Northern Illinois University Law Review

Volume 33 | Issue 1 Article 4

9-1-2012

Religion / State: Where the Separation Lies

Vincent J. Samar

Religion / State: Where the Separation Lies

VINCENT J. SAMAR*

I. 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 determine 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

* 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* (Univ. Press of Kan., 1998), *The Right to Privacy: Gays, Lesbians and the Constitution* (Temple Univ. 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.

these questions.[1] Where it appears the Establishment Clause overlaps the Free Exercise Clause or the Establishment Clause might interfere with the Free Exercise Clause, this Article will draw out the reasons why; otherwise, the focus will primarily be just on 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.

II. 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 . . . ."[3] 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 with protecting

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 bolster 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*, FINDLAW.COM, http://caselaw.lp.findlaw.com/data/constitution/amendment01/05.html (last visited Jan. 15, 2013).

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.'" (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970))); Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136, 144-45 (1987) ("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.").

3. U.S. CONST. amend. I.

states' rights and personal liberties.[4] Thereafter, the amendment was ratified by three-quarters of the states in 1791.[5] 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.[6] 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.[7]

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 for what principle it would later come to stand. 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.[8]

> 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."[9]

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

---

4. *Creating the Bill of Rights*, LIBR. OF CONGRESS, http://myloc.gov/Exhibitions/creatingtheus/BillofRights/Pages/default.aspx (last visited Oct. 30, 2012).

5. *Dec. 15, 1791: Bill of Rights Is Finally Ratified*, HISTORY.COM, http://www.history.com/this-day-in-history/bill-of-rights-is-finally-ratified (last visited Oct. 30, 2012).

6. William W. Van Alstyne, *What Is "an Establishment of Religion?,"* WM. & MARY L. SCH. SCHOLARSHIP REPOSITORY: FAC. PUBLICATIONS (1987), http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1761&context=facpubs.

7. *See id.*

8. *Religion and the Founding of the American Republic: Section I, Part 1*, LIBR. OF CONGRESS, http://www.loc.gov/exhibits/religion/rel01.html (last visited October 30, 2012).

9. *Id.*

state would then force conformity with and membership in the state religion.[10]

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.[11] 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 "inforced 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.[12]

Unfortunately, the intolerance of European societies would not be offset by greater tolerance in the American colonies.[13]

> 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

---

10. *Religion in Colonial America: Trends, Regulations, and beliefs*, FACING HIST. & OURSELVES, http://nobigotry.facinghistory.org/content/religion-colonial-america-trends-regulations-and-beliefs (last visited Oct. 30, 2012).

11. FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 248 (1985).

12. *Religion and the Founding of the American Republic*, *supra* note 8.

13. *Id.*

> 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. 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."[14]

There were some exceptions to colonial religious intolerance, although these were few and fairly limited.[15] Jewish settlers that lived in Dutch-held areas of Brazil fled after a Portuguese conquest that threatened to turn them over to the Inquisition.[16] Twenty-three fled by ship to New Amsterdam (which would become New York) and founded the colony of Rhode Island.[17] 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 Charles II to Quaker leader William Penn's father, to charter the colony of Pennsylvania.[18] Eventually, Pennsylvania would become a haven to various German sects who shared similar beliefs to the Quakers.[19] "Although the Stuart kings of England did not hate the Roman Catholic Church, most of their subjects did . . . ."[20] "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."[21] In contrast to the New England colonies, where the Church of England was regarded with suspicion, Virginia became a bastion of Anglicanism.[22] 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."[23]

Forrest McDonald, a historian, notes that one of the

---

14. *Id.*
15. *Religion in Colonial America*, *supra* note 10.
16. *Religion and the Founding of the American Republic: Section I, Part 2*, LIBR. OF CONGRESS, http://www.loc.gov/exhibits/religion/rel01-2.html (last visited October 30, 2012).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Religion and the Founding of the American Republic*, *supra* note 8.
21. *Id.*
22. *Religion in Colonial America*, *supra* note 10.
23. *Religion and the Founding of the American Republic*, *supra* note 8.

> [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 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 churches.[24]

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.[25]

"The Virginia Declaration of Rights had effectively disestablished the Anglican Church, though Baptists and other dissenters were not thereby accorded full rights. Whether because of disestablishment, the war, or other reasons, the 1780s witnessed a decline in religiosity in Virginia . . . ."[26] 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.[27] "Another bill, introduced in the same session, would have levied a 'General Assessment' to support teachers of Christianity without regard to denomination."[28] 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.[29]

---

24. MCDONALD, *supra* note 11, at 43.
25. *See id.*
26. *Id.* at 44.
27. *Id.*
28. *Id.*
29. MCDONALD, *supra* note 11, at 44-45 (citing JAMES MADISON, *Letter from Lee to Madison of Nov. 26, 1784, and Editorial Notes*, *in* 8-9 THE PAPERS OF JAMES MADISON 149, 195-97, 295-98, 430-31 (Robert A. Rutland et al. eds., 1962)).

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.[30] Law professor Ian Bartrum follows Noah Feldman's analysis that several founders were particularly concerned with protecting the right of conscience by way of the religious clauses.

> If we believe Feldman, both 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 the basis for Luther's 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 I will not retract anything, since it is neither safe nor right to go against conscience." Thus, it is with Luther, and Calvin immediately thereafter, that the definitively Protestant conception of an individual conscience that imposes duties upon us prior to any civil or ecclesiastical authority was born.[31]

Bartrum goes on to suggest that this concern was largely to "protect individual conscience against state intrusion precisely because it is a source of nonpublic reasons—reasons that we cannot hope to protect through the public political process—and because conscience imposes deontological duties upon us with which the just state should not interfere."[32]

The Scottish philosopher David Hume saw factions based on religion as destructive.[33] 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 that they must proselytize their system of beliefs and failure to achieve conversions will be per-

---

30. Ian C. Bartrum, *Nonpublic Reasons and Political Paradigm Change*, 85 ST. JOHN'S L. REV. 473, 476 (2011) (citing Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 358 (2002)).

31. *Id.*

32. *See id.* at 481.

33. MCDONALD, *supra* note 11, at 163.

ceived either as a failure on their part or a sign that evil is taking over.[34] As a consequence, discussion of religious tolerance often takes 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.[35] This can be seen in the history of colonial religious intolerance and even in debates between Federalists who favored adoption of the Constitution of 1787 and Anti-Federalists who did not.[36]

According to law professor Laurence Tribe, there were a number of different views concerning religion held among the framers of the Constitution.[37]

> [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.[38]

In *Federalist No. 10*, headed *Utility of the Union as a Safeguard Against Domestic Faction*,[39] Madison 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."[40]

---

34. *See* Charles G. Finney, *Converting Sinners a Christian Duty*, THE GOSPEL TRUTH, http://www.gospeltruth.net/1854OE/540104_conv_sinners.htm (last visited Oct. 27, 2012).

35. *See* The Religious Society of Friends (Quakers), *Quaker Beliefs and Practices*, RELIGIOUSTOLERANCE.ORG, http://www.religioustolerance.org/quaker2.htm (last visited Oct. 27, 2012).

36. HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 22 (1981).

37. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1158 (2d ed. 1988).

38. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1184 (Vicki Been et al., eds., 3d ed. 2006) (citing TRIBE, *supra* note 37, at 1158-60).

