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America's Church-State Proposition**

Carl H. Esbeck

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THE 60TH ANNIVERSARY OF THE *EVERSON* DECISION AND AMERICA'S CHURCH-STATE PROPOSITION

*Carl H. Esbeck**

On February 10, 1947, the United States Supreme Court handed down *Everson v. Board of Education of Ewing Township*.¹ For scholars of the First Amendment, *Everson* marks the beginning of the Supreme Court's modern era with respect to church-state relations. It is easy enough to state the reason for the decision's prominence, for it was in *Everson* where the Establishment Clause was first "incorporated" through the Fourteenth Amendment and made applicable to the actions of all state and local governments. But just what did it mean to take the restraints on federal power that comprise the principle of no-establishment and to make them limits on the governments of the several states, as well as on the thousands of municipalities, counties, and school districts that dot the land? In Part II of these remarks, I will focus on what has occurred downstream of *Everson* over these event-filled sixty years. As the reader will see, I am of the belief that *Everson's* new deal has resulted in more good than harm for religious freedom. Still the record is mixed, as it is with most major developments. However, before going there, in Part I of this extended essay, I look back in time to recapture just what was in the bundle of restraints that all nine of the Justices in *Everson* said they were bringing forward via the Fourteenth Amendment and making newly binding on the many unsuspecting state and local officials.

I. THAT BUNDLE OF RESTRAINTS NOW APPLICABLE TO STATE AND LOCAL GOVERNMENT

America is modern and religious. An overwhelming number of Americans say they are people of faith, most of them monotheists. And

* R. B. Price Professor and Isabelle Wade & Paul C. Lyda Professor of Law, University of Missouri, Columbia, Missouri. This extended essay was first presented at Princeton Theological Seminary on February 9, 2007, just one day preceding the 60th Anniversary of the decision in *Everson v. Bd. of Educ. Ewing Township*. Ewing Township is located just a short distance to the southwest of Princeton, N.J. I would like to thank the seminary for hosting the occasion and for the kind welcome and ensuing discussion by those in attendance.

1. 330 U.S. 1 (1947).

the United States today is perhaps the most spiritually pluralistic nation that has ever existed on the face of the earth.² While the foregoing observations are not contradictory, they do depict a multi-layered and at times confusing state of affairs. It has come about, at least in material part, because certain perspectives on religious freedom, encouraged by the Hebrew and Christian Scriptures as many Americans understood them, counseled respect for religiously informed conscience and also sought to jurisdictionally render unto Caesar the things that are Caesar's and to God the things that are God's.

Given these perspectives, for heuristic purposes religious freedom is usefully broken down into two relationships: (i) that between government and religious individuals; and (ii) that between government and organized religion.³ With respect to the latter relationship, since the fourth century, Western civilization has been characterized by a pattern of dual authority shared by state and church.⁴ While the respective spheres of jurisdiction of these two centers of authority have always been contested, and hence the boundary between them has shifted over the last sixteen-hundred years, the West has been in accord that there are two competencies and that the domain of each is in some real sense to be respected by the other.

The Protestant Reformation (beginning with Luther's ninety-five theses in 1517) shattered Western Christendom and its unity in one universal church at Rome.⁵ The Westphalian Peace came in 1648, ending the Thirty Years' War. In its wake, a unified Catholic

2. Religious pluralism is a fact. From the government's perspective, such pluralism is neither good nor bad. From the perspective of believers concerned for their liberty, religious pluralism is not necessarily bad so long as it is authentic. Openly acknowledging religious particularity in a civil society that lives with these differences amicably, without denying that the particulars truly matter, constitutes authentic pluralism. On the other hand, pluralism is undesirable when religious people are expected to hide their religious differences in the public square so as not to offend others of a different persuasion.

3. By "organized religion" I mean not only churches, synagogues, mosques, and religious organizations generally, but also identifiable systems of religion or religious observance such as Christianity, Judaism, Islam, Hindu, Buddhism, and the like, as well as their subdivisions such as Presbyterian, Catholic, Reformed Jewish, and Sunni religious communities.

4. See John F. Wilson & Donald L. Drakeman, *Introduction*, in *Church and State in American History* 1, 1-12 (John F. Wilson & Donald L. Drakeman eds., 3d ed., Westview Press 2003).

So there were two. Priest and prince, or church and state, each needed the other, but both were separate aspects of one society. This separated double authority structure is what marked off Western Christendom from Eastern Christianity, and it properly locates the significance of "church and state."

Id. at 3-4.

