, notwithstanding its early history, there has been a lack of philosophical justification for the Establishment clause.

---

[75] Justice Thomas's plurality decision, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, stated: "[I]n distinguishing between indoctrination that is attributable to the state and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons, without regard to religion." *Id.* at 809 (Thomas, J., plurality opinion). Justice O'Connor joined by Justice Breyer wrote separately arguing that the plurality opinion was too broad and effective ended the longstanding distinction between direct and indirect aid. *Id.* at 837 (O'Connor, J., concurring).

[76] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 22, at 1228.

[77] *See id.* at1241.

[78] *Id.*

In other areas where religion had long been connected to government activities, the Court seems very accommodationist. Earlier it was noted that in *Marsh v. Chambers*, without considering the *Lemon* test, the Court "upheld the constitutionality of a state legislature employing a Presbyterian minister for 18 years to begin each session with a prayer."[79] It also upheld in *Walz v. Tax Commission*, "a state law that provided property tax exemptions for real or personal property used exclusively for religious, educational, or charitable purposes,"[80] but it denied a similar exemption in *Texas Monthly, Inc. v. Bullock* "that was available only for religious organizations."[81] Perhaps, in the latter instance limiting the exemption *only* to religious organizations was just too close a connection for the Court to tolerate. In the former case, the long history of religious invocations at the beginning of a legislative session speaks closely to Justice Souter's view in *Van Orden v. Perry* and how tradition might affect a court's view in this area. In what follows I intend to present four contemporary normative philosophical frameworks that should provide a more solid grounding for interpreting the religious clauses—especially the Establishment clause—as well as one non-normative philosophy of science framework, which when connected to the normative frameworks, makes that grounding even more secure.

3. Philosophical Justifications for the Establishment clause

In this part, I consider how four very different normative philosophical frameworks might be adapted to justify having a constitutional provision akin to the Establishment clause. Because the four frameworks are very unlike, it is interesting to find that all four can be shown to justify having a constitutional or higher law provision against state establishment of religion. The four

[79] *Id.* at 1225 (citing 463 U.S. 783 [1983]).
[80] *Id.* at 1229 (citing 367 U.S. 664 [1970]).
[81] *Id.* (citing 489 U.S. 1 [1989]).

frameworks each represent an important development in the history of political philosophy.[82] Moreover, each makes an important contribution to the four traditions that are most frequently associated with political philosophy, viz., the rights tradition, political liberalism, common good, and the communitarian tradition.

Although the four frameworks selected by no means exhaust the philosophical positions under their respective traditions, they each afford an important and to many a persuasive philosophical justification for the set of positions they defend. More importantly for our purposes, no other competing theory falling under the first three of these traditions (there is no clear opposite to the fourth tradition)—libertarianism in contrast to Rawls' political liberalism, act utilitarianism in contrast to rule utilitarianism, and natural law in contrast to utilitarianism—would reach any different result with respect to a government operating over a pluralistic society being forbidden to establish a religion, nor would their different analyses affect the central content of the four respective justifications I offer in support of non-establishment. The fifth framework is not normative. I adopt it from philosophy of science. Its role here is to serve to provide further support for the four justifications the normative frameworks offer.

The way the Establishment clause gets interpreted by the courts has very real consequences for how the social contract between the citizens of the United States and their government will get carried out. Courts are bound when interpreting laws, including

---

[82] The philosopher Alan Gewirth has said:

> The central concern of political philosophy is the moral evaluation of political power. In its most important manifestations, political power is found in the state with its laws and government, which are formally and for the most part effectively supreme over all the other rules, institutions, and persons in any society. Political philosophy deals with the criteria for bringing these supreme political controls under moral control by subjecting them to moral requirements concerning their sources, their limits, and their ends or purposes.

ALAN GEWIRTH, POLITICAL PHILOSOPHY 1 (Toronto, OT: MacMillian, 1965).

constitutional provisions, to only rely on certain kinds of second-order reasons that replace other, first-order, reasons.[83] When the First Amendment prohibits Congress and the states from establishing a state religion that is a second-order reason designed to offset concerns about the abuses of power in the name of religious conformity that have haunted Americans since the founding. The obligation of the courts, including the Supreme Court, to obey that constitutional command is another second-ordered reason.[84] The Establishment clause was designed to offset

---

[83] Joseph Raz has noted that what distinguishes courts, as norm-applying institutions, from legislatures, as norm-making institutions, is that the former are limited in a way the legislature is not, to relying on only a certain limited set of rationales, for determining what are the norms of the legal system. In PRACTICAL REASON AND NORM*s* 123-48 (New York: Oxford University Press, 1975), Raz notes that courts are norm-applying institutions and these are the *primary* institutions of the modern legal system.

> Indeed the test by which we determine whether a norm belongs to the system is, roughly speaking, that it is a norm which the primary organs ought to apply when judging and evaluating behaviour. Thus legal and other institutionalized systems can be said to possess their own internal system of evaluation. …. The second important consequence of the difference between institutionalized systems and systems of absolute discretion [such as legislatures to a large extent] is that the former contain, indeed consist of, norms which the courts are bound to apply regardless of their merit.

Id. at 123-48.

[84] In *Marbury v. Madison*, Chief Justice Marshall announced two fundamental second-order reasons that would thence forth govern constitutional interpretation:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If then the courts are to regard the constitution; and he constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

first-order concerns by way of a determinate second-order prohibition. Still, because interpretations of the Establishment clause will appear to some as over-inclusive while to others as under-inclusive, an analysis of the first order reasons from the vantage point of political theory that gave rise to the clause may provide criteria for handling boundary line cases.[85] I will, therefore, consider each of the four normative frameworks and a non-normative framework for what it might add to the existing legal arguments the Supreme Court has already recognized.

A. Rights Theory

So far in this essay I have focused on the First Amendment Establishment clause. That is because this is the religious clause, in which the Supreme Court seems least secure. However, as mentioned above, there are two religious clauses in the First Amendment. The Free Exercise clause follows right after the Establishment clause and basically prohibits the government from interfering with the free exercise of religious belief. Earlier it was mentioned that the Free Exercise clause provides a counterpoint to how far the courts will go in interpreting the non-Establishment clause. It is less clear, however, how much protection the clause assigns to particular religious practices, especially if they do not directly implicate belief.[86]

I raise the point of the two clauses here because the justification for the Establishment clause under rights theory can be seen to piggybacks on the justification of the Free Exercise

---

5 (Cranch) U.S. 137, 178 (1803).

[85] Joseph Baldacchino, *Religion and the Constitutiion* in HUMANITAS , vol. XII, no. 1 (1999) a review of KENNETH R. CRAYCRAFT, THE AMERICAN MYTH OF RELIGIOUS FREEDOM (Dallas, TX: Spence Publishing, 1999).

[86] In *Employment Division, Department of Human Resources of Oregon v.* Smith, 494 U.S. 872 (1990), the Supreme Court upheld Oregon's denial of unemployment benefits to a members of a Native American Church who were terminated following discovery that they had used peyote in violation of state criminal laws as part of a religious practice because the law applied to everybody regardless of the purpose for their use.

clause. Perhaps it would be true that no one would really care if government established a religion so long as no one had to pay any attention to or contribute any support for it. The problem is that even seemingly benign establishments inevitably implicate free exercise concerns.

For example, the "Church of England is the official church of England and the English monarch is head of the church. The monarch appoints archbishops, bishops, and deans of the cathedrals, on the advice of the Prime Minister. But except for this, and the occasional ceremony such as a coronation, the Church imposes no other obligations on, including seeking taxpayer support from, the English people.[87] Of course, to some English subjects, who are not members of the Church, even this much of a connection may seem too much. I point this out to suggest that the justification for Establishment clause in America is closely tied to the justification for the Free Exercise clause. Indeed, although the two clauses are separate, the former can be seen to in part guarantee the latter. If government cannot establish a state religion, then it is less likely the free exercise of religious beliefs will be intruded upon.

For rights theory this is important because both egalitarian liberals and civil libertarians agree that government should not be telling private citizens what they must or must not believe.[88] Locke's idea here is not that conscience is infallible; although he believed reason should hold sway over anything we might feel.

> Craycraft notes that Locke, in his *Letter Concerning Toleration*, focuses "almost exclusively" on the historic tendencies within Christianity toward coercive force and religious persecution. But, he says, "this is a tactical rhetorical move designed

[87] http://www.churchofengland.org/about-us/facts-stats/funding.aspx#where.

[88] For a civil libertarian view of the importance of property rights see ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 171-72 (Englewood Cliffs, N.J.: 1974). For a more liberal egalitarian view, see JOHN RAWLS, POLITICAL LIBERALISM 298 (New York: Columbia university Press, 1993); *see also* JOHN RAWLS, COLLECTED PAPERS, 420 (Samuel Freeman, ed., Camdridge, MA: Harvard University Press, 1999).

> to obscure the more fundamental strategy of denying (on the grounds of natural right of conscience) the legitimacy of internal ecclesiastical authority". "For Locke ecclesiastical officers have no more business minding the religious affairs of men than do political officers"). . . . . Rather, for Locke every man *is* orthodox to himself, since conscience is by nature radically free, and religion by nature radically private".[89]

The idea that religious authority would stifle development of individual conscience can be seen as an assault on Locke's most basic of our property rights, the right to control our very life. That right, which Locke treats as basic to all other property rights, also provides a foundation for limiting the powers of government.

In his *Second Treatise of Government*, John Locke suggests that the idea for establishing a limited government would have occurred to people living in the state of nature, as a means to guarantee protection of their property rights. He says:

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour power* with, and joined to it something that is his own, and thereby makes it his *Property*.[90]

Having found the ground for property in the animation that is human life/human industry, Locke goes on to argue for its protection.

> The great end of Mens entring into Society, being the enjoyment of their Properties in Peace and Safety, and the great instrument and means of that being the Laws establish'd in that Society; the *first and fundamental positive Law* of all Commonwealths, *is the establishing of the* Legislative *Power;* as the *first and fundamental natural Law,* which is to govern even the Legislative it self, is *the preservation of the Society,* and (as far as will consist with the publick good) of every person in it.[91]

---

[89] http://www.nhinet.org/jb-cray.htm.
[90] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT No. 27 (New York: Cambridge University Press, 1960).
[91] *Id.* No. 134.