39. The Federalist No. 10 (James Madison).

40. *Id.*

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 and 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."[41] One way to guarantee security was for the new Constitution to provide that there would be no religious qualification for public office.[42] 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.[43]

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," and that to suggest otherwise would be despotism.[44]

Those Anti-Federalists who opposed adoption of the Constitution were also somewhat divided on how to set the relationship of government and religion. Many Anti-Federalists favored tolerance of the Protestant sects but not necessarily of other religions, including other Christian religious sects.[45] However, others would have also strengthened churches by compelling contribution, but not faith.[46] But there did seem to be agreement against a religious test for public office, as avoiding a possible threat to religion.[47]

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 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, this would be the test for public virtue. At least this would

---

41. THE FEDERALIST NO. 51 (James Madison).
42. THE FEDERALIST NO. 59 (James Madison).
43. U.S. CONST. art. VI, para. 3.
44. THE FEDERALIST NO. 69 (Alexander Hamilton).
45. STORING, *supra* note 36, at 22.
46. *Id.* at 23.
47. *Id.* at 64.

be the 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 land-ownership, than in the northern industrial New England states where private virtue was more highly touted.[48]

> 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.[49]

Forrest McDonald provides this clue to understanding George Washington, who 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. McDonald discusses an essay by Joseph Addison explaining the meaning of scenes from Addison's play *Cato* (where Cato the Younger holds together the remnants of the Roman republican Senate). McDonald quotes Addison's essay and explains what Addison meant as follows:

---

48. MCDONALD, *supra* note 11, at 75.

49. *Id.* at 76 (citing HAROLD TREVOR COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION (1965); RODGER D. PARKER, THE GOSPEL OF OPPOSITION: A STUDY OF EIGHTEENTH-CENTURY ANGLO-AMERICAN IDEOLOGY (1975)).

> "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, [Addison] 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 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.[50]

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 caused by requiring religious conformity.

B. RECENT CASES

For purposes of this discussion, which concerns the current Supreme Court understanding of the Establishment Clause, I will only briefly note how the clause came to be incorporated against the states, as that goes to a different constitutional question. Suffice it to note that there were few establishment cases prior to 1879 when, in *Reynolds v. United States*,[51] the U.S. Supreme Court upheld a federal law prohibiting polygamy in the then territory of Utah. Mormons asserted this law violated their religious faith. Although ultimately upholding the law, the Court, per Justice Sutherland, cited Thomas Jefferson's 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] [A]mendment."[52] 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 Clause applies against the states via the Fourteenth Amendment Due Process Clause.[53] Since the time of its initial incorporation against the states, however, scores of cases have come about testing the limits of state actions affecting religion. Indeed, it is fair to say that the Court's current

---

50. MCDONALD, *supra* note 11, 195-99 (second ellipsis in original) (citing 4 THE WORKS OF JOSEPH ADDISON 308 (Richard Hurd ed., London, 1881)).

51. Reynolds v. United States, 98 U.S. 145 (1878).

52. *Id.* at 164.

53. Everson v. Bd. of Educ., 330 U.S. 1, 5 (1947).

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 in flux 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, "[t]here are three major competing approaches to the Establishment Clause" that various Supreme Court Justices have discussed: strict separation, neutrality theory, and accommodation and equality."[54] 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 should not 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 does not 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 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. This showed itself to be especially 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, affect 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."[55] The strict separation "approach says that to the greatest extent possible government and religion should be separated."[56] In *Everson*

54. CHEMERINSKY, *supra* note 38, at 1192.
55. *See id.*
56. *Id.*

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."[57] 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.[58] 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 because the payments were made to parents regardless of religion and not to any religious organization.[59] 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.[60]

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 non-attendance.

---

57. *Everson*, 330 U.S. at 18.
58. *Id.* at 3.
59. *Id.* at 18.
60. *Id.* at 45 (Rutledge, J., dissenting) (citation omitted).

> 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.[61]

Although the Court's own use of the phrase "at least" suggested that the clause might mean more than this, it seemed content with the idea that unless the 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. 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."[62] In that case, Justice Brennan identified four specific purposes behind the Establishment Clause that would seem to support neutrality toward the 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.'[63]

---

61. *Id.* at 15-16.

62. CHEMERINSKY, *supra* note 38, at 1225.

63. *Id.* at 1193 (quoting Marsh v. Chambers, 463 U.S. 783, 803-05 (1983) (Brennan, J., dissenting)).

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.[64]

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 Exercise Clauses], read together as they should be, prohibit classification in terms of religion either to confer a benefit or impose a burden.'"[65] Following this approach, "[i]n recent years, several Supreme Court Justices have advanced a 'symbolic endorsement' test in evaluating the neutrality of a government's action."[66] 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 non-adherents that they are outsiders or less than full members of the political community.[67]

In *Capitol Square Review & 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."[68] Absent a majority opinion, in applying the symbolic endorsement test, seven of the Justices felt that permitting the erection of the cross "would not violate the Establishment Clause as a reasonable observer would not per-

---

64. *Id.*

65. *Id.* (quoting Phillip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961)).

66. *Id.* at 1194.

67. County of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring).

68. CHEMERINSKY, *supra* note 38, at 1194 (citing Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 758 (1995)).

ceive it as a state endorsement of religion."[69] Justices Stevens and Ginsberg dissented, arguing that symbolic endorsement did exist by the mere fact the state *is* permitting the erection on its property.[70] Justice Scalia objected to using symbolic endorsement at all where "the issue [involved] private speech on government property," which he thought was already protected by the First Amendment. [71]

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.[72] 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."[73] 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 and equality approach, holds that:

> [T]he 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.[74]

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."[75] This seems to give importance of the Free Exercise Clause over the Establishment Clause. An establishment violation occurs only if government establishes a church, coerces religious participa-

---

69. *Id.* (citing *Pinette*, 515 U.S. at 766-67).
70. *Id.* at 1195 (citing *Pinette*, 515 U.S. at 799-800 (Stevens, J., dissenting)).
71. *Pinette*, 515 U.S. at 766-67.
72. CHEMERINSKY, *supra* note 38, at 1196 (citing Van Orden v. Perry, 545 U.S. 677 (2005)).
73. *Id.* (citing *Van Orden*, 545 U.S. at 745).
74. *Id.*
75. *Id.* at 1197 (citing Mitchell v. Helms, 530 U.S. 793, 810 (2000)).

tion, or favors some religions over others.[76] "Several Justices discussed this in *Lee v. Weisman*, where the Court declared unconstitutional clergy-delivered prayers at public school graduations."[77]

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.'"[78] But could it not 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 this Article aims to show, 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*,[79] 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."[80] 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*.[81] Because the test eliminates both the intention to affect religion and any substantial consequence for religion, these Justices believe it erects a wall of separation between government and religion.[82] Whereas, "[j]ustices favoring the

---

76. Erwin Chemerinsky, *A Fixture on a Changing Court: Justice Stevens and the Establishment Clause*, 106 NW. U. L. REV. 587, 598 (2012).

77. *Id.* (discussing Lee v. Weisman, 505 U.S. 577 (1992)).

78. *Id.* at 1197-98.

79. *Id.* at 1202 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).

80. *Id.* (citing *Lemon*, 403 U.S. at 612-13).

81. CHEMERINSKY, *supra* note 38, at 1202 (citing Lynch v. Donnelly, 465 U.S. 668, 690 (O'Connor, J., concurring)).

82. 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*, 449 U.S. 39 (1980), requiring placement of a copy of the Ten Commandments on the wall of all public school classrooms. Similarly, in *McCreary County v. ACLU*, 545 U.S. 844 (2005), a requirement for placement of the Ten Commandments in all county buildings was held unconstitutional. This contrasts with an earlier case, *McGowan v. Maryland*, 366 U.S. 420 (1961), where a state law requiring business closures on Sunday was held to be constitutional. In

accommodationist approach [such as Justices Rehnquist, Kennedy and Scalia] urge the overruling of the *Lemon* test."[83] These Justices believe the purposes for the 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.[84] These Justices also seem concerned that the *Lemon* test places too strong a bar on the Free Exercise Clause, thereby shifting the emphasis too much toward non-establishment.[85] 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*."[86] 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 Breyer voted to give the equipment, along with Justice O'Connor, appearing un-