5. The Great Schism of A.D. 1054 had earlier divided the church into Western Catholicism and Eastern Orthodoxy.

establishment spanned the south of Europe, Lutheran or Reformed (Calvinist) churches held the north territory, and religious dissenters were suppressed in all the emerging nation-states. These Westphalian states had more sharply defined borders and were vested with the attributes of what is now called sovereignty. The resulting religious establishments altered the situation from “universal church in a universal empire” to one of nation-states and state churches. For the two centuries following the Westphalian settlement, individual religious liberty evolved first toward toleration and ever broader legalization of dissenting religions, and then matured into a fuller, more equality-based respect for religiously informed conscience. This promising development altered the first of the two relationships, namely that between government and individual religious adherents.

Except for Rhode Island and Pennsylvania, the English colonies in America, when they were first settled, adopted for themselves the various European models of state and church, and over time moderated them so as to adjust to New World conditions. Then, unlike Western Europe, Americans took a wholly novel step whereby the state churches were disestablished one by one. This latter development dramatically altered the second of the two relationships, namely that between government and organized religion.

Disestablishment in the States

For an extended period during and after the American War of Independence (1774-1833), the allied efforts of Protestant dissenters and statesmen of enlightenment-rationalistic sympathies brought about disestablishment in those states where the Anglican or Congregational Church still had a hold (nine of the original thirteen states, plus Vermont and Maine).⁶ This made for a total of eleven distinct disestablishment struggles on American soil. These efforts succeeded first in the Anglican South and only much later in Puritan New England. The allied leaders behind this push were leading statesmen and the clergy of religious nonconformists. The statesmen, while few in number, were politically well-placed, whereas the Protestant dissenters were rapidly growing in number and were disturbing previously homogeneous communities by moving in. Thus the nonconformists brought to the table the power of a voting bloc. Both parties to this common cause

6. These state-by-state disestablishments are chronicled in my article *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1448-1540 [hereinafter Esbeck, *Dissent and Disestablishment*].

were essential to its success.⁷

Disestablishment was a state-by-state affair, and it was not a short-term project—it took nearly sixty years. Even in the New England states, where one might expect similar paths to disestablishment, historian William McLoughlin said he “discovered that there was no uniformity” from state to state.⁸ The Congregational Church continued to receive financial support as late as 1832-33, as well as to enjoy other legal advantages. The tax funding of New England churches was assessed locally by majority rule, with increasing availability of exemptions for nonconformists who sought them. Supporters of the Puritan Standing Order denied that they had an “establishment” as such, whereas dissenters knew it to be a Congregational Church establishment in all but name, albeit very differently structured from the top-down Church of England in Great Britain.

In the South, Anglicans sought to hold on by enlarging their establishment to embrace all Christian denominations. This proved unsuccessful. The most dramatic showdown came in Virginia where disestablishment efforts peaked in the months of May 1784 through January 1786.⁹

The state-by-state disestablishments in many ways paralleled the revival that is now known as the Second Great Awakening.¹⁰ The American religious impulse was becoming popularistic, personalistic, and democratic, and was accompanied by a leveling of society, less deference to a learned clergy, a push westward, and the elevation of progress as an important value.¹¹ And, just as this outpouring of

7. Sidney E. Mead, *The Lively Experiment: The Shaping of Christianity in America* 34-35, 38, 42-45, 51-52 (Harper & Row 1963) (calling the coalition the “pietists” and the “rationalists”); William G. McLoughlin, *New England Dissent, 1630-1833: The Baptists and the Separation of Church and State* vol. 1, xv (Harv. U. Press 1971) (calling the allied parties the “pietistic” and “rationalist” approaches).

8. McLoughlin, *supra* n. 7, at xvii.

9. On the Virginia disestablishment, see Thomas E. Buckley, *Church and State in Revolutionary Virginia 1776-1787*, at 38-173 (U. Press Va. 1977); H.J. Eckenrode, *Separation of Church and State in Virginia: A Study in the Development of the Revolution* 74-115 (Da Capo Press 1971) (originally published 1910); William Lee Miller, *The First Liberty: Religion and the American Republic* 3-75, 96-106 (Alfred A. Knopf 1986).

10. See Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* 265-272, 279-280, 349-352 (W.W. Norton 2005). “[Revivalists] came to understand how the successful voluntarist innovations of the revivals had rendered formal state support unnecessary.” *Id.* at 270.