Applying Locke concerns to the First Amendment Establishment clause, two interpretations emerge. The stricter interpretation calls for a total separation of religion and state similar to the view mentioned by Justice Brennan in *Marsh v. Chambers*.[92] The weaker one calls for a neutrality view analogous to the one expressed by Justice O'Connor in *Capitol Square Review and Advisory Board v. Pinette*.[93] Because, as will be shown below, there will inevitably be overlaps to religion by what government does, the neutrality view, properly understood (which will also be discussed below), is the more plausible position.

For now, it is important to note how the Establishment clause gets justified, given that the Lockean view would clearly justify the Free Exercise clause. One obvious answer is that taxpayer property will inevitably be involved with any government involvement with religion. This could be by way of direct tax support of religion as the colonists of New Hampshire, Massachusetts, Connecticut, South Carolina, and, partially, Maryland found out. Or it could be more indirect by government allowing the use of public lands purchased at taxpayer expense to display religious symbols, or perhaps the government has purchased or is maintaining the symbols. Other indirect uses would include government financial support of faith-based initiatives for the purpose of expanding outreach programs designed to offset drug or alcohol abuse. Still, another possibility is government support of transportation or tuition programs to parents of students attending parochial schools. In short, there are a number of indirect ways at varying degrees of directness in which government can affect an individual's personal property by way of taxation in support of religion. Since all of these invariably concern the taxpayer, it is reasonable that the right to property would extend to taxpayers not having their property used for religious purposes, especially if the religion is one they may not be affiliated with. How strong a

[92] 330 U.S. 1, 18 (1947).
[93] 463 U.S. 783, 803-805 (1983)(Brennan, J., dissenting).

protection the right to property would afford, given that many indirect benefits to religion will be supported by non-religious purposes will be discussed in the next section. For now, I would like to offer a new reason for how the right to property attaches to the Establishment clause aside from the taxpayer concern.

Here one finds an analogy between even benign establishments of religion and those who, in the recent dispute over same-sex marriage versus civil unions would claim that civil unions are not of an equal status with marriage. In response to those seeking a right to same-sex marriage, civil unions—which offered the same rights and benefits as marriage, at least, at the state level—were offered as a compromise in some states to those same-sex couples seeking the full rights and benefits of marriage with opposite-sex couples under the Fourteenth Amendment equal protection clause.[94] The idea was if the same benefits could be provided under a different guise, then those who sought to keep opposite-sex marriage sacred would also be accommodated.[95] The problem was that the compromise of offering an equality of rights and benefits was attached to an inequality in status that the government was promoting. In other words, since the only reason for the compromise was the normative purpose to keep marriage "sacred", the compromise in effect placed government on the side of supporting a status difference between same-sex and opposite-sex couples that could be assigned to no other basis than religion. In this sense, the first property right, the right to property in one's own life, was diminished as government was saying that certain kinds of life relationships were of lesser value

---

[94] *See Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html.

[95] *See id.*

than others, in effect creating what has been described as second-class citizenship.[96] These were same-sex citizens who had all the rights of opposite-sex citizens but weren't quite as worthy of the same degree of "sacred" respect for their relationship as their opposite-sex counterparts.[97] And government was the promoter of this idea by its establishment of civil unions.[98]

By analogy, allowing a state established church to exist, even if no taxpayer money is used in its support, creates the idea that those citizens not affiliated with the church are somehow of lesser status in the eyes of the government. Citizens of England who are not members of the Church of England may be seen as not quite possessing the same status as those who are members of the Church. And if that were the case, then the property right in those citizen's lives would similarly be diminished. So, the only way to avoid this from occurring is for government to be completely neutral, if not totally separate, from religious establishment. It is an extension of the basic property rights all people have that can be traced back to Locke argument based in the right to life, which was also influential on Thomas Jefferson and the other drafters of the Bill of Rights is to be upheld, government should not be involved in any form of establishment of religion.[99]

---

[96] http://www.freedomtomarry.org/pages/marriage-versus-civil-unions-domestic-partnerships-etc.

[97] *See id.*

[98] I am not saying that civi unions may not have been a good intermediate step toward social acceptance of same-sex marriage. No doubt many think they are. The concern is that civil unions also create a status difference that government is affirming between same-sex and opposite-se couples.

[99] It should be noted that following Locke, Thomas Jefferson, in an early version of the Declaration of Independence, wrote "life, liberty and property" as the inalienable and sovereign rights of man, which by the final draft was changed to "life, liberty, and the pursuit of happiness." However, he was convinced by Benjamin Franklin of the more Humean view that property was a creature of society and thus could be taxed to support civil society. http://en.wikipedia.org/wiki/Life,_liberty_and_the_ *See also* DAVID HUME, A TREATISE OF HUMAN NATURE, Ed. L.A. Selby-Bigge, 2nd ed., 489 (New York: Oxford University Press, 1978).

B. *Political Liberalism*

In his book, *Political Liberalism*, John Rawls asks the question:

> How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines? Put another way: How is it possible that deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime[100]

For our purposes, I want to treat Rawls' answer to this question to provide the grounds of a justification for the religious clauses contained in the First Amendment, especially the Establishment clause. Specifically, I want to inquire "when may citizens by their vote properly exercise their political power over one another when fundamental questions are at stake?"[101] Rawls answer to this and the broader question of creating a stable society brings together three main ideas: overlapping consensus,[102] priority of right and ideas of the good,[103] and the idea of

---

[100] RAWLS, POLITICAL LIBERALISM, *supra* note 88, at vviii.

[101] *Id.* at 217.

[102] For Rawls, "two main points about the idea of an overlapping consensus. The first is that we look for a consensus of reasonable (as opposed to unreasonable or irrational) comprehensive doctrines. …. [The second] in a constitutional democracy the public conception of justice should be, so far as possible, presented as independent of comprehensive religious, philosophical, and moral doctrines." *Id.* at 144. Three features defining an overlapping consensus are:

> first, the object of consensus, the political conception of justice, is itself a moral conception. And second, it is affirmed on moral grounds, that is, it includes conceptions of society and citizens as persons, as well as principles of justice, and an account of the political virtues which those principles are embodied in human character and expressed in public life. …. The preceding two aspects of an overlapping consensus—moral object and moral grounds—connect with a third aspect, that of stability. This means that those who affirm the various views supporting the political conception will not withdraw their support of it should the relative strength of their view in society increase and eventually become dominant.

Id. at 147-48.

[103] Rawls states: "In justice as fairness the priority of right means that the principles of political justice impose limits on permissible ways of life; and hence the claims citizens make to pursue

public reason.[104] More precisely, his answer to the narrow question states: "[O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."[105] In effect, Rawls is placing a kind of objectivity requirement on the use of political power. Although he doesn't use the term, the objectivity requirement seems clearly present, if not empirically based in the way evidence in the social sciences is objective and identifiable. It can encompass ideas and values by requiring that they be capable of leading to honest social cooperation, rather than cooperation following strictly out of fear or threat of force.[106] Rawls says as much when he elaborates his answer in context to the political relationship democracies establish between their citizens.

> As reasonable and rational, and knowing that they affirm a diversity of reasonable religious and philosophical doctrines, [citizens] should be ready to explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality.[107]

Adopting Rawls' point of view, one sees immediately that positions based purely on religious doctrines, even if a majority of the citizenry upholds the doctrine, will not be able to

---

ends that transgress those limits have no weight." *Id.* at 174. For our purposes, I will not go into details of Rawls' principles of political justice. It suffices for our purposes that they should provide an account of fairness between citizens that all could rationally affirm.

[104] Rawls says: "[I]n a democratic society public reason is the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and amending their constitution." *Id.* at 214.

[105] *Id.*

[106] The sense of objectivity Rawls has in mind I believe is analogous to the way a teacher might evaluate a student essay. It is not the sense of objectivity that follows a strictly right wrong answer as on a "objective" test. Rather, it is the sense that a comment made about an essay could be readily acknowledged by another knowable reader of the subject to be relevant and material to what was written, even if the two readers might finally disagree as to just how salient the comment is.

[107] *Id.* at 218.

achieve the overlapping consensus required for stability of the democratic state. That is to say, there will not be the kind of common ground that all citizens could affirm as justifying a particular action, even if the action were thought by any subgroup of citizens to ultimately be correct. Debate and discussion based on what all can reasonably and rationally affirm might lead towards acceptance of a particular decision, but only if based on the possibility of achieving an overlapping consensus among the groups affected by the action. Indeed, it is no doubt a ground for the Establishment clause that governmental actions be explainable to all who are likely to be affected by them in terms each could be expected to affirm. In this case, we have a kind of reversal from the direction of concern I talked about in regard to rights theory where government had an affirmative duty not to interfere with the free exercise of religion. Here government must not promote religion as that could constitute an interference with its free exercise.

Previously, it will be recalled that I started from an interpretation of Locke that each person has a property right in their own conscience to believe whatever their conscience provided, since conscience was by its very "nature radically free and religion by nature radically private."[108] Consequently, no political or even ecclesiastical officer has any "business minding the religious affairs of men."[109] I then pointed out that the Establishment clause could be found to be rooted in the Free Exercise clause either, directly, because taxpayer money is being used to affect what people believe or, indirectly, if government was instituting a status difference between those citizens whose beliefs conformed with the majority view and those whose beliefs did not.