---

McCreary, the Court clearly saw the placement to have a secular purpose; whereas, in *McGowan* it could be argued that the purpose was secular—to limit an excessively long workweek in a manner most would find conducive. *McCreary*, 545 U.S. 844; *McGowan*, 366 U.S. 420. Utilizing the second prong of the *Lemon* test, the requirement for a secular effect, the Court in *Estate of Thornton v. Caldor*, *Inc.*, 472 U.S. 703 (1985), held unconstitutional a Connecticut statute that "provided that no person may be required by an employer to work on his or her Sabbath." CHEMERINSKY, *supra* note 38, at 1204. The Court felt that the law "favored religion over all other interests." *Id.* at 1205. Similarly, in *Corporation of the Presiding Bishop of the 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." *Id.* The church discharged an employee who worked for a nonprofit it ran for ineligibility to attend temples. After discussing *Lemon*'s first two prongs, the Court went on to note that there was no unacceptable governmental entanglement with religion in this case. Previously, it recognized small involvements would not necessarily rise to the level of an impermissible entanglement. Regarding the final prong of the *Lemon* test, the prohibition of excessive government entanglement in religion, the Supreme Court, in *Mitchell v. Helms*, 530 U.S. 793 (2000), held, without a majority opinion, that the government may give instructional equipment to parochial schools so long as it is 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. *Id.* It is not clear how *Mitchell* affects the no-entanglement prong of the *Lemon* test. *See id.* The Court did not explicitly overrule or disavow of the entanglement inquiry. *See* CHEMERINSKY, *supra* note 38, at 1192-93.

83. CHEMERINSKY, *supra* note 38, at 1202.

84. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1380 (17th ed. 2010).

85. CHEMERINSKY, s*upra* note 38, at 1206.

86. *Id.*

concerned with how this "affects the no-entanglement prong of the *Lemon* test."[87]

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."[88]

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 ensure neutrality by invoking the endorsement test to determine if an establishment has occurred. Chemerinsky noted that in *Lynch v. Donnelly*,[89] "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.[90] The idea here is to ask whether a par-

---

87. *Id.*

88. *See id.* at 1206. 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. CHEMERINSKY, *supra* note 38, at 1207 (citing Widmar v. Vincent, 454 U.S. 263 (1981)). In *Rosenberger v. Rector & 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 Rosenberger v. Rector & Visitors of the Univ. of Va., 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 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000)). More confusing seem the Court's decisions concerning school release programs. Although in *Illinois ex rel. 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 the school building by outside teachers," *Id.* at 1215 (citing Illinois *ex rel.* McCollum v. Bd. of Educ., 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 Zorach v. Clauson, 343 U.S. 306 (1952)). Furthermore, in *Wallace v. Jaffree*, the Court did not allow an Alabama law to stand that "authorized a moment of silence in public schools for 'meditation or voluntary prayer.'" *Id.* at 1217 (quoting Wallace v. Jaffree, 472 U.S. 38 (1985)).

89. Lynch v. Donnelly, 465 U.S. 668 (1984).

90. CHEMERINSKY, *supra* note 38, at 1222-23. In this context, Chief Justice Burger wrote that Pawtucket's purpose was secular because the city 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 fully

ticular 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 likely to be perceived. Is it likely to be perceived by the public as an endorsement of religion? The endorsement test, "[f]ocusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device."[91] The question in these situations is twofold: has the endorsement benefited or harmed the religious institution? Second, how will the public most likely perceive 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 directly or indirectly coerce participation when the state creates an orthodoxy.[92] 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.[93] Among the concerns Justice Kennedy expressed was fear that the attempt by the principal to keep the prayer nondenominational by giving the rabbi delivering the

---

> shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. *E.g.*, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). 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, as the District Court found, is not neutralized by the setting, the overall holiday setting changes what viewers may 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.

Lynch, 465 U.S. at 687-92 (O'Connor, J., concurring). Justice O'Connor's view is compatible with the Court's subsequent decision in *County of Allegheny v. ACLU*, 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 found the display of the nativity scene unconstitutional but allowed the menorah as it was accompanied by other religious and secular symbols. *Id.*; *see* CHEMERINSKY, *supra* note 38, at 1223.

91. *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring).

92. Lee v. Weissman, 505 U.S. 577, 592 (1992).

93. *Lee*, 505 U.S. 577.

prayer a pamphlet on composing nondenominational prayers would impact the religious content.[94] 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."[95] The presenter would want to be invited back and keep a good reputation in the community. Perhaps 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.[96]

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 originated in *Mitchell v. Helms*, which made use of only the first two prongs of the *Lemon* test when the matter concerned governmental aid to parochial schools.[97] It will be remembered that the case concerned the Elementary and Secondary Education Act of 1965,[98] under which federal education funds would be given to state and local governmental agencies that would then loan such educational materials as library, 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 suggested that aid to religious groups is now allowed, so long as it furthers a legitimate *secular* governmental purpose and the aid is granted in the same way to a nonreligious

---

94. *Id.*
95. *Id.* at 588.
96. *Id.* at 595.
97. Mitchell v. Helms, 530 U.S. 793 (2000).
98. 20 U.S.C.A. §§ 7301-7373 (West 2002).

organization.[99] 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.[100] But, as three Justices dissented in *Mitchell*—Stevens, Souter, and Ginsburg—it would be difficult to ensure that this type of support could not be used for religious purposes.[101] 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.[102] First, the aid must not be *only* given to "nonpublic schools and their students" but to students attending public schools as well.[103] Second, there is a presumption against providing aid *directly* to nonpublic schools unless the aid is "provided directly to the students."[104] 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.

In other areas, where religion had long been connected to government activities, the Court seems very accommodationist. Earlier it was noted that in *Marsh*, 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."[105] The Court also upheld, in *Walz v. Tax Commission*, "a state law that provided property tax exemptions for real or personal property used exclusively for religious, education-

---

99. *Helms*, 530 U.S. at 809. Justice Thomas's plurality decision, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy, stated: "In 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.* (Thomas, J., plurality opinion). Justice O'Connor, joined by Justice Breyer, wrote separately arguing that the plurality opinion was too broad and ended the longstanding distinction between direct and indirect aid. *Id.* at 837 (O'Connor, J., concurring).

100. *Id.* at 809 (Thomas, J., plurality opinion).

101. CHEMERINSKY, *supra* note 38, at 1228.

102. *Id.* at 1241.

103. *Id.*

104. *Id.*

105. *Id.* at 1225 (citing Marsh v. Chambers, 463 U.S. 783 (1983)).

al, or charitable purposes,"[106] but it denied a similar exemption in *Texas Monthly, Inc. v. Bullock* "that was available only for religious organizations."[107] 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.[108] In what follows, this Article presents four contemporary, normative philosophical frameworks that should provide a more solid ground for interpreting the religious clauses—especially the Establishment Clause—as well as one philosophy of science framework, which when connected to the normative frameworks, makes that grounding even more secure.

III. PHILOSOPHICAL JUSTIFICATIONS FOR THE ESTABLISHMENT CLAUSE

This part considers four very different, normative philosophical frameworks that 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 frameworks each represent an important development in the history of political philosophy.[109] Moreover, each makes an important contribution to the four traditions that are most frequently associated with political philosophy, namely, the rights tradition, political liberalism, common good, and the communitarian tradition.[110]

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

---

106. CHEMERINSKY, *supra* note 38, at 1229 (citing Walz v. Tax Comm'n, 397 U.S. 664 (1970)).

107. *Id.* (citing Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989)).

108. *See* Van Orden v. Perry, 545 U.S. 677, 746 (Souter, J., dissenting).

109. *See* ALAN GEWIRTH, POLITICAL PHILOSOPHY 1 (Lewis White Beck ed., 1965). 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.

Id.