11. See Nathan O. Hatch, *The Democratization of American Christianity* 3-46 (Yale U. Press 1989); Mark A. Noll, *America’s God: From Jonathan Edwards to Abraham Lincoln* 207-208 (Oxford U. Press 2002). Historians Nathan Hatch and John Wigger report that:

The early American republic [was] . . . a period of great religious ferment and originality. The wave of popular religious movements that broke upon America in the generation after independence decisively changed the center of gravity of American

Protestant enthusiasm shaped the new nation,¹² the American context equally altered Protestant Christianity, especially Baptists and Methodists, the largest denominations to emerge.¹³

The First Amendment (1789-91) had no impact on the struggles over disestablishment in the several states. That it did is a widely mistaken belief. Indeed, despite the fact that questions of church-state relations were coming before the U.S. Supreme Court starting early in its history, the cases were not resolved by reference to the First Amendment's Establishment Clause but on other legal grounds.¹⁴ The

religion, worked powerfully to Christianize popular culture, splintered American Christianity beyond recognition, divorced religious leadership from social position, and above all, proclaimed the moral responsibility of everyone to think and act for themselves. In this ferment, often referred to as the Second Great Awakening, Christendom witnessed a period of religious upheaval comparable to nothing since the Reformation—and an upsurge of private initiative that was totally unprecedented.

The mainspring of the Second Great Awakening was that religion in America became dominated by the interests and aspirations of ordinary people. In the generation after the Revolution, American Christianity became a mass enterprise—and not as a predictable outgrowth of religious conditions in the British colonies. The eighteen hundred Christian ministers serving in 1775 swelled to nearly forty thousand by 1845. While the American population expanded tenfold, the number of preachers per capita more than tripled; the colonial legacy of one minister per fifteen hundred people [became] one per five hundred. This dramatic mobilization indicates a profound religious upsurge—religious organizations taking on market form—and resulted in a vastly altered religious landscape.

Nathan O. Hatch & John H. Wigger, *Introduction*, in *Methodism and the Shaping of American Culture* 13-14 (Nathan O. Hatch & John H. Wigger eds., Abingdon Press 2001).

12. Wigger notes:

Older denominations rooted to traditional patterns of hierarchy steadily lost favor throughout the era. While the Presbyterians and, to a lesser extent, the Congregationalists and Episcopalians posted modest gains in absolute numbers, their rate of growth lagged far behind that of the Methodists and Baptists. This was true not only on the frontier but also throughout the United States. In the south Atlantic region, where the Methodists were prominent, the Episcopalians' share of church adherents dropped from 27 percent to 4 percent between 1776 and 1850. In cities such as New York and Baltimore, the one religious sentiment that working-class men and women in general seem to have agreed upon was a strong dislike for established, European-style clericalism. The early Methodist circuit rider James Quinn clearly understood the uniqueness of the American situation. Following the Revolution, wrote Quinn,

the anti-Christian union between the Church and state had been broken up, tithes and glebes could no longer be relied upon for Church revenue, and the religious orders of America were left free to choose their own course, and worship God, with or without name, in temple, synagogue, church, or meeting-house, standing, sitting, or kneeling, in silence or with a loud voice, with or without book.

John H. Wigger, *Taking Heaven by Storm: Methodism and the Rise of Popular Christianity in America* 9 (Oxford U. Press 1998) (footnote omitted).

13. See Hatch, *supra* n. 11, at 3-16; Noll, *supra* n. 11, at 443-445.

14. See Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 *Tulsa L. Rev.* 7 (2001) (reviewing four church-state disputes that reached the High Court in the first half of the 19th Century and were resolved without resort to the First Amendment).

reason, in material part, is simple enough: it was widely understood that the Bill of Rights was not binding on the states.¹⁵ Because it was limited to restraining only the actions of the national government, the Establishment Clause was not taken up and applied by the Supreme Court until 1899, well into the nation's second century.¹⁶ Only two of the Supreme Court's twentieth-century cases up to the time of its decision in *Everson*, relied on the no-establishment text.¹⁷ And it was not until a year later in the case of *McCullum v. Board of Education* that the Court found a violation of the Establishment Clause for the first time.¹⁸ For all the heightened attention it garners today, it must be said the Establishment Clause is very much a late bloomer.

Voluntaryism

During this country's early national period, state-by-state disestablishment was the first fruits of America's embrace of voluntaryism. Voluntaryism is the historical term (and spelling), but the concept is easily misunderstood today. Voluntaryism does not refer to religious belief being consensual and thus that there is an absence of government compulsion or coercion. To be sure, coerced belief is a violation of conscience and is prohibited as a matter of the free exercise of religion.¹⁹ But that is not voluntaryism. Rather, in America's early

15. See *Barron v. City of Baltimore*, 32 U.S. 243 (1833) (holding that the Bill of Rights is not meant to bind the states). That included, of course, the protection of religious freedom by the First Amendment. *Permoli v. Municipality No. 1 City of New Orleans*, 44 U.S. 589 (1845) (holding that First Amendment does not protect an individual's religious freedom from the actions of state officials).

16. See *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding the use of federal funds for construction at a Catholic-affiliated hospital corporation situated in the District of Columbia).