Here, relying on Rawls' understanding of political liberalism, that earlier argument works in reverse. What reliance on public reason prevents is the establishment of an idea that cannot be

[108] *Supra* note 89, at http://www.nhinet.org/jb-cray.htm.
[109] *Id.*

reasonably and rationally explained to all affected by it. This, in turn, leads to the protection of religious freedom because if an establishment cannot be explained, then following through on it can only be aimed at trying to affect the conscience of the citizenry—their private religious beliefs as free an equal citizens. And so, from the point of view of political liberalism, prohibiting state establishment of religion is not just in service to religious liberty, but a precondition for it.[110]

At this point, I should note that not all find Rawls' argument here compelling. Ian Bartrum, for example, has argued that allowance of nonpublic reasons can produce the very democratic stability Rawls' restriction to only rely on public reasons is meant to achieve. In fact, he illustrates his position anecdotally by referring to the New York City Catholic School Controversy that occurred in the 1840s. Since 1813 the Free School Society, later changed to the New York Public School Society, received state education funds allocated to New York City, as part of the common school movement, to assist in the education of the city's youth. The funding statute had restricted use of public money for sectarian purposes, but at the time "sectarian" was understood to refer "only to the practices of a specific religious denomination."[111] However, because the teachers for the Society did promote "generic Protestant values, and encouraged general readings from the King James Bible and the Book of Common Prayer," the Roman Catholic Bishop John Hughes protested, and when that protest seemed to fall on deft ears, led a movement to elect state legislators who would be pro-Catholic on the question of funding. Hughes ultimately failed to achieve his political objective that would have made it law for each

[110] Here I disagree with Ian Bartrum that Rawls' argument for using public reasons over nonpublic reasons based on a "duty of civility" is really consequentialist, not deontological. As I have tried to show in my brief sketch of the argument, Rawls' position here is centered in the kind of Kantian autonomy most often associated with rights theory. *See id.*
[111] *Id.*

school district to decide for itself what religious message it would send the children. But the protestant community also lost in the long run, for the controversy involving nonpublic reasons eventually led to the exclusion of "the King James Bible and the Book of Common Prayer as well."[112] Bartrum believes that this was a victory for democracy, as "those Protestant communities that complain most aggressively about secular schools today, are, in a historical sense, hoist on their own petard."[113]

Although the result in this particular instance may have been a victory for democratic stability, , as Bartrum suggests, it is less clear that it need necessarily have been so, given his desire to include nonpublic reasons into the debate. Indeed, the whole example is very fact dependent. If the effort of Bishop Hughes perhaps had been stronger, the Catholic community more powerful, the result could have been far less from confrontational. For if school districts were allowed to choose which religious values to profess, all sorts of problems would arise as citizens moved between districts either to get into districts whose religious professions they agreed with or out of districts whose religious professions they objected to. One need look no further than the white flight of the 1960s, to escape integrated public schools, to see the reality this would have led to. And in the religious case, unlike the 1960s, situation there would not be the public reasons related to basic human dignity at the core concept to try and create the necessary overarching consensus to hold the society together. Rawls' argument to exclude nonpublic reasons from at least determining final outcomes of the debate seems the more sensible view.

C. *Utilitarianism*

[112] *Id.*
[113] *Id.*

The view of utilitarianism known as "act utilitarianism", derived initially from writings by Jeremy Bentham[114] and later from those of John Stuart Mill[115] was initially not well suited to a discussions of fundamental interests, let alone rights, which neither author would affirm.[116] That is because act utilitarianism is concerned solely with the aggregation of preferences in deciding whether to do or to refrain from doing an action based on whether the net utility from the decision will produce not just more pleasure but a better quality of pleasure than its absence.[117] Though significant in helping to frame decisions at least for the short-run, this view of utilitarianism may fail to capture the full importance of the choice in the long run unless it also

---

[114] *See generally* BENTHAM, JEREMY, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (Oxford, Eng.: Clarendon Press, 1907).

[115] *See generally* JOHN STUART MILL, UTILITARIANISM in ESSENTIAL WORKS OF JOHN STUART MILL (New York: Bentham Books, 1961).

[116] Clearly, Mill does not affirm this. *See infra* note 120.

[117] John Stuart Mill in UTILITARIANISM states:

> The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure. To give a clear view of the moral standard set up by the theory much more requires to be said; in particular what things it includes in the ideas of pain and pleasure, and to what extent this is left an open question.

Id. at 194. Mill will go on to suggest that utilitarian writers have often ignored "that some kinds of pleasures are more desirable and more valuable than others." *Id.* at 195. In Mill's words:

> If I am asked what I mean by a difference in quality of pleasures, or in what makes one pleasure more valuable than another, merely as a pleasure, except its being greater in amount, there is but one possible answer. Of two pleasures, if there be one to which all or almost all who have experience of both give a decided preference, irrespective of any feeling of moral obligation to prefer it, that is the more desirable pleasure. If one of the two is, by those who are competently acquainted with both, placed so far above the other that they prefer it, even though knowing it to be attended with a greater amount of discontent, and would nor resign it for any quantity of the other pleasure of which there nature is capable, we are justified in ascribing to the preferred enjoyment a superiority in quality so far outweighing quantity as to render it in comparison of small account.

Id. at 196.

"is grounded on the permanent interests of man as a progressive being."[118] In this sense, act utilitarianism is not well suited to establishing principles that would operate to secure longer-term values over shorter-term preferences. This view need not be based upon a Lockean styled natural right; it would be sufficient if it affords a strong presumption in favor of sustaining those liberties, which are thought necessary to the promotion of satisfaction when exercised to their fullest, to the greatest number of humankind in the long-run.[119]

John Stuart Mill can be credited for recognizing, what I shall call this more "ideal form of utilitarianism." In his book, *On Liberty*, Mill identifies where these liberties lie and why they should not be causally interfered with, even if upon a more narrow utilitarian construction one might think that would be justified. The significance of Mill's thought for this writing on the Establishment clause concerns specifically the importance of conscience and how society might impede its importance unjustifiably if it follows only the Bentham-styled act utilitarian kind of model.

To understand the connection between conscience and the Establishment clause one needs to first recognize what Mill describes as

> a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or, if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say, only himself, I mean directly, and in the first instance: for whatever affects himself

---

[118] JOHN STUART MILL, ON LIBERTY in ESSENTIAL WORKS OF JOHN STUART MILL 264 (New York: Bantam Books, 1961).

[119] Mill writes:

> It is proper to state that I forgo any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions, but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.

Id.

may affect others through himself.[120]

Following this recognition, Mill's next step was to more precisely delineate the types of action this sphere of "self-regarding" actions would encompass. And, it is in this place that the ideal utilitarian presumption for protection of liberty of conscience in Mill's understanding is born:

> This, then, is the appropriate region of human liberty. It comprises, first, an inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. …. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like subject to such consequences as may follow; without impediment from or fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combinations of individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.[121]

The sense here in which Mill speaks of liberty of conscience is as a punisher of immoral action; not necessarily linking it to religious conscience nor disavowing it either.[122] Consequently, unless the practice of one's religion is likely to cause measurable harm to others, society should have no concern with it anymore than society should be concerned with any other self-regarding act. Where it is likely to harm others—if the practice would implicate, e.g., child abuse or the abuse of women—society may legitimately intrude to prevent it, either by way of direct proscription if the abuse is severe or indirect persuasion if that is deemed the better way to handle the problem. Indeed, the Millian argument speaks no more strongly in favor of a free

---

[120] *Id.* at 265. Here I might note that elsewhere I provide a fuller algorithm to delineate this notion of a "self-regarding (private) action." However, for our purposes here Mill's more elusive description suffices. *See* VINCENT J. SAMAR, THE RIGHT TO PRIVACY: GAYS, LESBIANS AND THE CONSTITUTION 66-68 (Philadelphia: Temple university Press, 1991).

[121] MILL, ON LIBERTY, *supra*, note 118, at 265.

[122] I want to thank Professor Mark Strasser of Capital University Law School for bring this particular insight to my attention.

exercise of religion than it does of any other non-other-harming behavior. Although Mill is offering what essentially is a consequentialist view of the limits of society's authority, it is sufficiently nuanced by both his concern that it serve the long term interests of humankind as progressive beings as well as his concern to avoid harm to others to be almost indistinguishable from my earlier rights theory argument that supports upholding an anti-establishment of religion clause, although here it is in the name of ensuring protection of individual freedom of conscience.

Mill actually presents an example from his time of a situation of religious establishment that society might be concerned with because it purposely impedes the free exercise of conscience in his sense:

> [T]he majority of Spaniards consider it a gross impiety, offensive in the highest degree to the Supreme Being, to worship him in any other manner than the Roman Catholic; and no other public worship is lawful on Spanish soil. The people of all Southern Europe look upon a married clergy as not only irreligious, but as unchaste, indecent, gross, disgusting. What do Protestants think of these perfectly sincere feelings, and of the attempt to enforce them against non-Catholics? Yet, if mankind are justified in interfering with each other's liberty in things which do not concern the interests of others, on what principle is it possible consistently to exclude these cases? Or can we blame people for desiring to suppress what they regard as a scandal in the sight of God and man? No stronger case can be shown for prohibiting anything which is regarded as a personal immorality than is made out for suppressing these practices in the eyes of those who regard them as impieties; and unless we are willing to adopt the logic of persecutors, and to say we may persecute others because we are right, and that they must not persecute us because they are wrong, we must be aware of admitting a principle of which we should resent as a gross injustice the application to ourselves.[123]

Although Mill never directly considers a purely establishment situation free of impeding the free exercise of conscience, it follow from what has been said above that he would view such a situation as very unjust. Even if the impediment were very slight, unless it can be fully

[123] MILL, ON LIBERTY, *supra*, note 118, at 272-73.

justified, independent of any religious association and even then, the harm to conscience that is likely to result will always be present. The only question would be whether it was justified to offset some greater harm occurring, which is hard to imagine.

This is not to say that there will never be situations where society's legitimate actions may affect the liberty of conscience. Obviously, most of society's laws are geared in part toward setting standards for directing peoples' behavior. What is important, if the inward domain of conscience is to be protected, is that the justification for these laws be founded in their ability to eliminate some important harm to others that can be objectively identified, or if the law be purely perfunctory, as in which side of the street to drive on, that the underlying basis for its existence be a need to rectify a situation that would otherwise be objectively harmful to others. Anything less—anything based, for example on purely, religious or moral doctrine, no matter how seemingly non-consequential—would open a door to infringements on conscience that will probably produce greater harm than the harm intended to be offset.[124] For these reasons, utilitarians, like Mill, would argue against society taking such actions and in favor of restrictions

[124] Mill himself notes this when he says:

> In all things, which regard the external relations of the individual, he is *de jure* amenable to those whose interests are concerned, and if need be, to society as their protector. There are often good reasons for not holding him to the responsibility; but these reasons must arise from the special expediencies of the case: either because it is a kind of case in which he is on the whole likely to act better, when left to his own discretion, than when controlled in any way in which society have it in their power to control him; or because the attempt to exercise control would produce other evils, greater than those which it would prevent.