110. *See, e.g.*, *supra* note 88; *infra* notes 128, 134, 177-78, 199.

positions they defend.[111] More importantly, no other competing theory falling within any of the first three traditions *(there is no clear opposite to the fourth tradition)*—libertarianism in contrast to Rawls's 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 that are offered. A fifth framework, incommensurability, is not normative.[112] It is adopted from the philosophy of science. Its role here is 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. When interpreting laws, including constitutional provisions, courts are bound to only rely on certain kinds of second-order reasons that replace other first-order reasons.[113] When the First Amendment prohibits Congress and the states from establishing a state religion, this 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.[114] The obligation of the courts, including the Supreme Court, to obey that constitutional command is another second-order reason.[115] The Establishment Clause was designed to

---

111. *See, e.g.*, *supra* note 88; *infra* notes 128, 134, 177-78, 199.

112. It is not normative in the sense that it does not prescribe how things ought to be, but rather how things are. *See* Robert Schenk, *Positive and Normative*, CYBER ECON., http://ingrimayne.com/econ/Introduction/Normativ.html (last visited Oct. 31, 2012).

113. *See* JOSPEH RAZ, PRACTICAL REASONS AND NORMS 123-48 (1990). Joseph Raz has noted that what distinguishes courts, as "norm-applying" institutions, from legislatures, is that the former are limited in a way the legislatures are not, in relying on only a certain limited set of rationales for determining what are the norms of the legal system. In *Practical Reason and Norms*, Raz notes that courts are "norm-applying" institutions and these are the *primary* institutions of the modern legal system. *Id.* at 136.

> 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 139.

114. *See supra* Part II.A.

115. In *Marbury v. Madison*, Chief Justice Marshall announced two fundamental second-order reasons that would thenceforth govern constitutional interpretation:

offset first-order concerns by way of a determinate second-order prohibition.[116] Still, because interpretations of the Establishment Clause may 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.[117] This Article, therefore, considers each of the four normative frameworks and a scientific framework for what it might add to the existing legal arguments the Supreme Court has already recognized.

A. RIGHTS THEORY

So far, this essay has focused on the First Amendment Establishment Clause because this is the religious clause in which the Supreme Court seems least secure.[118] However, as mentioned above, there are two religious clauses in the First Amendment.[119] The Free Exercise Clause follows right after the Establishment Clause and basically prohibits the government from interfering with the free exercise of religious belief.[120] Earlier, it was mentioned that the Free Exercise Clause provides a counterpoint to how far the

---

> 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 the 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.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-178 (1803).

116. For example, those who seek a strict separation of church and state, like Justice Souter, will see some interpretations of the Establishment Clause as overbroad—allowing too much government involvement. Others, like Justice Scalia, preferring a more accommodationist approach for religion will see some interpretations limiting the range of government involvement as too narrow.

117. Joseph Baldacchino, *Religion and the Constitution*, 12 HUMANITAS, no. 1, 1999 at 110 (reviewing KENNETH R. CRAYCRAFT, THE AMERICAN MYTH OF RELIGIOUS FREEDOM (1999), *available at* http://www.nhinet.org/jb-cray.htm).

118. *See Free Exercise of Religion*, FINDLAW FOR LEGAL PROFS., http://caselaw.lp.findlaw.com/data/constitution/amendment01/05.html (last visited Oct. 31, 2012).

119. U.S. CONST. amend I.

120. *See Free Exercise of Religion*, FINDLAW FOR LEGAL PROFESSIONALS, http://caselaw.lp.findlaw.com/data/constitution/amendment01/05.html (last visited Oct. 31, 2012).

courts will go in applying the 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.[121]

Justification for the Establishment Clause under the rights theory can be seen to piggyback on Free Exercise 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.[122]

For example, the Church of England is the official church of England, and the monarch is its leader.[123] The monarch appoints archbishops, bishops, and deans of the cathedrals on the advice of the prime minister.[124] Except for this and the occasional ceremony, such as a coronation, the church imposes no other obligations on the English people, including seeking taxpayer support. [125] Of course, with England becoming an increasingly multicultural society, even this much of a connection may seem too much.[126] I point this out to suggest that the justification for the American Establishment Clause 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.[127] Locke's idea here is not that con-

---

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

122. *Church of* England, BBC, http://www.bbc.co.uk/religion/religions/christianity/cofe/cofe_1.shtml (last updated June 30, 2011).

123. *See id.*

124. *See id.*

125. *Funding the Church of England,* THE CHURCH OF ENGLAND, http://www.churchofengland.org/about-us/facts-stats/funding.aspx#where (last visited Oct. 27, 2012).

126. *Church of* England, BBC, http://www.bbc.co.uk/religion/religions/christianity/cofe/cofe_1.shtml (last updated June 30, 2011).

127. For a civil libertarian view of the importance of property rights, see ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 171-72 (1974). For a more liberal egalitarian view, see JOHN RAWLS, POLITICAL LIBERALISM 298 (1993); *see also* JOHN RAWLS, COLLECTED PAPERS 420 (Samuel Freeman ed., 1999).

science is infallible, although he believed reason should hold sway over anything we might feel.[128] Joseph Baldacchino of the National Humanities Institute, reviewing Kenneth R. Craycraft's *The American Myth of Religious Freedom*, points out that

> 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, [Craycraft] says, "this is a tactical rhetorical move designed 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."[129]

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.[130] That right, which Locke treats as basic to all other property rights, also provides a foundation for limiting the powers of government.[131]

In his *Second Treatise of Government*, 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.[132] He said:

> 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

---

128. *See* Alexander Moseley, *Political Philosophy of John Locke*, INTERNET ENCYCLOPEDIA OF PHIL. (Apr. 4, 2005), http://www.iep.utm.edu/locke-po/.

129. Baldacchino, *supra* note 117, at 114-15 (citations omitted) (quoting CRAYCRAFT, *supra* note 117, at 40-41, 45).

130. *See* Moseley, *supra* note 128.

131. *See id.*

132. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27 (Cambridge Univ. Press 1960) (1690).

> *Labour power* with, and joined to it something that is his own, and thereby makes it his *Property*.[133]

Having found the ground for property in the animation that is human life/human industry, Locke goes on to argue for its protection[134]:

> 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.[135]

Applying Locke's 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*.[136] 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*.[137] 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 is justified, given that the Lockean view would clearly justify the Free Exercise Clause.[138] 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 discovered.[139] Or, it could be more indirect by government allowing the use of public lands purchased at taxpayer expense to display religious symbols.[140]

---

133. *Id.*
134. Emerson v. Bd. of Educ., 330 U.S. 1 (1947).
135. LOCKE, *supra* note 132, § 134.
136. *See* Emerson v. Bd. of Educ., 330 U.S. 1, 18 (1947).
137. *See* Marsh v. Chambers, 463 U.S. 783, 803-05 (1983) (Brennan, J., dissenting).
138. *See supra* pp. 26-27.
139. *See* MCDONALD, *supra* note 11.
140. Warren Richey, *Crosses on Public Lands: Did the Supreme Court Leave the Legal Issue in "Shambles"?*, THE CHRISTIAN SCI. MONITOR (Oct. 31, 2011), http://www.csmonitor.com/USA/Justice/2011/1031/Crosses-on-public-land-Did-Supreme-Court-leave-legal-issue-in-shambles.

Or, perhaps the government has purchased or is maintaining the symbols.[141] 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.[142] Still, another possibility is government support of transportation or tuition programs to parents of students attending parochial schools.[143] 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 protection the right to property would afford, given that many indirect benefits to religion will be supported by nonreligious purposes, will be discussed in the next section. For now, this Article will 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 the state level—were offered as a compromise in some states to same-sex couples seeking the full rights and benefits of marriage that opposite-sex couples enjoyed under the Fourteenth Amendment.[144] 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.[145] 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.[146] 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

---

141. *Supreme Court Ruling in Utah: Religious Symbols Case Unlikely To Be Final Word*, AMERICANS UNITED (Feb. 25 2009), http://www.au.org/media/press-releases/supreme-court-ruling-in-utah-religious-symbols-case-unlikely-to-be-final-word.