17. The two additional pre-*Everson* cases are as follows: *The Selective Service Draft Law Cases*, 245 U.S. 366 (1918) (upholding exemptions from military draft for clergy, theology students, and pacifist denominations); *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (upholding disbursement of Indian trust funds, held by the federal government as trustee, to a Catholic mission operating religious schools for Indian children). In both cases the Court did a mere summary inquiry into the meaning of no-establishment. Only one other Supreme Court case pre-dating *Everson* expressly referenced the Establishment Clause. In *Davis v. Beason*, 133 U.S. 333 (1890), the Court upheld the conviction of a Mormon residing in the Idaho Territory for falsely taking an oath to the effect that he was not a member of any polygamous organization. The holding is properly recognized as a case about the Free Exercise Clause. However, in passing the Court noted that while the Establishment Clause prohibited government enforcement of a religious tenet, that truism did not imply that the observance of a religious tenet could not be prohibited by law in the interest of public morals. *Id.* at 345.

18. 333 U.S. 203 (1948) (invalidating a public school program permitting local churches to hold weekly religion classes in classrooms during regular school hours).

19. This understanding of voluntaryism is reflected in the modern Supreme Court's cases that distinguish the Establishment Clause from the Free Exercise Clause on the basis that the no-establishment principle (unlike free exercise) does not require a showing of coercion of religion-

national period the term voluntarism meant (juridically and theologically) that organized religion, including specific belief or observance, was to be voluntarily supported, if at all, only by the people, the churches, and others in the private sector.²⁰ Voluntarism describes a government not actively involved in advancing religion or, for that matter, that is not actively opposing any or all religion. For example, a mild establishment such as the Church of England in Great Britain today does not coerce dissenters, and all faiths are tolerated; yet such an establishment falls well short of the voluntarist ideal.²¹

Disestablishment was the first step in fully realizing voluntarism, namely the matter of discontinuing taxation for the support of religion. Disestablishment, and by extension voluntarism, were about securing freedom. But it was the sort of freedom that is consequential to the action of limiting the power delegated to a government. The aim of disestablishment in the American states was, in the first instance, to do away with governmental authority over a state-preferred church. Disestablishment withdrew official control over doctrine, liturgy, selection of clergy, and financial support. Historian Jack Rakove nicely characterizes the event in modern terminology as the deregulation of organized religion.²² Moreover, it was not thought paradoxical for people of Christian faith to have worked for disestablishment, which many did. They believed, and their experience had shown, that an established church is a captive church, one in which the form of worship, liturgy, prayer books, clerical appointments, and ecclesiastical administration are controlled by the state for the state. With establishment, a counterfeit called civil religion soon springs up, a

based conscience or other religious harm. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 221, 223 (1963); *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

20. Examples of specific religious belief or observance are a theistic oath, worship services, proselytizing, prayer, devotional Bible reading (as opposed to the use of the Bible as literature or history), and the teaching of religion (as opposed to teaching about religion).

21. While voluntarism will bear its own weight as a civil legal principle, the principle did coincide with those organized religions that believe that religious faith should be subscribed to and practiced wholly apart from the affirmative support of the government. The formidable Jesuit, Fr. John Courtney Murray, criticized voluntarism as a Protestant reading of the Establishment Clause rather than, as was his view, the Religion Clauses of the First Amendment were merely an article of peace among multiple religious denominations. John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* 58-72 (Image Books ed. 1964); see Miller, *supra* n. 9, at 134-135, 218-221. However, Fr. Murray's role in Vatican II suggests that he came to see considerable merit in the American church-state proposition and he successfully worked to have the Roman Catholic Church move closer to the American view. See John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* 331-353 (U. Cal. Press 1998).

22. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 311-312 (Vintage Books 1997).

confusion of Caesar and God. This conflation, it was thought, inevitably leads to the misuse of religion by state officials as an instrument to carry out political objectives.

At the state level—where the slow and difficult work of disestablishment took place from 1774 to 1833—the vast number of Americans pushing for it were not doing so out of enlightenment-rationalism or secularism. Nor were they primarily motivated, in light of America's diverse Protestant groups and its growing Catholic immigrant population, to grant religious freedom to all as the price of obtaining it for their own denomination. Rather, these American dissenters (e.g., Isaac Backus and John Leland) were religious people who primarily sought disestablishment for (as they saw it) biblical reasons.²³ They were allied in this effort with certain well-placed statesmen, most notably James Madison, Jr.²⁴ Two corrections were sought. First, disestablishmentarians decried the state church as interfering with religion, corrupting the role of clergy, using the church as a tool to carry out state policy, and oppressing dissenters. Specific religious beliefs and observances “are not within the cognizance” of civil government, as Madison succinctly stated the matter.²⁵ A state church was thought to be bad for authentic faith, disestablishment the opposite.²⁶

Second, disestablishmentarians believed that a state that took sides in disputes over creedal tenets and specific forms of religious observance would dangerously risk dividing the body politic.²⁷ They

23. See Esbeck, *Dissent and Disestablishment*, *supra* n. 6, at 1432-1448, 1498-1524 (surveying the efforts of Isaac Backus and John Leland).