Id. at 264-65. An point Joel Feinberg makes in regard to the Free Exercise clause, which I believe I have now established to be closely connected to the Establishment clause, is that "[t]he more important a part of the religious observance is the conduct in question, the more important must be the 'state's interest' (i.e., the harm, offense, or other evil for the aversion of which the prohibition is necessary)." JOEL FEINBERG, OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 169 (New York: Oxford University Press, 1985). Similarly, one could say the more likely the establishment is to implicate conscience, the greater must be the state's interest in its establishment.

on any establishments that might lead to devaluing the importance of conscience

D. A Communitarian Approach

"Communitarianism is an ideology that emphasizes the connection between the individual and the community."[125] It differs from both classical liberalism in the sense that communitarians do not see individual persons as apart from their communities, but rather recognizes that the basic structures of society (e.g., family, community, religion) are constitutive parts of who these persons are. Thus, the structures form part of the framework that is individual identity. Consequently, communitarians disagree with theories like those of John Rawls, which take the individual to be prior to the social structures in which she is immersed.[126]

Specifically with respect to religion, philosophy professor Michael Sandel has put forth, as a possible criticism of contemporary liberalism, that "

> [p]rotecting religion as a lifestyle, as one among the values that an independent self may have, may miss the role that religion plays in the lives of those for whom the observance of religious duties is a constitutive end, essential to their good and indispensible to their identity. Treating persons "as self-originating sources of valid claims" may thus fail to respect persons bound by duties derived from sources other than themselves.[127]

Sandel does not seem to be saying that liberalism should uphold any particular religious values. Rather, he seems to be arguing that because human persons are so constituted by their social situations—including often by their religious beliefs—that treating persons in context of Rawls' more recent views on public reason by limiting their speech on public matters to only "public"

---

[125] http://en.wikipedia.org/wiki/Communitarianism.

[126] For a general discussion of communitarian criticisms to Rawls' theory of political liberalism, see the entry under "Communitarianism" in the STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/communitarianism/.

[127] Michael J. Sandel, *Religious Liberty—Liberty of Conscience or Freedom of Choice?* 1989 UTAH LAW REV. 597, 611 (citing John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 543 [1980]).

reasons, in effect disrespects the very beings they are. But if that is the case, then contrary to Rawls, Sandel argument becomes an argument for the inclusion in public debate and political discourse of values and convictions that are fundamentally religious. But that would likely have liberalism bend to the public religious values of the majority, something the framers seemed concerned about.

While it is surely not the case that Rawls expects persons, when they enter the public arena, to give up their private beliefs, he is saying that only public reasons should count toward effecting matters involving law and politics. This is because one is conscious of his role as a citizen operating in a world where not all may share his private reasons, or where if his private reasons are to have an effect, they need to be justified on neutral grounds. Consequently, operating in that context, the advocate must expect to support his private positions by referral to public reasons that others could also find persuasive and, if unable, accept the situation that his nonpublic reasons should fail to convince others, until he can find reasons that would persuade others. To allow otherwise is just to assert power, which perhaps in an extreme situation might be understandable, but if this should become a regular pattern of operation, it is unlikely the democratic process will survive very long.

The public sector is not the place for private reasons to operate where actions affecting others will likely result from much debate and discussion. This is because what may influence a person's choice in private, where they may be more open to uncertainty, is likely to be quite different from what will influence them in a public domain, where the coercive power of government can be manifested to achieve certain ends, especially where it is recognized that the reasons supporting its use are unlikely to appeal to others who do not already accept them.

In a sense, the situation of public discourse is analogous to the professional discourse a

doctor might have with a patient, who is asking for a prognosis of his current medical condition. Certainly, the doctor could say, "If God wills, you will do just fine." But that would really not be answering the patient's question in the medical context in which it is being asked. Even if the patient is a believer and shares similar beliefs to those of the doctor, he is likely to still feel unsatisfied by the doctor's answer, in part because he is looking for an objective medical, rather than subjective religious, judgment of his future health prospects. If the doctor's answer is even relevant it may be just as a substitute for saying there is not a definite medical answer to the question being asked. But, if that is the case, then the doctor's statement is really just an elliptical way of saying, "I truly don't know how things are likely to turn out." But even, then, if the doctor is really being responsive to the patient's question, she should go on to provide what the probabilities are of different outcomes occurring, at least to extent known within the professional community, and not simply throw the matter up to the will of God.

Needless to say, if Sandel's view is correct that non-public reasons should be part of the public discourse for making decisions, then the proper interpretation of the Establishment clause might indeed be the interpretation that comes closest to accommodating a variety of different religious beliefs in contemporary American society. In essence, the interpretation would support the so-called "accommodationist" position of some recent Supreme Court justices. Whereas, if Rawls' understanding is correct that public reasons help insure stability where the citizenry share many different comprehensive doctrines, the better interpretation of the Establishment clause would be closer to either Justice Black's complete separation position or Justice Brennan's neutrality theory.[128] For reasons I describe in the next section, the complete separation position

[128] Here it might be thought that Rawls' understanding is really consequentialist, perhaps along utilitarian lines, since he is concerned with stability. But I think that may be the result of communitarian views that treat persons as constituted "by duties derived from other sources then

will prove unsustainable for the modern American democratic capitalist state, and this will suggest that the neutrality thesis is the better result. For now, however, I will limit myself to showing that an accommodationist view developed along lines Sandel describes will fail to meet even communitarian expectations behind the Establishment clause.

Sandel's vision that public debate should proceed on the basis of both public and nonpublic reasons is very problematic both theoretically and practically. The theoretical problem can be seen if we recall that Rawls places religious doctrine in the same epistemological category as reasons based on morality and metaphysics. They are all inherently incommensurable because there is no common framework for settling disputes that arise among them.[129] Take, for example, the current dispute in this country over same-sex marriage being allowed under law. A religious point of view held by most Unitarian Universalists, many Presbyterian, and some Quaker churches, several Jewish sects, and most of Buddhism believes God intended marriage to be available to all persons as a means to their own self-fulfillment.[130] And certainly many of those who argue for the right to marry someone of the same–sex claim that without marriage their personal level of self-fulfillment is substantially decreased. In contrast, religions like Roman Catholicism, Eastern Orthodox, Methodists, Reformed Church of

---

themselves." *See* Bartrum, *Nonpublic Reasons and Political Paradigm Change*, supra note 19. Contrary to Bartrum, however, I do not see Rawls as consequentialist when he says that for "the exercise of political power to be legitimate, the ideal of citizenship imposes a moral, not a legal duty--the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason." RAWLS, POLITICAL LIBERALISM, *supra* note 88, at 217.
The reason why I do not see this as consequentialist, is because Rawls is, in fact, affirming that all of the participants in the political process are autonomous in their ability to make their own choices provided the reasons offered can be rationally established.

[129] Particular religious traditions, for example, may have different ways to resolve conflicts in apparent doctrine. But there is no overarching way to finally decide conflicts between different Christian denominations, let alone with doctrines of other non-Christian faiths.

[130] http://en.wikipedia.org/wiki/Religion_and_homosexuality.

America, American Baptist Church, and various conservative Evangelical churches attest that same-sex marriage is no marriage at all, that it demeans the status of opposite-sex marriage (the "true" marriage), that it is a perversion and an excuse for sinning.[131] Certainly in a public debate between holders of these diametrically opposed positions, there is no middle position they can come to because there is no common ground. It is simply not plausible that diametrically opposite positions on matters of religion, morals and metaphysics can be left for settlement in public debate, especially where the issue, however it gets resolved, will have some important affect on someone's fundamental rights.

Some have argued, while acknowledging what I just said to be true, that this is the very reason why nonpublic reasons must be included in such debates. They have suggested, as with the same-sex marriage issue, that although the religious positions do not seem to leave much room for compromise, when one also brings into the forum public reasons as well, then one can see a way to protect the "sacredness" of marriage, while at the same time affording all the rights, duties, and benefits of marriage for both same and opposite-sex couples, as established by law.[132]

Some of these thinkers have even suggested that affording all persons the rights and benefits of marriage under the guise "Civil Unions" without affording them the name "marriage" actually operates to resolve this difficult debate, and that this solution would likely not have happened if the political/legal discussion of marriage had limited itself to just considering only the public reasons involved. They argue that this is what the state and society gain by now

---

[131] *Id.*

[132] *See, e.g.,* http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx.

including both nonpublic as well as public reasons into the debate.[133] What these compromisers fail to appreciate, however, is that their proposed compromise of the state creating "civil unions" itself proves to be unsatisfactory to both sides in the debate, except perhaps as an interim solution to resolving certain immediate legal problems that same-sex couples face.[134] That is because it puts government on the side of affirming a higher-level status for certain relationships because they are based in marriage over others based bon civil law, strictly because of a religious preference.

The reason why the compromise doesn't satisfy either side is because its very premise is designed to keep intact a normative distinction that neither side can be truly satisfied with. Many same-sex couples simply will not accept that their relationship in the eyes of the state should be viewed as less than what appears to them as an equivalent relationship involving opposite-sex persons.[135] Indeed, many religious people who hold convictions that do *not* condemn homosexuality will likewise feel similarly demeaned.[136] That some other religions might see the

---

[133] *See, e.g.,* http://debatepedia.idebate.org/en/index.php/Debate: Civil unions vs. gay marriage. *See generally* Vincent J. Samar, *Privacy and its Relationship to the Debate Over Same-Sex Marriage Versus Unions*, DEPAUL L. REV. 54.3(2005): 783-804.

[134] Civil Unions, because they provide all the rights and benefits of marriage, at least at the state level, help resolve questions concerning health care decisions, property inheritance, state taxes, etc.

[135] In *Kerrigan v. Commissioner of Public Health*, 957 A. 2d 407 (2008), the Supreme Court of Connecticut agreed "with the plaintiffs that '[m]aintaining a second-class citizen status for same-sex couples by excluding them from the institution of marriage is the constitutional infirmity at issue."

[136] *ABC Poll: Majority now Supports Gay* Marriage, March 18, 2011, http://hotair.com/archives/2011/03/18/abc-poll-majority-now-supports-gay-marriage/.