142. *The Faith Based Initiative and "Charitable Chioice,"* ANTI-DEFAMATION LEAGUE, http://www.adl.org/religious_freedom/resource_kit/faith_based_initiative.asp (last visited Oct. 27, 2012).

143. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

144. *See Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html (last updated Jun. 10, 2012).

145. *See id.*

146. *See* Vincent J. Samar, *Privacy and Same-Sex Marriage: The Case for Treating Same-Sex Marriage as a Human Right*, 68 MONT. L. REV. 335, 355-56 (2007).

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 than others, in effect creating what has been described as second-class citizenship.[147] These were same-sex citizens who had all the rights of opposite-sex citizens, but were not quite as worthy of the same degree of "sacred" respect for their relationship as their opposite-sex counterparts.[148] Government was the promoter of this idea by its establishment of civil unions.[149]

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 citizens' lives would similarly be diminished. So, the only way to avoid this is for government to be completely neutral, if not totally separate, from religious establishment.[150] It is an extension of the basic property rights all people have that can be traced back to Locke's argument based on the right to life, which was also influential on Thomas Jefferson and the other drafters of the Bill of Rights.[151] Government should not be involved in any form of establishment of religion.[152]

---

147. *Marriage Versus Civil Unions, Domestic Partnerships*, FREEDOM TO MARRY, http://www.freedomtomarry.org/pages/marriage-versus-civil-unions-domestic-partnerships-etc (last visited Oct. 18, 2012).

148. *See id.*

149. This is not to say that civil 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-sex couples.

150. The other alternative would be for government to get out of the marriage business altogether and call every such relationship a civil union, but this is not a politically likely possibility.

151. *Locke's Influence on the American Ideas of Natural Rights*, LIBR. OF CONGRESS, http://myloc.gov/Exhibitions/creatingtheus/DeclarationofIndependence/RevolutionoftheMind/ExhibitObjects/LockesNaturalRights.aspx (last visited Oct. 31, 2012).

152. 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." Carol V. Hamilton, *The Surprising Origins and Meaning of the "Pursuit of Happiness,"* HIST. NEWS NETWORK (Jan. 27, 2008), http://hnn.us/articles/46460.html (last visited Oct. 27, 2012). 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. *See* BENJAMIN FRANKLIN, THE COMPLEATED AUTOBIOGRAPHY 413 (Mark Skousen ed., 2006). *See also* DAVID HUME, A TREATISE OF HUMAN NATURE 489 (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1739).

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?[153]

For purposes of this Article, Rawls's answer to this question provides the grounds of a justification for the religious clauses contained in the First Amendment, especially the Establishment Clause. Specifically, this Article inquires, "[W]hen may citizens by their vote properly exercise their coercive political power over one another when fundamental questions are at stake?"[154] Rawls's answer to this and the broader question of creating a stable society brings together three main ideas: overlapping consensus,[155] priority of right and ideas of the good,[156] and the idea of public reason.[157]

---

153. RAWLS, POLITICAL LIBERALISM, *supra* note 127, at xviii.

154. *Id.* at 217.

155. *Id.* at 144. There are, 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 is that] 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. 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.

156. *Id.* at 174. 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 ends that transgress those limits have no weight." *Id.* For our purposes, I will not go into details of Rawls's principles of political justice. It suffices for

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."[158] In effect, Rawls is placing a kind of objectivity requirement on the use of political power. Although he does not 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.[159] 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.[160] Rawls says as much when he elaborates his answer in context to the political relationship democracies establish between their citizens.[161]

> 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.[162]

Adopting Rawls's 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 achieve the overlapping consensus required for stability of the democratic state. That is to say, there will not be

---

our purposes that they should provide an account of fairness between citizens that all could rationally affirm.

157. *Id.* at 214. 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 in amending their constitution." *Id.*

158. RAWLS, POLITICAL LIBERALISM, *supra* note 127, at 214.

159. My point here is that Rawls's public reasons, not being based on incommensurable metaphysical, moral, or religious doctrines, operate intersubjectively, like objective reasons in science, in that they provide practical grounds for cooperation. 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 or wrong answer as in an "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.

160. Rawls's "political conception is freestanding: its content is set out independently of the comprehensive doctrines that citizens affirm." Leif Wenar, *John Rawls*, STANFORD ENCYCLOPEDIA OF PHIL., http://plato.stanford.edu/entries/rawls/ (last visited Oct. 31, 2012).

161. Baldacchino, *supra* note 117, at 115 (quoting KENNETH R. CRAYCRAFT, JR., THE AMERICAN MYTH OF RELIGIOUS FREEDOM 45 (1999)).

162. RAWLS, POLITICAL LIBERALISM, *supra* note 127, at 218.

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.[163] 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, there is a kind of reversal from the direction of concern discussed earlier 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, this Article started with 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."[164] Consequently, no political or even ecclesiastical officer has any "business minding the religious affairs of men."[165] This Article 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.[166]

Here, relying on Rawls's understanding of political liberalism, the earlier argument that begins from a property right in one's own conscience works in reverse. Reliance on public reason prevents the establishment of an idea that cannot be reasonably and rationally explained to all those 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 and 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.[167]

---

163. *See id.* at 137.

164. Baldacchino, *supra* note 117, at 115 (quoting KENNETH R. CRAYCRAFT, JR., THE AMERICAN MYTH OF RELIGIOUS FREEDOM 45 (1999)).

165. *Id.* at 114 (quoting CRAYCRAFT, *supra* note 161, at 45).

166. *See supra* pp. 26-27.

167. Here, I disagree with Ian Bartrum that Rawls's argument for using public reasons over nonpublic reasons based on a "duty of civility" is really consequentialist, not deontological. Bartrum, *supra* note 30, at 474. As I have tried to show in my brief sketch of the

Not all find Rawls's argument compelling.[168] Ian Bartrum, for example, has argued allowance of nonpublic reasons can produce the very democratic stability that Rawls's restriction to only rely on public reasons is meant to achieve.[169] In fact, he illustrates his position anecdotally by referring to the New York City Catholic school controversy that occurred in the 1840s.[170] 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.[171] The funding statute restricted the use of public money for sectarian purposes, but at the time "sectarian" was understood to refer "only to the practices of specific religious denominations."[172] However, because the teachers for the Society promoted "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 deaf ears, led a movement to elect state legislators who would be pro-Catholic on the question of funding.[173] Hughes ultimately failed to achieve his political objective that would have made it law for each school district to decide for itself what religious message it would send the children.[174] But the Protestant community also lost in the long run because the controversy involving nonpublic reasons eventually led to the exclusion of "the King James Bible and the Book of Common Prayer as well."[175] 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."[176]

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 in the debate.[177] Indeed, the whole example is very fact dependent. If the effort

---

argument, Rawls's position here is centered in the kind of Kantian autonomy most often associated with rights theory. *See id.*

168. Bartrum, *supra* note 30, at 487.
169. *Id.* at 492.
170. *Id.* at 487-91.
171. Bartrum, *supra* note 30, at 487.
172. *Id.*
173. *Id.* at 487-89.
174. Bartrum, *supra* note 30, at 489-90.
175. *Id.* at 491.
176. *Id.*
177. Although, by the end of the controversy, "Catholics would still have to surrender their children to Protestant nonsectarian schools," which would eventually give way to secularism, the result could have gone the other way if the political forces on the side of sectarian schools had been stronger. *Id.*

of Bishop Hughes had been stronger, the community more powerful, the initial result could have been far less confrontational. If school districts were allowed to choose which religious values to profess, problems would arise as citizens moved between districts either to get into districts whose religious professions they agreed with or to get out of districts whose religious professions they objected to. Although the data is uncertain, a comparable example is reflected in the white flight of the 1960s to escape integrated public schools.[178] And in the religious case, unlike the 1960s situation, there would not be the public reasons related to basic human dignity as the core concept to try and create the necessary overarching consensus to hold society together. Rawls's argument to exclude nonpublic reasons from at least determining final outcomes of the debate seems the more sensible view.