24. See Noonan, *supra* n. 21, at 61-91.

25. James Madison, Jr., *A Memorial and Remonstrance Against Religious Assessments* ¶¶ 1, 8 (1785), in *The Papers of James Madison* vol. 8, 299, 301-302 (Robert A. Rutland & William M.E. Rachal eds., U. Chi. Press 1973).

26. There is no small number of religious Americans today who cling to the belief that active government support for religion *qua* religion is good and the removal of the government's support is bad. In the long term, however, it is the voluntaristic proposition that active government support for religion is harmful in multiple ways: to be genuine, religion is the product of persuasion not state privilege; independent religious organizations are an effective check on the power of the state, which in turn helps to preserve and expand liberty; government support for religion often leads to civil religion instead of authentic faith, causing some to have contempt for a church that has become a lapdog to civil authorities; and active state support for religion can compromise (even co-opt) the church and silence her prophetic voice. See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1, 63-75 (1998) (collecting authorities) [hereinafter Esbeck, *Establishment Clause as Structural*].

27. At the time of the American founding, republics were still experimental and thought to be unstable. The founders knew, for example, how sectarian division contributed to the failure of the English Commonwealth (1649-58). It was believed that for a nation-state to take sides in disputes over creeds and other specific forms of religious observance was to dangerously risk dividing the body politic just at the moment when unity was most needed. Hence, for example, religious tests

believed that specifically religious doctrine and doctrinal disputes were never properly within the state's temporal authority. By placing specific religious belief and observance outside the jurisdiction of civil authorities, the alliance sought a more limited republic, one with no control over doctrine, forms of observance, selection of clergy, tax support, or internal church administration.

It must be said, however, that the logical implications of voluntarism were not implemented in full by the mid-1830s. The close association of the legal tradition with nondenominational Protestant observance was too intertwined to sort out quickly. Thus, while tax assessments for religion were done away with in the laws of these states that disestablished, non-financial support for religion and the nondenominational symbols of religion continued, as actual practice lagged behind the legal principle. Moreover, the failure to fully implement voluntarism in the nineteenth century may well have been due to more than just the difficulty of unentangling general Protestant observance from the religious symbols and "God talk" of government and government officials. Some historians believe that evangelical Christianity was by the mid-nineteenth century transmogrified into a "religion of the republic," a mild but nonetheless palpable conflating of Protestantism and American national destiny.²⁸

Separation is not Privatization

Today, the continued outworking of voluntarism is popularly known as the "separation of church and state." This separation is of the institutions of government and organized religion; it is not a bar to government and religious organizations freely communicating and, within certain safeguards, openly cooperating with an eye to accomplishing some public good in temporal matters.²⁹ Indeed, in the

for public office were bad for civic peace, as were civil courts attempting to resolve disputes over religious doctrine. See U.S. Const. Art. VI[3] ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); *Watson v. Jones*, 80 U.S. 679 (1871) (no civil court jurisdiction with respect to disputes over religious doctrine, polity, or church discipline). But the focus of "divisiveness analysis" must be on the government alone and its specifically religious behavior. Care must be exercised so that "divisiveness avoidance" does not slop over and violate the Free Speech Clause or the right to expressive association. See *McDaniel v. Paty*, 435 U.S. 618, 640-642 (1978) (Brennan, J., concurring in the judgment).

28. Mead, *supra* n. 7, at 134-155; Robert T. Handy, *A Christian America: Protestant Hopes and Historical Realities* 82-133 (2d ed., Oxford U. Press 1984).

29. Separation of church and state (voluntarism) is not to be confused with the application of religious doctrine to questions of public morality and the codification of public morality into civil law. See *Harris v. McRae*, 448 U.S. 297, 319-320 (1980) (rejecting argument that codifying a moral position concerning abortion, one shared by some religions, was a violation of the no-

early American republic religion was widely expected to serve as a seedbed of civic virtue, from which a people acquired the knowledge to properly exercise the office of citizen and develop the self-restraint to prevent liberty from careening into license. The ever quotable Alexis de Tocqueville, as a result of his travels in the early 1830s, observed such an America firsthand:

Religion in America takes no direct part in the government of society, but it must nevertheless be regarded as the foremost of the political institutions. . . . I do not know whether all the Americans have a sincere faith in their religion; for who can search the human heart? but I am certain that they hold it to be indispensable to the maintenance of republican institutions. This opinion is not peculiar to a class of citizens or to a party, but it belongs to the whole nation, and to every rank of society.