> Support is up by a striking 23 points among white Catholics, often a swing group and one that's been ready, in many cases, to disregard church positions on political or social issues. But they have company: Fifty-seven percent of non-evangelical white Protestants now also support gay marriage, up 16 points from its level five years ago. Evangelicals, as noted, remain very broadly opposed. But **even in their ranks, support for gay marriage is up by a double-digit margin**.

Id. (bold in original).

matter differently is of no importance when the net affect is to put the state on one side or the other of what is essentially a religious debate. But that is what occurs when nonpublic reasons enter the discussion. And it is a particular concern when the state takes on a position in favor of one religious position over another, or over no-religious position at all. It comes about because governmental institutions carry the authority of the whole people and, thus, are likely to affect—in varying way—the well being of the whole people, especially when what is at stake is a social institutions that has a long-standing relationship with culture, family, and tradition.

Interestingly, the one compromise that might have truly resolved the issue but politically had no chance of being accepted would be for the state to get out of the business of naming marriages all together and just call every couple's significant relationship a civil union. However, because marriage already possesses cross-cultural connections along with deep cultural roots to familiar ways of life, the solution of civil unions for everyone is unlikely to be accepted. And to provide civil unions only to one group of citizens is effectively to create two different classes of citizenship when the only apparent reason for doing so is to protect the religious views of some ion the society. This is not a stable situation in a pluralistic society.

On the practical side, accommodationist approaches also will prove too cumbersome to offer much help here. Americans hold too many different religious beliefs on too many things to make accommodation workable for all but maybe the leading religions, and even here there is much doubt. Trying to accommodate just the religions with the larger number of members would likely be an incredible task. Trying to accommodate all religious views is practically non-doable.

E. Incommensurability Argument

The above four discussions have attempted to establish a normative justification for the First Amendment Establishment clause. A point that was present to all four justifications was the lack of a commonly accepted standard for the determining the truth of religious doctrines. In this respect, religion doctrines, like propositions in metaphysics and to a certain extent morality, do not share the same degree of certainty as propositions of science and mathematics.[137] Religious doctrines must in the final analysis be based on faith rather than observation or even formal deduction from purely neutral premises. The consequence of this is that different groups of people by virtue of different histories, cultures, and traditions, are likely to hold to different religious doctrines, associated to different worldviews, at least within limitations of reasonableness, which itself can be an open ended question.[138] And among these different religious groups it will often prove very difficult, if not impossible, to find common ground, especially where the worldview with which the doctrines attach is itself very different.[139] I want to emphasize this last point.

Most of the major upheavals in science have occurred when the governing paradigm failed to account for new observations in a way that can be made coherent with the prevailing theory as a whole. When enough such contradictions occur, it is usually by virtue of some surge of creative insight that a new paradigm emerges capable of bringing within its framework the

[137] Contrary to mathematics, where propositions, other than basic axioms, can be shown to be true by deduction, the truth of propositions of science must be shown by induction. This means that claims in science, even at the level of scientific laws, can never be shown to be apodictically true. At most, they can be asserted assertorically, as facts about the world for which, after much investigation, there has not been found any counterexample that cannot be accounted for within the framework of current understanding.

[138] The limitation of reasonableness means that the doctrine is not internally inconsistent or so incompatible with human life experience as to be irrelevant to the obtainment of human goods.

[139] *See* http://en.wikipedia.org/wiki/Religion.

formally outlining examples. And this new theory will last for so long, and no longer, than it can continue without too much disturbance from countervailing examples.

Science inspirations sometimes emerge that are not, strictly speaking, based on mediate observations. Still, for a theory in a scientific area to be accepted, it must ultimately stand the observational test. This means that the theory must first, be compatible with previously well-established theories in the field; second, the theory must be able to go beyond merely accommodating existing outlining examples but, to the extent new examples are likely to be uncovered, the theory should be able to predict their existence; finally, at least among scientific theories, if two theories are fairly equivalent in their ability to explain and predict, if one is simpler in how it operates, it tends to be correct.[140]

In contrast, alternative religious views do not rely on observation to the same extent; they may rely on anecdotal evidence and will try to explain the particular matter in question. Beyond this, however, there isn't the same kind of basis for judging their truth that applies between alternative scientific theories. More importantly, the incommensurability that sometimes occurs between scientific theories is even more paramount between scientific and religious theories.[141] This is important because sometimes religious, or religiously based arguments (like "intelligent design") are offered as alternative scientific explanations to be taught in the public schools for how the world came into existence.[142]

---

[140] *See* IRVING M. COPI ET AL, INTRODUCTION TO LOGIC, 14th ed., 522-25 (Upper Saddle River, NJ: Prentice Hall, 2011).

[141] I want to thank Professor Kevin Davey of the University of Chicago Philosophy Department for putting me onto this point.

[142] Thomas Kuhn points to three types of incommensurability that can occur between scientific theories. Methodological incommensurability occurs when there is no common measure between successive scientific theories, suggesting that a change from one theory to another will most likely be expressed in some new language of evaluation. The above-discussed methods for evaluating scientific theories would still stand, but the choice is tween theories would likely

For these and related reasons, institutions, whose function it is to operate among different groups of people holding very different religious views, if they are to survive by more than just their ability to wield power, must be sensitive to what they can and cannot legitimately claim to be true. Surely, they can claim what most people's preferences are: their likes and desires at any given time. This is an empirical claim and often an economic one. Institutions can also speak to the long-term effects on social relations from adopting different grounding principles concerning the way the institution will operate, provided they can render some real evidence for their view. In this sense, they can promote a limited set of worldviews provided the views supported can be established either by empirical observation or formal rational deduction. Beyond these limitations, however, institutions that operate among different religious and nonreligious groups need to be sensitive to what they cannot say or do, if long-term stability reinforced by human dignity is to be preserved. I make this point because, although perfect objectivity may be an illusion, there is sufficient basis to establish a common intersubjectivity within scientific areas to allow for coordinated common action provided the discussion is limited to only observational reasons.[143] And in this respect, science and notions of incommensurability provide an analogous reference point for the kinds of reasons governments can rely upon when making decisions likely

---

encompass new understandings of measurement. Ineffability comes in to because certain new statements about the subject matter will only be understood after the new theory is adopted. Here I am reminded how statements in a non-scientific arena, specifically Kantian epistemology, concerning, e.g., the apriori forms of sensibility or even the categories, would not be understand within either Humean empiricism or Aristotelian specific empiricism (I take this term from Alan Gewirth), although Aristotle does provide a table of categories. Finally, taxonomic incommensurability may also occur when subsets of inter-defined terms cannot be translated across theories because the different taxonomies are mutually exclusive. *See* http://plato.stanford.edu/entries/incommensurability/; *see also* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 2.6 (Chicago: University of Chicago Press, 1962).

[143] *See Objectivity (Science)*, http://en.wikipedia.org/wiki/Objectivity_%28science%29.

to affect the fundamental concerns and interests of their citizens. The same cannot be said of non-public, religious reasons.

4. Boundary Conditions

For purposes of this part I will assume that the above four normative and one scientific discussion provide adequate grounds to justify a non-establishment of religion principle for democratic governments to operate within pluralistic societies. The question here is how easy will it be to discern the borders to this principle in practical terms given that governments may also have non-religious, public, reasons based on their responsibilities to insure the common good that might impact religion. Is there a principle of adjudication for determining when government can and cannot impact religion (either positively or negatively) if it is in service to non-religious, public reasons?

A. The Doctrine of Double Effect

I want to suggest the that doctrine of double effect might be just the kind of principle that is needed to help clarify this border. Although originally developed within Thomistic studies, it has been applied beyond Catholic theological thinking. The doctrine is most often used to justify an action which has as one of its effects a result that one should otherwise avoid.[144] According to the *Stanford Encyopedia of Philosophy*, St. Thomas Aquinas is actually credited with first discussing the principle while explaining that killing another person in self-defense may not violate the natural law, provided one's purpose was to save their own life, rather than take the

[144] http://en.wikipedia.org/wiki/Principle_of_double_effect,

life of another.[145] According to *The New Catholic Encyclopedia*, for the doctrine to apply, four conditions for its application must be met:

> 1. The act itself must be morally good or at least indifferent.
> 2. The agent may not positively will the bad effect but may permit it. If he could attain the good effect without the bad effect he should do so. The bad effect is sometimes said to be indirectly voluntary.
> 3. The good effect must flow from the action at least as immediately (in the order of causality, though not necessarily in the order of time) as the bad effect. In other words the good effect must be produced directly by the action, not by the bad effect. Otherwise the agent would be using a bad means to a good end, which is never allowed.
> 4. The good effect must be sufficiently desirable to compensate for the allowing of the bad effect.[146]

Nor is the doctrine confined strictly to Catholic moral teaching. Warren Quinn provides a secular non-absolutist view of the doctrine recasting it as "a distinction between direct and indirect agency," rather than as "between and merely forseen harm,"[147]

> Quinn's view would imply that typical cases of self-defense and self-sacrifice would count as cases of direct agency. One clearly intends to involve the aggressor or oneself in something that furthers one's purpose precisely by way of his being so involved. Therefore, Quinn's account of the moral significance of the distinction between direct and indirect agency could not be invoked to explain why it might be permissible to kill in self-defense or to sacrifice one's own life to save the lives of others.[148]

More recently and possibly along the Quinn line of thought, Justice Stevens stated in his concurring opinion in *Washington v. Glucksberg* that

> Today we hold that the Equal Protection Clause is not violated by the resulting disparate treatment of two classes of terminally ill people who may have the same interest in hastening death. I agree that the distinction between permitting death to

---

[145] http://plato.stanford.edu/entries/double-effect/#Formulations (citing ST.THOMAS AQUINAS, SUMMA THEOLOGICA, II-II, Qu. 64, Art.7).
[146] *Id.* (citing F. J. CONNELL, "Double Effect, Principle of," NEW CATHOLIC ENCYCLOPEDIA (Volume 4), 1021 [New York: McGraw-Hill, 1967]).
[147] *Id.* (citing Quinn, Warren, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18(4) PHIL. & PUB. AFF. 334–351 [1989]).
[148] *Id.*

> ensue from an underlying fatal disease and causing it to occur by the administration of medication or other means provides a constitutionally sufficient basis for the State's classification.[149]