C. UTILITARIANISM

The view of utilitarianism known as "act utilitarianism," derived initially from writings by Jeremy Bentham[179] and later those of John Stuart Mill,[180] was initially not well suited to a discussion of fundamental interests, let alone rights, which neither author would affirm.[181] Neither would affirm such interests 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.[182] Though significant in helping to frame decisions for the short run,

---

178. Jan Blakeslee, *"White Flight" to the Suburbs: A Demographic Approach*, INST. FOR RES. ON POVERTY, www.irp.wisc.edu/publications/focus/pdfs/foc32a.pdf (last visited Oct. 27, 2012).

179. *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Clarendon Press 1907) (1789).

180. *See generally* JOHN STUART MILL, UTILITARIANISM (1863), *reprinted in* ESSENTIAL WORKS OF JOHN STUART MILL (Max Lerner ed., 1961).

181. Mill, who comes closest to a rights viewpoint, clearly disavows it. *See* JOHN STUART MILL, ON LIBERTY (1869), *reprinted in* ESSENTIAL WORKS OF JOHN STUART MILL 264 (Max Lerner ed., 1961).

182. MILL, UTILITARIANISM, *supra* note 180, at 194. 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.

this view of utilitarianism may fail to capture the full importance of the choice in the long run unless it also is "grounded on the permanent interests of man as a progressive being."[183] In this sense, act utilitarianism is not well suited to establishing principles that would operate to secure longer-term values over shorter-term preferences.[184] 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 that are thought necessary to the promotion of satisfaction when exercised to their fullest, to the greatest number of humankind in the long run.[185]

John Stuart Mill can be credited for recognizing this more "ideal form of utilitarianism."[186] 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 "act" utilitarian construction, one might think that would be justified.[187] 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.[188]

Id. 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 difference in quality of pleasures, or 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 not 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.

183. MILL, ON LIBERTY, *supra* note 181, at 264.

184. *See* William H. Stoddard, *Values and the Ethical Life*, TROYNOVANT.COM (Sept. 2010), http://www.troynovant.com/Stoddard/Essays/Why-Not-Utilitarian.html (last visited Oct. 27, 2012).

185. 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.

MILL, ON LIBERTY, *supra* note 181, at 264.

186. *See* MILL, ON LIBERTY, *supra* note 181.

187. *Id.*

188. *Id.*

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, may affect others through himself.[189]

Following this recognition, Mill's next step was to more precisely delineate the types of action this sphere of *self-regarding* actions would encompass.[190] 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, the 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 our 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 combination among 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.[191]

The sense in which Mill speaks of liberty of conscience appears to be as a punisher of immoral action, not necessarily linking it to religious con-

---

189. *Id.* at 265. A fuller algorithm to delineate this notion of a "self-regarding (private) action" is provided elsewhere. VINCENT J. SAMAR, THE RIGHT TO PRIVACY: GAYS, LESBIANS AND THE CONSTITUTION 66-68 (1991). However, for purposes of this Article, Mill's more elusive description suffices. *See id.*

190. *See* MILL, ON LIBERTY, *supra* note 181, at 265.

191. *Id.*

science, nor disavowing it.[192] 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, for example, 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 deemed the better way to handle the problem. Indeed, Mill's argument speaks no more strongly in favor of a free exercise of religion than it does of any other self-regarding, non-other-harming behavior.[193] Although Mill is offering what is, essentially, 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 and his concern to avoid harm to others, which is almost indistinguishable from the 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

192. JOHN STUART MILL, UTILITARIANISM (1863), *in* MARXISTS INTERNET ARCHIVE, http://www.marxists.org/reference/archive/mill-john-stuart/1863/utility/ch03.htm (last visited Oct. 27, 2012). I want to thank Professor Mark Strasser of Capital University Law School for bringing this particular interpretation of Mill's use of conscience to my attention.

193. The point here is that religious beliefs no doubt comprise part of the inward domain of consciousness, unless carried into actions involving other persons.

> 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.[194]

Although Mill never directly considers a purely establishment situation free of impeding the free exercise of conscience, it follows from what has been said above that he would view such a situation as very unjust. The situation would be unjust even if the impediment were very slight, unless it can be fully justified independent of any religious association—and even then, the harm to conscience that is likely to result would 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 people's 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 inconsequential—would open a door to infringements on conscience and would probably produce greater harm than the harm intended to be offset.[195] For these reasons, utilitarians, like Mill, would argue against society taking such actions and, instead, would argue

---

194. MILL, ON LIBERTY, *supra* note 181, at 272-73.

195. *Id.* at 264-65. 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. A point Joel Feinberg makes in regard to the Free Exercise 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 (1985). Similarly, one could say the more likely the establishment is to implicate conscience, the greater the state's interest must be in its establishment.

in favor of restrictions on any establishments that might lead to devaluing the importance of conscience.

D. A COMMUNITARIAN APPROACH

Communitarianism implicates cultural factors—for example, how people see themselves in community—that affect the rights those in the community are thought to possess.[196] It differs from classical liberalism in the sense that communitarians do not see individuals as apart from their communities, but rather recognize that the basic structures of society (i.e., family, community, and religion) are constitutive parts of who these persons are.[197] 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 he is immersed.[198]

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

> 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.[199]

Sandel is not saying that liberalism should uphold any particular religious values. Rather, he is arguing that because individuals are so constituted by their social situations—including often by their religious beliefs—that treating persons in context of Rawls's more recent views on public reason by limiting their speech on public matters to only "public" reasons in effect disrespects the very beings they are. But, if that is the case, then contrary to Rawls's argument, Sandel's argument becomes an argument for the inclusion in public debate and political discourse of values and convictions that are fundamentally religious. This would likely force liberalism to bend to

---

196. *See generally* Daniel Bell, *Communitarianism*, STANFORD ENCYCLOPEDIA OF PHIL., http://plato.stanford.edu/entries/communitarianism (last visited Oct. 31, 2012) (discussing, generally, communitarian criticisms to Rawls's theory of political liberalism).

197. *Id.*

198. *Id.*

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

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 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 would 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. This is especially the case 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." Even then, if the doctor is really being responsive to the patient's question, he should go on to provide what the probabilities are of different outcomes occurring, at least to the extent known within the professional community, and not simply throw the matter up to chance.

Needless to say, if Sandel's view is correct that nonpublic reasons should be part of the public discourse for making decisions, then the proper interpretation of the Establishment Clause might indeed be the interpreta-

tion 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"[200] position of some recent Supreme Court Justices. Whereas, if Rawls's 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.[201] For reasons described in the next section, the complete separation position 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, it is enough to show that an accommodationist view developed along the 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.[202] Take, for example, the current dispute in this country over same-sex marriage being allowed under law. Most Unitarian Universalists, many Presbyterian—and some Quaker—churches, several Jewish sects, and most Buddhists believe God intended marriage to be available to all persons

---

200. *See* CHEMERINSKY, *supra* note 38, at 1102.

201. Here it might be thought that Rawls's 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 themselves." *See* Bartrum, *supra* note 30. Contrary to Bartrum, however, Rawls is not acting as a consequentialist when he says:

> [T]he exercise of political power itself must 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 127, 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.

202. 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.

as a means to their own self-fulfillment.[203] 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, religious groups like the Roman Catholic Church, the Eastern Orthodox Church, the United Methodist Church, the Reformed Church in America, the American Baptist Churches, 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), and that it is a perversion and an excuse for sinning.[204] 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 effect on someone's fundamental rights.

Some have argued, while acknowledging this argument to be true, that this is the very reason why nonpublic reasons must be included in such debates.[205] 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.[206]

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 considering only the public reasons involved. They argue that this is what the state and society gain by now including both nonpublic as well as public reasons into the debate.[207] What these compromisers fail to appreciate, however, is that their

---

203. *Religious Groups' Official Positions on Same-Sex Marriage*, THE PEW FORUM ON RELIGION AND PUB. LIFE (Dec. 7, 2012), http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religious-Groups-Official-Positions-on-Same-Sex-Marriage.aspx (last visited Oct. 27, 2012).