The Americans combine the notions of Christianity and of liberty so intimately in their minds, that it is impossible to make them conceive the one without the other. . . .

Upon my arrival in the United States, the religious aspect of the country was the first thing that struck my attention; and the longer I stayed there, the more did I perceive the great political consequences resulting from this state of things, to which I was unaccustomed. In France I had almost always seen the spirit of religion and the spirit of freedom pursuing courses diametrically opposed to each other; but in America I found they were intimately united, and that they reigned in common over the same country. My desire to discover the causes of this phenomenon increased from day to day. In order to satisfy it, I questioned the members of all the different sects. . . . I found that [Catholic clergy] . . . mainly attributed the peaceful dominion of religion in their country, to the separation of church and state. I do not hesitate to affirm that during my stay in America, I did not meet a single individual, of the clergy or of the laity, who was not of the same opinion upon this point.³⁰

When separation of church and state is taken to mean a socially or juridically enforced separation of religious values from public affairs and the formation of civil law (i.e., the privatization of religion), then the

establishment principle).

30. Alexis de Tocqueville, *Democracy in America* vol. 1, 334-335, 337 (Henry Reeve trans., 4th ed., J. & H.G. Langley 1864) (originally published 1841).

concept has no antecedent in the early American states.

II. *EVERSON'S* NOVATION OVER THESE SIXTY YEARS

It is all too common to call a U.S. Supreme Court decision a landmark or watershed opinion, but *Everson v. Board of Education of Ewing Township* is the genuine article. The case was a novation, the substitution of a new legal obligation for an old one. Incorporating the Establishment Clause through the Fourteenth Amendment, the *Everson* Court made the clause's restraints applicable to state laws and municipal ordinances and the actions of their many officials. Writing for the majority, Justice Black associated the denial of the government's power over religion with the implementation of voluntarism when he said that "religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."³¹ The two-fold nature of the restraint is noteworthy: the state is without power to either help or hinder organized religion.

For the first time in the nation's history, the daily, retail-level interactions between church and state were now a matter of federal constitutional law and thereby subject to federal judicial review. In *Everson* we had, so to speak, a nationalization of American juridical-religious culture. Henceforth, there was to be uniformity in church-state relations from the Atlantic to the Pacific, and from the Canadian border down to Mexico.

Because *Everson* instituted the effort to bring the practice of voluntarism more closely in line with its principle, there was much social clearing to be done. If the ideal of voluntarism was now to be taken to its logical ends, then a fresh examination of government support for religion by way of symbols and "God talk" had to be undertaken. Thus it was not too long before teacher-led prayer in public schools, as well as devotional Bible reading, fell under the Court's examination.³² These downstream changes brought about by *Everson* were painful for many white Protestants who had until then held the mantle of cultural authority.

With *Everson*, an Establishment Clause—not originally intended to oversee municipal and state laws with respect to the prickly matter of

31. *Everson*, 330 U.S. at 11.

32. *Schempp*, 374 U.S. at 221, 223 (holding that public school classroom prayer and devotional Bible reading violates the Establishment Clause); *Engel*, 370 U.S. at 430 (holding that public school classroom prayer violates the Establishment Clause).

organized religion—now had to be filled with substantive content to do just that. For that content, the Supreme Court, rightly or wrongly, drew deeply upon the rationale and principles that had originally given impetus to disestablishment in the early states. While acknowledging that “[n]o one locality and no one group throughout the Colonies could rightly be given entire credit,”³³ the Court gave special emphasis to Virginia and its disestablishment struggles, which intensified from May 1784 through January 1786.³⁴

The 1960s’ adoption of the legal fiction of taxpayer standing in *Flast v. Cohen*³⁵ permitted the Court to police the church-state boundary even in the absence of a complainant suffering “injury in fact” or actual religious harm. This is unique, for no claim other than one brought under the Establishment Clause is permitted by plaintiffs asserting taxpayer standing.³⁶ Referencing the Virginia experience of 1784-86, the *Flast* Court said that the “concern of Madison and his [Virginia] supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers” to aid religion.³⁷ *Flast* showed just how determined the post-*Everson* Court was to enforce voluntarism, thereby further closing the gap between actual practice and the principle. Even now we see the logic of voluntarism being pressed with respect to government displays of the Ten Commandments³⁸ and the “under God” language in the Pledge of

33. *Everson*, 330 U.S. at 11.

34. *Id.* at 11-13 (Black, J., for the Court); *id.* at 28, 33-41 (Rutledge, J., dissenting). For continued reliance on the Virginia experience, see *Mitchell v. Helms*, 530 U.S. 793, 870 (2000) (Souter, J., dissenting) (referencing the passage of the Virginia Bill for Establishing Religious Freedom). Additional authorities are collected at Esbeck, *Dissent and Disestablishment*, *supra* n. 6, at 1578-1584.