The case involved the state of Washington's ban on physician-assisted suicide. Justice Stevens remark indicated what the Court saw as an important distinction between physician assisted suicide and allowing the patent freedom from medical interventions making use of extraordinary procedures that would, at most, only temporarily prevent the disease from running its final course. Although indicating some skepticism as to how well the distinction always holds up, Justice Steven's comment clearly suggests a willingness by the Court to see how far the doctrine of double effect might be pushed to distinguishing cases in which the only difference might be how directly the actor was involved.[150]

By contrast, in Establishment clause cases it seems like the greater fear is suspicion over government's true intentions. Consequently, joining the more traditional interpretation of the doctrine of double effect to the First Amendment prohibition of government establishment of religion, by treating any benefit or burden to religious practice as the wrong or harm government should be avoiding, it seems clear that the application would embolden more the neutrality doctrine put forth by Justice Brennan's in *Marsh v. Chambers*,[151] than it would Justice Black's total separation thesis in *Everson v. Board of Education*.[152] The reason why is because, as Justice Brennan dissent citing the Lemon test in *Marsh* implied, there may be other cases arising

---

[149] Washington v. Glucksberg, 521 U.S. 702, 750 (Stevens, J., concurring, 1997).
[150] Justice Stevens did note that "[u]nlike the Court, however, see *Vacco, post,* at 801-802, I am not persuaded that in all cases there will in fact be a significant difference between the intent of the physicians, the patients, or the families in the two situations." *Id.* (citing *Vacco v. Quill*, 521 U.S.793 [1997], decided that the same day, in which the Court upheld a New York ban on physician-assisted suicide while permitting state to let patients decide whether or not to refuse life-sustaining treatment.)
[151] 463 U.S. 783, 803-805 (1983) (Brennan, J., dissenting).
[152] 330 U.S. 1, 18 (1947).

in which an important governmental purpose, combined with a secular effect, and not much government entanglement with religion, would justify a very limited and unintended involvement with religion. In other words, there may be purposes for government action—economic, political, social—that are unrelated to benefitting any religion, or even the idea of religion, generally. The fostering of those purposes need not be with the intent to produce any effect on religion. The result of government engaging in the activity must be a social good independent of any effect it might have on religion whatsoever. Finally, the good effect must be felt by all those affected by it to pretty much out weigh any bad effect caused by any benefit to or burden placed upon any religious practice.

Although Justice Brennan did not say what exactly such a case might look like, his neutrality position combined with his cite of the Lemon test suggests that such a case could exist. The purpose of my incorporation of the doctrine of double effect here tries to afford some further instruction concerning how such a case might be determined by suggesting some scenarios in which it might plausibly be made out. The scenarios are meant to be instructive and speculative, but not necessarily reference any specific cases past or current.

B. Casuistry

In this section, I will speculate on how some of the cases mentioned above might have been resolved had Justice Brennan's neutral view been followed bolstered by the doctrine of double effect. Starting with state supported school voucher payments to parents, who choose to place their children in private or parochial schools, the following considerations are relevant. First, are their adequate public schools available that the children could attend? Adequacy would be determined here in terms of safety, availability, and academic quality. Safety could be measured

based upon police reports concerning disruptive behavior as well as internal reports developed by the principle and her staff. Availability goes to where the school is located in reference to where the children live: Are there school buses to afford safe transportation to and from school? Academic quality would be assessed based upon teacher preparation, size of library, and availability of Internet and audio-visual services on a comparable basis with other schools in the district.

A school would not fail the academic quality test if there was a small shortfall from the mean—because the building was older, the books not as new—but would fall short of the mean if, taking these factors into account, students would be unlikely to obtain the same preparation of those attending schools whose academic quality is more to the center of the bell curve. The point here is to discern a legitimate governmental purpose for aiding parents in securing a quality education for their children, which presumably also benefits society in the long run, and can be found to be consistent with a general right to well-being of all people. In no event, should the money be designated toward assisting parents in securing a religious education for their children; and it would probably be safer, in the sense of avoiding even the appearance of governmental entanglement, if the money were paid directly to parents and not to the school.

Turning next to questions of symbolic endorsement, courts must be on guard against efforts that, although they don't directly benefit a particular religion, have the symbolic character of affording governmental approval towards certain religious practices. The idea is to guard against instances where symbolic approval becomes a stand-in for affording a higher social status to particular religions. At the same time, individual freedom of expression, including religious expression, cannot be denied.[153] Therefore, places where traditionally the public

[153] *See* U.S. Constitution, amend. 1 (regarding freedom of speech and free exercise of religion).

congregates, such as a public square or park, are usually designated public forums because in a free society it is thought that these places should be open to both secular and religious expressions. Still, government in its recognition of these places or its designation of more limited public forums for particular purposes (such as for theatrical performances) must always remain neutral to any content of the expression insofar as it implicates religion. [154]

Perhaps more interesting are questions concerning symbolic expressions that are mixed religious and nonreligious. Take, for example, displays of the Ten Commandments in on the state courthouse, Christmas lights along a commercial street, government placement of a crèche or menorah in a public holiday display, and similar scenarios perhaps involving Santa Clause and his Elves. Here one finds the potential for mixed motives between supporting basic universal values as might be depicted by Commandments Four thru Ten or commercial sales during times when such sales are likely to be made. The problem, of course is that the impermissible effect cannot be willed by the government agency, which suggests if there is an alternative way to secure its secular purpose, government is obligated to adopt that way.

In the case of the Ten Commandments two problems arise that call into question any governmental depiction that makes the Commandments a central focus in a public courthouse: one concerns religious history; the other religious content. The religious view of the history of the Ten Commandments was that God delivered these to Moses on Mount Sinai to govern the Jewish people. The content problem is that the first three commandments refer to duties owed directly to God. Consequently, it would be hard to understand a government intention to prominently exhibit the Ten Commandments inside a state courthouse that did not also intend to

[154] For purposes of this article, I do note consider whether government might provide other content restrictions (as, e.g., might apply to obscenity) as this is more a freedom of speech rather than establishment of religion issue.

highlight their religious significance. The matter would be different if rather than prominently displaying the Commandments themselves, government erected a display of Western culture that exhibited several moral codes, including the Code of Hammurabi, along with the Ten Commandments to illustrate the development of the rule of law. In that instance the intention could be to call to mind how the current state of law evolved from various predecessors. The permissible motive of showing historically how society got to where it is would be the outcome of the governmental action.

Government displays of holiday lights along a commercial street during the Christmas season seems much more attenuated to conveying any hidden religious purpose than, let's say displays of the crèche or menorah. The governmental purpose here could very easily be understood to be the promotion of commercial sales as a way to boaster economic output, greater employment, and even closer family ties, during a time when retail sales are particularly important for the economy to do well. The problem with also displaying the crèche or menorah is that then the tie to particular religious traditions is much more closely drawn. Nor is it necessary for the government to be involved in this aspect of the holiday depictions; private businesses and religious institutions are free to put up whatever displays they believe will benefit their purpose. And, of course, in areas like public parks where it is reasonable to perceive a public forum is present, various private depictions of religious symbols is certainly acceptable so long as government is not the provider of the symbol, the symbol is not standing alone so as to suggest some official approval of it,[155] and government's only involvement with the symbol is

[155] This requirement is necessary to avoid even the appearance of an official endorsement. In the case of a religious symbol like a crèche placed in a public park during the holidays, it would be better, to avoid even the appearance of an official endorsement, that the symbol not be grouped *only* with other "Christmas" decorations, even if they are secular in nature, like Santa Claus' sleigh.

related to its involvement with the park generally. Government can maintain and protect what is present in the parks during these occasions as part of its general duty to servicing the park and protecting those who make use of it. In all these instances, the fourth condition of double effect seems applicable, namely, that the good effect be sufficiently desirable to compensate for any possible suggestion of impermissible establishment.

Some kind of prayer or meditation often accompanies major events in individual's lives, such as graduations, major sporting events, and arenas where honors or tributes are conveyed. The question is can a public institution, like a state college or university, set a program that includes even a nondenominational prayer? Based on the neutrality position I have adopted, the answer would be no because to formally specify a religious prayer, even a nondenominational one, would be government establishment of religion. On the other had, such events often include statements of valedictorians, class presidents, and others. If one of these persons wants to include a prayer as part of their statement, it would seem well within their speech rights to do so. If the speeches were specified in the program, then specification of the prayer would not be an establishment of religion but simply a specification of what the speakers were planning to say. The point is not to appear hostile to religion at the same time the state should not be establishing or even accommodating religion, as opposed to free speech. The point is to be neutral towards religion.

Similarly, public universities may in the name of advancing a broad based diverse cultural education afford formal recognition and even funding to student organizations that themselves both encourage broad-based discussions of many points of view within the greater university community and provide students a place to meet others, who may initially share similar viewpoints. What is not permissible would be to allow these organizations to also

discriminate as to who, within the university community, can become members for then the university would not be just encouraging learning and dialog, along with safe places for students to interact, which on its face is neutral to religious establishment. In that instance, the university would actually be endorsing (and perhaps funding) a private religious view within the campus community.[156]

Providing a five or six day work week does not violate the establishment condition provided that the requirement is based on workers' health and does not require employers to recognize any particular day because it is religiously sacred. By the same token, if the public by and large expects at least for certain industries to have a specific day of the week off, and employers agree that it makes economic sense to make that the required day off; government should not be involved in determining what constitutes specifically a economic/cultural employment decision. Similarly, dismissal from school during regular school hours with parental permission to attend religious education courses ought not to be banned provided the same excuse would be allowed parents for their children to attend any other cultural activity and, further, provided that the time off from school will not impede the student's progress in their secular studies. Otherwise, parents could simply have these students attend these religious courses during non-school hours.

Where a more profound issue might arise concerns what might be taught in secular public school courses. Certainly, as part of the study of history and culture, schools can make reference to religion, as they can to other cultural events that underlie historical or cultural events. What

[156] The case, *Christian Legal Society v. Martinez*, 561 U.S. ___, 130 S.Ct. 2971 (2010), presents a good example where the Court allowed a university to draw a line between nondiscrimination and non-establishment and freedom of religion. Although not overtly a non-establishment case, the Court's protection of the university's policy to guarantee all students nondiscrimination in official university organizations in effect affirmed that the school would also not be establishing religion.

they cannot do is profess the truth of any religious view, or isolate out particular religious views for special consideration outside the historical or cultural content in which they occur. Nor can they manipulate cultural context to overemphasize a single religious viewpoint. Teaching that the puritan migration to the New England colonies was to escape religious persecution in Europe is fine. Teaching aspects of puritan theology as a reason to adopt puritan beliefs or even to be more modest is not.