204. *Id.*

205. *Id.*

206. *See, e.g.*, *Civil Unions & Domestic Partnership Statutes*, NAT'L CONF. OF STATE LEGISLATURES, *http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx* (last updated Nov. 2012).

207. *See, e.g.*, *Debate: Civil Unions vs. Gay Marriage*, DEBATEPEDIA, http://debatepedia.idebate.org/en/index.php/Debate:_Civil_unions_vs._gay_marriage (last visited Oct. 31, 2012); *see generally* Vincent J. Samar, *Privacy and the Debate over Same-Sex Marriage Versus Unions*, 54 DEPAUL L. REV. 783, 783-804 (2005).

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.[208] 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 on civil law strictly because of a religious preference.

The reason why the compromise does not 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.[209] Indeed, many religious people who hold convictions that do *not* condemn homosexuality will likewise feel similarly demeaned.[210] It is of no importance that some other religions might see the matter differently when the net effect is to essentially put the state on one side or the other of 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 ways—the well-being of the whole people, especially when what is at stake is a social institution 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

---

208. 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, and so forth. See BERTRAND RUSSELL, THE PROBLEMS OF PHILOSOPHY 60-69 (1959), on induction.

209. In *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 418 (Conn. 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.'" *Id.*

210. Allahpundit, *ABC Poll: Majority Now Supports Gay Marriage*, HOTAIR (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. (emphasis in original was in bold—it was retained here but placed in italics).

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 in the society. This is not a stable situation in a pluralistic society.

On the practical side, accommodationist approaches will also 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 only the religions with the larger number of members would likely itself be an incredible task; trying to accommodate all religious views is practically impossible.

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 determining the truth of religious doctrines. In this respect, religious 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.[211] 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.[212] 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.

---

211. 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. *See* IRVING M. COPI ET AL., INTRODUCTION TO LOGIC 539 (14th ed. 2011); *see also* BERTRAND RUSSELL, PROBLEMS OF PHILOSOPHY 63-67 (Oxford Univ. Press 1959) (1912).

212. 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.

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 formally outlying examples. This new theory will last so long as it can continue without too much disturbance from countervailing examples.

Scientific 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, first, must be compatible with previously well-established theories in the field; second, must be able to go beyond merely accommodating existing outlying examples so that, to the extent new examples are likely to be uncovered, the theory should be able to predict their existence; and finally, must withstand the test, at least among scientific theories, that if two theories are fairly equivalent in their ability to explain and predict, the one that operates more simply tends to be correct.[213]

In contrast, alternative religious views do not rely on observation to the same extent, but they may rely on anecdotal evidence and will try to explain the particular matter in question. Beyond this, however, there is not 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.[214] 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.[215]

---

213. *See* IRVING M. COPI ET AL., *supra* note 211, at 522-29.

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

215. 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 between theories would likely encompass new understandings of measurement. Ineffability comes in too because certain new statements about the subject matter will only be understood after the new theory is adopted. Statements in a non-scientific arena, specifically Kantian epistemology, concerning, for example, the apriori forms of sensibility or even the categories, would not be understood within either Humean empiricism or Aristotelian specific empiricism (I take this term from Alan Gewirth, *see* Alan Gewirth, Professor of Philosophy, Lecture in Aristotle Class at the University of Chicago), 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 The Incommensurability of Scientific Theories*, STANFORD

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 world views 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. 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.[216] And, in this respect, science and notions of incommensurability provide an analogous reference point for the kinds of public reasons governments can rely upon when making decisions likely to affect the fundamental concerns and interests of their citizens. The same cannot be said of nonpublic, religious reasons.

IV. BOUNDARY CONDITIONS

For purposes of this part, the above four normative and one scientific discussions 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 nonreligious, public reasons based on their responsibilities to ensure the common good that might impact religion. Is there a principle of adjudication for

---

ENCYCLOPEDIA OF PHIL., http://plato.stanford.edu/entries/incommensurability/ (last visited Oct. 31, 2012); *see also* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

216. Immanuel Kant, for example, explains in the *Prolegomena to Any Future Metaphysics*, how a science of nature is possible when the perceiving subject can translate his judgment of perception into one of experience by bringing it under concepts all beings similar to him can agree to. *See* IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS § 22 (Bobbs-Merrill, 1950) (1783). Kant, however, is careful to state that the laws which govern such experience do not apply to things in themselves but only to objects of possible experience. *Id.* § 23.

determining when government can and cannot impact religion (either positively or negatively) if it is in service to nonreligious, public reasons?

A. THE DOCTRINE OF DOUBLE EFFECT

This Article suggests that the 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,[217] it has been applied beyond Catholic theological thinking. The doctrine is most often used to justify an action that has as one of its effects a result that one should otherwise avoid.[218] According to the *Stanford Encyclopedia 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 life of another.[219] 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.[220]

---

217. *See Principle of Double Effect*, CAMBRIDGE DICTIONARY OF PHILOSOPHY 737-38 (Robert Audi ed., 2d ed. 1999).

218. *See* Alison McIntyre, *Doctrine of Double Effect*, STANFORD ENCYCLOPEDIA OF PHIL., http://plato.stanford.edu/entries/double-effect/#Formulations (last visited Oct. 31, 2012) (citing ST. THOMAS AQUINAS, SUMMA THEOLOGICA (13th century), II-II, Q. 64, art.7, *reprinted in* ON LAW, MORALITY, AND POLITICS (William P. Baumgarth & Richard J. Regan eds., 1988)).

219. *Id.*

220. *Id.* (citing *Double Effect, Principle of*, *in* 4 NEW CATHOLIC ENCYCLOPEDIA 1021 (Francis J. Connell ed., 1967)).

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 intended and merely foreseen harm."[221]

> 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.[222]

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

> [t]oday 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 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.[223]

The case involved the State of Washington's ban on physician-assisted suicide. Justice Stevens's remark indicated what the Court saw as an important distinction between physician-assisted suicide and allowing the patient 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 Stevens'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.[224]

---

221. *Id.* (citing Warren Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF. 334-351 (1989)).

222. *Id.*

223. Washington v. Glucksberg, 521 U.S. 702, 750 (1997) (Stevens, J., concurring).

224. Justice Stevens did note that "[u]nlike the Court, however, 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.* (citation omitted) (citing Vacco

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 in *Marsh v. Chambers*[225] than it would Justice Black's total separation thesis in *Everson v. Board of Education*.[226] The reason why is because, as Justice Brennan's dissent citing the *Lemon* test in *Marsh* implied, there may be other cases arising 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, and 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 outweigh 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 incorporating the doctrine of double effect here is to try to afford some further instruction concerning how such a case might be determined by suggesting some scenarios in which it might plausibly be utilized. The scenarios are meant to be instructive and speculative, but not necessarily reference any specific cases past or current.

B. CASUISTRY

This section speculates on how some of the cases mentioned above might have been resolved had Justice Brennan's neutrality view been 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 there adequate public schools available that the children could attend? Ade-

---

v. Quill, 521 U.S. 793, 801-02 (1997)) (decided on the same day in which the Court upheld a New York ban on physician-assisted suicide while permitting the state to let patients decide whether or not to refuse life-sustaining treatment).

225. Marsh v. Chambers, 463 U.S. 783, 803-805 (1983) (Brennan, J., dissenting).

226. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

quacy 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 principal 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 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 do not 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.[227] Therefore, places where traditionally the public 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.[228]

---

227. *See* U.S. CONST. amend. I (regarding freedom of speech and free exercise of religion). In any event, there should be some indication showing that the area is open to other expressions as appropriate to the kind of forum presented.