35. 392 U.S. 83 (1968). The Court in *Flast* held that even in the absence of actual “injury in fact,” federal courts have standing to hear taxpayer claims brought under the Establishment Clause where it is alleged that congressional appropriations are being wrongly channeled to religion. *Id.* at 105-106. In *Hein v. Freedom from Religion Foundation*, 551 U.S. ___, 127 S. Ct. 2553 (2007) (plurality opinion), seven Justices said they continue to adhere to the ruling in *Flast*, whereas a different majority of five Justices held that they would not extend *Flast* to discretionary actions by officials in the executive branch.

36. *Cuno v. Daimler Chrysler Corp.*, 547 U.S. ___, ___, 126 S. Ct. 1854, 1864-1865 (2006) (denying taxpayer standing in claim alleging a violation of the Dormant Commerce Clause).

37. 392 U.S. at 103-104. The Virginia experience was then attributed to the Establishment Clause (written four years later) as constituting a restraint “designed as a specific bulwark against such potential abuses of governmental power, and that [the] clause . . . operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8.” *Id.* at 104. This attribution of the Virginia experience to the Establishment Clause is dubious history, but the Court in *Flast* had an objective in mind other than fidelity to history.

38. Compare *McCreary Co. v. ACLU*, 545 U.S. 844 (2005) (holding that recent depiction of the Ten Commandments in county building display case violates Establishment Clause); with *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality opinion) (determining that a stone monument on

Allegiance.³⁹

No claim is made here that this power-negating nature of the modern Establishment Clause was originally intended by the authors of the First Amendment text.⁴⁰ The argument, rather, is that what the *Everson* and post-*Everson* Supreme Court has been doing, in the main, is to have the clause take on the meaning of voluntarism. Part of what vindicates the Court's limitations on the government's authority in matters of organized religion is its parallel in the dual-authority relationship of state and church that is deeply entrenched in the Western legal tradition.⁴¹ Standing, as the Supreme Court does, in the flow of Western civilization, I believe it is no accident that this has occurred.

Where Does *Everson* Leave Matters?

The Free Exercise Clause today is regarded by the Supreme Court as an individual right, one applicable to federal, state, and local laws. The right vests in people, including churches and other groups of people bound together in religious association. Thus, a religious organization has standing to assert free exercise rights when the entity, or its membership, suffers religious coercion or other injury. Coercion or some other religious burden is a necessary element of any successful free exercise claim.⁴² Further, the rights-claimant needs to profess a religion. Non-belief is an exercise of freedom, but it is not an exercise of religion. For those who have a religious faith, the Free Exercise Clause protects belief absolutely. With respect to religious observance, however, the clause prohibits intentional discrimination by government

the grounds of a state capitol building depicting the Ten Commandments that had been in place for several years did not violate the Establishment Clause).

39. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (holding that plaintiff did not have standing to maintain claim that voluntary public school student recitation of "under God" in Pledge of Allegiance violates the Establishment Clause).

40. The *Everson* Court did indulge the wildly improbable assertion that the Virginia experience of 1784-86 was bootlegged by James Madison and Thomas Jefferson into the Establishment Clause of the First Amendment as it was being drafted by the First Congress meeting in New York City during the period June to September 1789. 330 U.S. at 11-13; *id.* at 28, 33-41 (Rutledge, J., dissenting). The drafting and ratification of the Bill of Rights entailed a mostly different cast of participants and an entirely new array of concerns. We have a sketchy but still informative record of the debate in both the House and Senate of the First Congress over the drafting and redrafting of the text that eventually became the Establishment Clause. See John Witte, Jr., *Religion and the American Constitutional Experiment* 80-89 (2d ed., Westview Press 2005). There is no indication that the Virginia experience of a few years before was even mentioned during these debates or was otherwise a factor. While Madison was in the middle of things, Jefferson was in Paris serving as our ambassador to France.

41. Esbeck, *Dissent and Disestablishment*, *supra* n. 6, at 1387-1394, 1401-1414, 1589.

42. *Tilton v. Richardson*, 403 U.S. 672, 689 (1971); *Schempp*, 374 U.S. at 221, 223; *Engel*, 370 U.S. at 430.

against religious practices—and little else.⁴³

By way of contrast, the nature and scope of the modern Establishment Clause is less clear. That said, however, the law of no-establishment is far less uncertain than the Supreme Court's many critics would allow. For example, much can be learned just by starting with the text of the clause and its origin as a part of the Bill of Rights. It is fundamental that constitutional restraints check only the government, not the private sector. Moreover, the Establishment Clause, indeed the entire Bill of Rights, vested no new power in the national government. Just the opposite: the purpose of these ten amendments was to deny to the new central government the ability to assume powers implied from the 1789 Constitution that might trench on fundamental liberties.⁴⁴ Thus, the Free Exercise Clause and Establishment Clause are not a font of additional power vested in the national government but a negation of federal power. And now, with *Everson*, that same negation of power runs as well against any assumption of state or municipal authority with respect to religious establishment.