But what about science courses involving evolution or health courses on sex education. Here the limitations of what I earlier discussed under incommensurability become paramount. If there are good heath reasons for teaching, for example, how contraceptives avoid transmittal of sexually transmitted diseases including AIDS, parents should not be allowed to opt their children out of these courses. Parents are certainly free to teach that they have a different point of view including abstinence, but they cannot take students out of classes where it is empirically well-established that knowledge about contraception will prevent the spread of sexually transmitted diseases and AIDS. Here one confronts a possible conflict between the free exercise of religion and the state's establishment of programs to ensure the public health. Since the latter are clearly grounded on empirical data generally verifiable, the state has a compelling duty to make this information generally available.[157] And although parents generally have a right to control what information their children are exposed to, that right cannot overcome the state's compelling interests to provide information that will protect the health and welfare of its citizens, especially those most vulnerable due to age or lack of information.[158] To do any the less would be for

[157] *See generally School Health Education to Prevent AIDS and Sexually Transmitted Diseases*, WORLD HEALTH ORGANIZATION Series 10, (1992), whqlibdoc.who.int/**aids**/WHO_**AIDS**_10.pdf.
[158] In *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), citing *Meyer v.* Nebraska, *infra*, the Supreme Court struck down a compulsory education act requiring children between the ages of eight and sixteen to attend "a public school for the period of time a public school shall be held

government to abuse its responsibility to protect the public health in the name of affirming particular religious beliefs. The beliefs can still be affirmed by the parents; what should not be allowed is for the parents to perhaps unwittingly be able to place their children in a potentially dangerous situation due to lack of information. Similarly, government cannot excuse children from receiving an academically recognized proper education because of fear that they may not return to following the lifestyles of their parents. The U.S. Supreme Court's decision in *Wisconsin v. Yoder*[159] was a bad decision, because if after returning to following the lifestyles of their parents, the children find they don't fit in, they may be too ill-equipped from having been let out of the public secondary school system to pursue alternative economic gain elsewhere.[160]

The educational issue is slightly more interesting when it comes to teaching evolution in science courses. Here the claim by some religious exponents is that science courses that teach evolution are directly attacking their religious belief that God created the world. And, if one means by "creation" simply a *causal* link between some divine intentionality and what exists, then clearly the teaching of evolution would seem to affront that religious view. It is interesting

---

during the current year", as a violation of the liberty of parents under the due process clause of the Fourteenth Amendment to determine the upbringing of their children by sending them to private or parochical school In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court had struck down a state law prohibiting foreign language instruction in school "the natural duty of the parent to give his children education suitable to their station in life..." *Id.* at 402. *See generally Education Law: An Overview*, LEGAL INFO. INST., CORNELL UNIV. L. SCH., http://www.law.cornell.edu/wex/Education.

[159] 406 U.S. 202 (1975). In *Wisconsin v. Yoder*, the U.S. Supreme Court allowed Amish parents to remove their children from secondary public education on the ground that students who continued in the public school system often didn't return back to the farm. The parents' claimed that the Wisconsin law, which required compulsory education, violated their free exercise of religion rights to have their children learn and accept their way of life. The problem is that granting the parents in this context free exercise of religion implicates the state in burdening the children's economic potential so as to make it very difficult for them to chose, should they want, any alternative course of life for their future.

[160] *See* BRIAN BARRY, CULTURE AND EQUALITY 207-298 (Cambridge, MA: Harvard University Press, 2001).

to note, however, that science's teaching of evolution need not be seen to affront a religious view of creation provided the religious view does not insist on limiting God to the standard model of causation. In other words, if the religious view sees God as operating outside of space and time and thus in eternity, then what appears in scientific understanding as grounded in either quantum uncertainty or Darwinian mutation and natural selection, may appear to the divine quite differently. (Of course, in that instance even the word "operating" as mentioned in the last sentence itself becomes vague.) Still, in that circumstance there needn't be any conflict between religion and science, since what would be taught in the science class would simply be a different—if not incomplete—picture from the standpoint of the believer of what was professed. On the other hand, if a believer insists that courses in science should understand the origin of the universe and human life as a creation of God following the standard causation model, then there would be a conflict. For then God would be understood to be operating within space and time, and within those constraints, quantum uncertainty and Darwin's understanding of the origin of the species would appear to provide the much better fit to what the empirical evidence shows of how humans came to be and the universe arose respectively.[161] But this just goes to show all the more that schools should *not* be teaching creationism or any form of "intelligent design" as part of science *both* because public schools should not be professing religious beliefs generally and also because the religious view is simply not science, which is the empirical study of the physical universe and how it operates.[162]

---

[161] *See generally* PHILLIP KITCHER, ABUSING SCIENCE: THE CASE AGAINST CREATIONISM (Cambridge, MA: MIT Press, 1982).

[162] *See* COPI ET AL,, INTRODUCTION TO LOGIC 130, at 513; *see* also 171-72, 173-78 (Cambridge, MA: MIT Press, 1982). Kitcher notes that

> Creation "science" is not a promising rival to evolutionary theory. It is not integrated with the rest of science, but is a hodgepodge of doctrines, lacking independent support. It offers no starting predictions, no advance in knowledge.

Turning to public legislation that may implicate religion, neutrality requires the strongest separation of state involvement in religion, pro or con, even over what a majority of the public might freely prefer otherwise. If the state affords tax exemptions to nonprofit organizations and some churches operate as nonprofit organizations, granting the same exemption from property taxes granted other nonprofit organizations does not offend the Establishment clause. Nor is the Establishment clause offended if faith-based organizations receive public funds to provide community support in areas such as drug and substance abuse, where the program is already established, there is not a comparable state run program available, and the moneys are not being used to support adherence to the doctrines of any religious faith. On the other hand, public financial support is clearly not justified for faith based adoption centers that refuse to place children in homes of same-sex couples, where the state has allowed a marriage or civil union, and the psychological literature suggests that such placements would benefit the children.

> We cannot commend it for any ability to shed light on questions that orthodox theories are unable to answer. Nor can we praise it for offering a definite alternative that might help scientists in their quest for an improved biological or geological theory. "Scientific" Creationism has no evidence that speaks in its favor, partly because creationists are so meticulous in leaving their doctrines blurred. Finally, there is no excusing it on grounds that t's resources are, as yet, untapped. Ample opportunity has been provided. Numerous talented scientists of the eighteenth and nineteenth centuries tried creationism. Nothing has come of their efforts, or the efforts of their modern successors. Where the appeal to evidence fails so completely, the appeal to tolerance cannot succeed.

Id. at 171-72. Similarly, the more recent efforts to make a form of creationism, "Intelligent Design" scientific, have faired no better than past efforts to develop "scientific" creationism. *See* Eugenie C. Scott and Glenn Brach, *Intelligent Design: Not Accepted by Most Scientists,* NATIONAL CENTER FOR SCIENCE EDUCATION, August 12, 2002, http://ncse.com/creationism/general/intelligent-design-not-accepted-by-most-scientists.

In these instances, government support of such centers would, in fact, be an intentional affirmation of a religious position.[163] If public run (or other private run) adoption centers were not available in the area, the greater duty for government would be to create them. By the same concern, to insure that government is not entangled with religion, requiring that a nonprofit that receive a tax exemption, not to lobby does not offend the free exercise of religion. The point is to keep the two from becoming inexorably entangled.

The recent debate over same-sex marriage raises an important establishment question in addition to the more commonly raised free exercise and equal protection questions. The establishment question arises because it is generally conceded that much of the argument for keeping marriage a separate institution arises out of a religious rather than a secular basis.[164] But if that is the case, then government non-establishment of same-sex marriage, especially where there exists independent secular reasons to do so—reasons attaching, e.g., to equal protection—can be seen as an establishment of a particular religious point of view. This is the case even if the government follows the intermediate position of providing civil unions. For although civil unions would provide all the same rights an benefits of marriage—at least at the governmental

---

[163] *See, e.g., Illinois Catholic Charities Drop Lawsuit Against State Over Gay Adoption, Foster Care*, HUFFINGTON POST, Nov.15, 2011, http://www.huffingtonpost.com/2011/11/15/illinois-catholic-chariti_n_1093649.html

[164] In *Varnum v. Brien*, 763 N.W. 2d 862 (2009), the Iowa Supreme Court said:

> This contrast of opinions in our society largely explains the absence of any religion-based rationale to test the constitutionality of Iowa's same-sex marriage ban. Our constitution does not permit any branch of government to resolve these types of religious debates and entrusts to courts the task of ensuring government *avoids* them. The statute at issue in this case does not prescribe a definition of marriage for religious institutions. Instead, the statute declares, "Marriage is a civil contract" and then regulates that civil contract. Thus, in pursuing our task in this case, we proceed as civil judges, far removed from the theological debate of religious clerics, and focus only on the concept of civil marriage and the state licensing system that identifies a limited class of persons entitled to secular rights and benefits associated with civil marriage.

Id. at 65. (citations omitted).

level where they are recognized—the reality is that they would create two distinct classes of citizens—those who can marry and those who can only unionize—based on a religious grounding. Such a status difference, established by government, with no greater purpose than to affirm a particular religious belief concerning the "sacredness" of marriage would in itself constitute an establishment of religion. The First Amendment clearly prohibits government from establishing a religion, and by the arguments in this article, I hope, I have shown that even seemingly benign efforts by government—such as creating civil unions in place of marriage—are an establishment that the First Amendment does not allow.

Finally, an interesting recent question implicating both the establishment and Free Exercise clauses came about when, under the new American Health Care Law, the Department of Health and Human Services (HHS) issued regulations requiring employer and university health insurance plans to cover birth control for students and employees without a co-payment.[165] The law already provides a limited exemption for religious institutions, which the Church claimed was further narrowed by the HHS by not including religious based institutions.[166]

---

[165] Denise Gardy, *Ruling on Contraception Draws Battle Lines at Catholic Colleges*, NEW YORK TIMES, January 29, 2012.