228. For purposes of this Article, I do not 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.

Perhaps more interesting are questions concerning symbolic expressions that are mixed religious and nonreligious. Take, for example, displays of the Ten Commandments in 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 Claus and his Elves. Here, one finds the potential for mixed motives between supporting basic universal values as might be depicted by commandments four through 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.[229] 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 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 seem much more attenuated to conveying any hidden religious purpose than 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 bolster 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 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

229. This point was made in *Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (per curiam).

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 in the area are acceptable so long as government is not the provider of the symbols, the symbols are not standing alone so as to suggest some official approval of them,[230] and government's only involvement with the symbols is related to its involvement with the park generally (i.e., keeping the place free of clutter, safe, and secure). 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 is sufficiently desirable to compensate for any possible suggestion of impermissible establishment.

Some kind of prayer or meditation often accompanies major events in individuals' 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 this Article has 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 hand, 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 (provided all the speeches were specified), 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 learn-

230. 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's sleigh.

ing 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.[231]

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 a specifically 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 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 health 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

231. The case *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), presents a good example in which 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.

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.[232] 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.[233] To do any the less would be for 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*[234] was a bad decision because if, after returning to following the lifestyles of their parents, the children find they do not fit in, they may be too ill-equipped

---

232. *See generally School Health Education to Prevent AIDS and Sexually Transmitted Diseases*, WORLD HEALTH ORG. Series 10 (1992), http://whqlibdoc.who.int/aids/WHO_AIDS_10.pdf.

233. In *Pierce v. Society of Sisters*, 268 U.S. 510, 530 n.1 (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 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 parochial school. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court struck down a state law prohibiting foreign language instruction in school, stating: "the natural duty of the parent [is] 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 (last visited Oct. 31, 2012).

234. Wisconsin v. Yoder, 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 did not 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. *See* BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 207-298 (2001).

from having been let out of the public secondary school system to pursue alternative economic gain elsewhere.[235]

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 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 need not be any conflict between religion and science, since what would be taught in the science class would simply be a different—if 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 the universe arose and how humans came to be respectively.[236] 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 because the religious view is simply not science, which is the empirical study of the physical universe and how it operates.[237]

---

235. *See* BARRY, *supra* note 234.

236. *See generally* PHILLIP KITCHER, ABUSING SCIENCE: THE CASE AGAINST CREATIONISM (1982).

237. *See* COPI ET AL., *supra* note 211, at 513; *see also* KITCHER, *supra* note 236, at 171-72, 173-78. 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 startling predictions, no advance in knowledge. 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"

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 provided the program is already established, there is not a comparable state run program available, and the funding is 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.

In these instances, government support of such centers would, in fact, be an intentional affirmation of a religious position.[238] 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 receive a tax exemption on condition that it will not lobby government to support any specifically religious purpose 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

---

> 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 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 fared no better than past efforts to develop "scientific" creationism. *See* Eugenie C. Scott & Glenn Brach, *Intelligent Design: Not Accepted by Most Scientists*, NAT'L CENTER FOR SCI. EDUC. (Aug. 12, 2002), http://ncse.com/creationism/general/intelligent-design-not-accepted-by-most-scientists.

238. *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.

is generally conceded that much of the argument for keeping marriage a separate institution arises out of a religious rather than a secular basis.[239] 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, for example, 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 and benefits of marriage—at least at the governmental 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, as demonstrated by the arguments in this Article, 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) initially issued regulations requiring employer and university health insurance plans to cover birth control for students and employees without a co-payment.[240] The law already provides a limited exemption for religious institutions, which the Roman Catholic Church claimed was further nar-

---

239. In *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 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 905 (citations omitted).

240. Denise Grady, *Ruling on Contraception Draws Battle Lines at Catholic Colleges*, N.Y. TIMES, Jan. 29, 2012, http://www.nytimes.com/2012/01/30/health/policy/law-fuels-contraception-controversy-on-catholic-campuses.html?pagewanted=all&_r=0.

rowed by HHS not including religious-based institutions.[241] 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."[242] 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

---

241. The Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A (2010), provides the following exemption for a religious employer under § 5000A(d). The requirement to maintain minimum essential coverage is as follows:

> (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—
> (i) a member of a recognized religious sect or division thereof which is described in section 1402(g)(1), and
> (ii) an adherent of established tenets or teachings of such sect or division as described in such section.

Id. 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."

How New HHS Mandate Redefines "Religious Employer," CAL. CATH. CONF., http://www.cacatholic.org/index.php/issues2/religious-liberty/conscience-rights/190-background-mandated-contraceptive-and-sterilization-coverage (last visited Oct. 31, 2012).

242. Denise Grady, *supra* note 240. *See generally The HHS Mandate for Contraception/Sterilization Coverage: An Attack on Rights of Conscience*, U.S. CONF. CATH. BISHOPS (January 20, 2012), http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/preventiveqanda2012-2.pdf (last visited Jan. 21, 2013).

governed by the "best interest of the child" standard, the state can surely withhold its resources from adoption agencies that refuse to comply with that standard.[243] There, the state not only has a compelling interest in 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 does not violate its own nondiscrimination 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 organizations should receive these same benefits whether the institution is religiously affiliated or not.[244]

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 could otherwise all become 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?[245] One could envision religious institutions intentionally associating with large business in part to more widely promote their own religious values over the more secular concerns 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 and religion an exemption from civil rights protections that would otherwise prevent them

243. The best interest of the child standard is the usual standard that governs the placement of children up for adoption. *See, e.g.*, Fla. Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79, 85 (Fla. Dist. Ct. App. 2010).

244. Stephen Prothero, *My Take: "Real Catholics" Not Opposed to Birth Control*, CNN (Feb. 3, 2012), http://religion.blogs.cnn.com/2012/02/03/my-take-real-catholics-not-opposed-to-birth-control/.

245. *See Using Religion to Discriminate*, ACLU, http://www.aclu.org/using-religion-discriminate (last visited Oct. 31, 2012).

from discriminating?[246] In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[247] the Supreme Court in a unanimous decision recently held that a "called" teacher, as opposed to a lay teacher, was a religious minister and could not file an Americans 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, there should emerge 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 adopted 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.[248] 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 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

246. 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 Boy Scouts of America 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's membership were opened up." *Id.* at 686-87 (Stevens, J., dissenting).

247. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

248. Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

> 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 the purpose 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.[249]

The Court in the Jaycees case found that the Jaycees fit 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 organizations, and selection for employment or to receive a degree usually does not hinge on a prior commitment to adhere to a particular religious doctrine.[250] 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 the taxpayer may not always agree with. To the contrary, the intended purpose behind HHS's initial regulations seemed clearly related to the state's legitimate concern to deal with certain wide-ranging health 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. It now requires insurance companies to directly provide these services where there exists a religious objection to providing the service, the idea being that it would be cheaper for the insurance companies to provide these services for free than providing the heath care that would be required were these services not available.

---

249. *Id.* at 617-18.

250. *See Why a Catholic College or University?*, NAT'L CATH. C. ADMISSION ASS'N, http://www.catholiccollegesonline.org/parents-students/10-reasons-for-attending-catholic-college.html (last visited Dec. 29, 2012).

> [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.[251]

While the adjustment to the original directive was no doubt affected by political lobbying by President Obama's more liberal Catholic allies, it has not proven enough to satisfy the more conservative Catholic bishops, who issued a statement calling for "legislative action on religious liberty" and calling rescission of the mandate the "only complete solution."[252] 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 Care Act 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.

V. 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 the Court's 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.

This Article has 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. It has suggested that considering not just the history of the clause or the cases the Court has decided under it, but also considering

---

251. Helene Cooper & Laurie Goodstein, *Rule Shift on Birth Control Is Concession to Obama Allies*, N.Y. TIMES, Feb. 10, 2012, http://www.nytimes.com/2012/02/11/health/policy/obama-to-offer-accommodation-on-birth-control-rule-officials-say.html?pagewanted=all.

252. *Id.*

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, while also providing 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 this Article has been successful in this effort, then it 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.