[166] Patient Protection and Affordable Care Act, 48 U.S.C § 5000 (d) (2010), provides the following exemption for a religious employer under Sec. 5000A. Requirement to maintain minimum essential coverage:

> ''(d) APPLICABLE INDIVIDUAL.—For purposes of this section—
> ''(1) IN GENERAL.—The term 'applicable individual' means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).
> ''(2) RELIGIOUS EXEMPTIONS.—
> ''(A) RELIGIOUS CONSCIENCE EXEMPTION.—Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that such individual is a member of a recognized religious sect or division thereof described in section 1402(g)(1) and an adherent of established tenets

Catholic colleges and universities have objected to the requirement on the ground that it would force "them to violate their beliefs and finance behavior that betrays Catholic teachings."[167] The problem is not the same as a religious institution running an adoption center that receives public funds but refuses to place children for adoption with otherwise qualifying same-sex couples. In the latter case, if the law provides that adoption determinations should be governed by the "best interest of the child" standard, the state can surely withhold its resources from adoption agencies, which refuse to comply with that standard.[168] There the state not only has a compelling interest in the placing unwanted children in homes that provide love as well as financial and psychological support for them, it also has a financial stake in ensuring that this goal is met in a way that doesn't violate its own laws. With regard to the HHS situation, the concern from the state's point of view is in seeing to it that needed health benefits be provided to employees of private as well as public employers, and maybe also that students attending large educational

---

or teachings of such sect or division as described in such section.

According to the California Catholic Conference, the Health Resources and Services Administration adopted, on August 1, 2011, the following guidelines narrowing the statutory religious exemption only to apply to a "religious employer," defined as 'one that (1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code.' HHS notes that these provisions of the Code refer to 'churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.'" http://www.cacatholic.org/index.php/issues2/religious-liberty/conscience-rights/190-background-mandated-contraceptive-and-sterilization-coverage.

[167] Denise Gardy, *Ruling on Contraception Draws Battle Lines at Catholic Colleges*, *supra* note 165. *See generally The HHS Mandate for Contraception/Sterilization Coverage: An Attack on Rights of Conscience,* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, January 20, 2012, www.**usc**cb.org/issues-and-action/.../preventiveqanda2012-2.pdf.

[168] The best interest of the child standard is the usual standard that governs the placement of children up for adoption. *See, e.g.,* Florida department of Children and Families v. In re Matter of Adoption of X.X.G. and N.R.G., 45 So. 3d 79, 85 (Fla. Ct. App. 2010).

organizations should receive these same benefits whether or not the institution is religiously affiliated or not.[169]

What differentiates the health insurance situation from the adoption situation is that the contents of the insurance program are mandated. Is the state, in effect, thus forcing religious institutions to act contrary to their beliefs? Or, is this a situation, where by deciding to operate as a college, university, or hospital, the religious institution sheds its protected status for the sake of being able to enter into these business/professional operations? One concern might be that because religious institutions often enter into many varied kinds of business associations, these businesses would otherwise all be exempt from having to provide reproductive benefits as part of their employees' health insurance plans, notwithstanding that it was the public health policy of the state to make these benefits generally available. Are these businesses somehow transformed into religious institutions deserving protection under the First Amendment religious clauses because of their affiliation? If so, how far could an affiliation with religion extend?[170] One could envision religious institutions intentionally associating with large business in part to promote their own religious values over the more secular values of the state.

What about other secular value requirements promoted by the states? If members of some organization shared a common disdain for a particular group, especially if the disdain was religiously based, could the organization then claim in the name of freedom of association an exemption from civil rights protections that would otherwise prevent them from

[169] Stephen Prothero *My Take: real Catholics Not opposed to Birth Control*, February 3, 2012, CNN, http://religion.blogs.cnn.com/2012/02/03/my-take-real-catholics-not-opposed-to-birth-control/.
[170] *See Using Religion to* Discriminate, January 10, 1012, http://www.aclu.org/using-religion-discriminate.

discriminating.[171] In *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*,[172] the Supreme Court in a unanimous decision recently held that a "called" teacher versus a lay teacher was a religious minister and could not file an American with Disabilities Act lawsuit against the school where she worked. If this decision portends a future direction for religious affiliations beyond where the person hired is determined to be a minister of the faith, a serious problem of religious neutrality would arise, except now it would arise not because the state was being less than neutral, but because religious institutions were expanding into areas traditionally thought to be subject to state regulation. Thus, both *Hosanna-Tabor* and the growing debate over what health insurance requirements the state can mandate for *large* religiously affiliated institutions, turns on its head the traditional First Amendment requirement that the state should be neutral towards religion. In its place emerges a new but equivalent requirement that religion should also be neutral, at least in the sense of not blocking the state from fulfilling its legitimate secular concerns, such as avoidance of unwanted pregnancies.

Following a pattern similar to what the Court adopt—against a First Amendment Freedom of Association challenge—in *Roberts v. United States Jaycees* might perhaps be the best way to insure neutrality on the side of religion by further insuring that the state's intent be only on effectuating its policy concerns and not intruding onto religious beliefs under the doctrine of double effect.[173] There the Court decided that a private organization, the Jaycees, was bound by the Minnesota Human Rights Act to admit women as full voting members over

---

[171] In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), Justice Stevens warned in his dissent that the Court's willingness to let the BSA exclude from scout leadership a young man simply because he was gay was contrary to the view that the First Amendment right to association "is not a freedom to discriminate at will, nor is it a right to maintain an exclusionary membership policy simply out of fear of what the public reaction would be if the group membership were opened up. *Id.* at 686-87 (Stevens, J., dissenting).

[172] 132 S. Ct. 694 (2012).

[173] 468 U.S. 609 (1984).

their objection that this would violate their First Amendment right to freedom of association. In his majority opinion, Justice Brennan wrote:

> Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of cases, the court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for purposes of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The constitution guarantees freedom of association of this kind as an indispensible means of preserving other individual liberties.[174]

The Court in the Jaycees case found that the Jaycees fitted mostly into the latter grouping where state restrictions against discrimination—because of the organization's large size and otherwise lack of selectivity for membership—would not hinder its members' ability to associate for particular purposes. Similarly, in the present case, Catholic colleges and universities tend to be fairly large organization, and selection for employment or to receive a degree usually does not hinge on a prior commitment to adhere to a particular religious doctrine.[175] In such contexts, members associate for a variety of educationally related purposes so that applying the same health care insurance rules to these institutions, as are applied to non-religiously affiliated institutions of the same kind, does not appear to have as its intended purpose alteration of a particular religious belief. Nor is the effect of the directive likely to implicate religious belief, given the size of the organizations involved, any more than paying taxes has more than a *de minimis* effect on policies one may not always agree with. To the contrary, the intended purpose seems clearly related to the state's legitimate concern to deal with certain wide-ranging health

[174] *Id.* at 617-18.
[175] *See* http://www.catholiccollegesonline.org/parents-students/10-reasons-for-attending-catholic-college.html.

issues—such as unwanted pregnancies and the spread of dangerous venereal diseases, including AIDS.

Since the story of HHS's directive that religiously affiliated universities and hospitals offer birth control through their employee health insurance plans broke, the Obama administration has reframed the HHS directive to require insurance companies to directly provide these services where there exists a religious objection to providing the service.

> [President] Obama announced that rather than requiring religiously affiliated charities and universities to pay for contraceptives for their employees, the cost would be shifted to health insurance companies. The initial rule caused a political uproar among some Catholics and others who portrayed it as an attack on religious freedom.[176]

While the adjustment to the original directive was no doubt effected by political lobbying by President Obama's more liberal Catholic allies, it has not proven enough to satisfy the more conservative Catholic bishops, which issued a statement calling for "'legislative action on religious liberty' and 'calling rescission of the mandate the 'only complete solution.'"[177] Still, for purposes of this article, which concerns the constitutional boundary of the Establishment clause, the change should be enough to show that the Administration's *intent* need not be seen as an attack on religious liberty, under the Doctrine of Double Effect, but rather as an effort to provide comparable health care services to all employees of large institutions who may have need of them. The conflict between the Catholic Church and the Administration is perhaps more the result of each side searching for a way to navigate the new territory inscribed by the Affordable Health Care Law to continue to satisfy its own legitimate beliefs and purposes, rather than one side trying to displace the legitimate beliefs and purpose of the other.

---

[176] Helene Cooper and Laurie Goodstein, *Rule Shift on Birth Control Is Concession to Obama Allies*, NY TIMES, February 10, 2012.
[177] *Id.*

Conclusion

This article has taken a close look at some recent Supreme Court decisions involving the First Amendment prohibition on the establishment of religion. It has concluded that no clear pattern of determination seems to reflect Court decisions in this area. In part this is due to the fact that the justices have disagreed over exactly how to interpret the prohibition against establishment of religion. Varying judicial views of the Establishment clause from viewing it as a total separation of church and state, to simply requiring state neutrality in religious matters, to actually trying to accommodate religion have led to inconsistent results and confusion.

In this article, I have tried to suggest a new direction to clear up some of the confusion and put future Establishment clause cases on a clearer, if not, firmer footing. I have suggested that considering not just the history of the clause or the cases the Court has decided under it, but also considering overlaps from various philosophical justifications for the clause—including justifications from rights theory, political liberalism, utilitarianism, and communitarianism—would provide a clearer grounding for its understanding and would eliminate entirely the "accommodationist" approach. I have also suggested how taking into account what in moral theory is known as the doctrine of double effect would further limit the various judicial views to just neutrality, and would also provide both clearer and firmer conditions for how government should operate to insure its own neutrality.

Having done that, the article speculates on how future Supreme Court decisions in which establishment claims will likely play a significant role ought to be decided. Obviously, without specific facts to consider one cannot be sure as to what would be the best answer in these cases. What one can hope to do is clarify the theory so that the theory is able to provide a clear

direction for how to get started in the decision process, what questions to ask, and what concerns to attend to. If I have been successful in this effort, then this article should stimulate greater discussion and debate in this very important area of the interrelation of religion and the state, which will no doubt become even more significant in the not-too-distant future.