Now consider the text. The Establishment Clause reads, "Congress shall make no law respecting an establishment of religion." The power of Congress to enact a general law about religion is not negated. Rather, what is negated is a law about, more narrowly, "an establishment" of religion. So, for example, assume the 1791 Congress had enacted a law regulating conscription into the Army and Navy. In exercising the express constitutional power to oversee the armed forces,⁴⁵ nothing prevented Congress from providing an exemption from the draft for religious pacifists. While the source of power to provide for such an exemption had to come from a delegated power in the original 1789 Constitution (not the Establishment Clause because it is not a font of power), nothing in the Establishment Clause prohibits such an exemption. Although adopting a military draft exemption for pacifists is

43. See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Empl. Div. of Ore. v. Smith*, 494 U.S. 872 (1990). There are limited instances where even intentional discrimination on the basis of religion does not violate the Free Exercise Clause. See *Locke v. Davey*, 540 U.S. 712 (2004) (long-standing state constitutional provision prohibiting state funding of those training for the clergy was held sufficient to support exclusion of divinity student from state scholarship program without violating the Free Exercise Clause).

44. See Richard Labunski, *James Madison and the Struggle for the Bill of Rights* 178-255 (Oxford U. Press 2006). James Madison, Jr., a member of the House of Representatives, introduced the Bill of Rights and said their purpose was "to limit and qualify the powers of the Government, by excepting out to the grant of power those cases in which the Government ought not to act, or to act only in a particular mode." 1 Annals of Congress 454 (House of Representatives, June 8, 1789) (Joseph Gales ed., Gales & Seaton 1834).

45. U.S. Const. Art. I, § 8, cl. 14 delegates to Congress the authority "To make Rules for the Government and Regulation of the land and naval Forces."

certainly to “make [a] law respecting” religion, the exemption is not more narrowly about “an establishment” of religion. As a second example, it would be fully consistent with the Establishment Clause for Congress to enact comprehensive legislation under the Interstate Commerce and Taxing Clauses so as to require employers to provide unemployment compensation to their employees, but then to exempt religious organizations from the act.⁴⁶ To enact such a religion-specific exemption is certainly to “make [a] law respecting” religion, but the exemption is not “an establishment” of religion.

In a similar vein, although the text of the Free Exercise Clause disallows laws “prohibiting” religious exercise, the government retains authority to allow for those wishing to independently pursue their religious interests. For example, a public school is free to have a policy permitting a teacher to observe a religious holy day during one of the teacher’s allotted “personal days.” While the school’s power to accommodate the teacher does not come from the Free Exercise Clause, neither does the clause negate such a power.

The foregoing demonstrates why law professor Philip Kurland’s theory that what is constitutionally required is a “religion blind government”⁴⁷ is deeply flawed, for his theory is contrary to the very text of the two Religion Clauses. Indeed, the government’s noninvolvement in religious belief and doctrine is enhanced by a legislature’s religion-specific exemptions from general regulatory and tax burdens.⁴⁸ Government does not establish religion by leaving it alone. Rather, such exemptions expand religious freedom and reinforce the desired church-state separation. Hence, it is entirely proper that the Supreme Court has held in all congressional religion-exemption cases before it that the legislation in question does not violate the Establishment Clause.⁴⁹ The Court’s rationale in these cases has not

46. See *Rojas v. Fitch*, 127 F.3d 184 (1st Cir. 1997) (holding that statutory exemption for faith-based organizations from unemployment compensation tax did not violate the Establishment Clause).

47. See Philip B. Kurland, *Religion and the Law: Of Church and State and the Supreme Court* 18, 112 (Aldine Pub. Co. 1962) (proposing that First Amendment means religion can never be used as a basis for classification by the government).

48. While religious exemptions from general regulatory and tax burdens are compatible with the Establishment Clause, exemptions that discriminate among religions or that cause government officials to be drawn into the task of resolving a question of religious doctrine in order to administer a law do violate the Establishment Clause. See *Tex. Mthly., Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality opinion) (disallowing state sales tax exemption on sale of a narrow range of sacred literature); *Larson v. Valente*, 456 U.S. 228 (1982) (disallowing regulatory law that favored longstanding religions but not newly emerging faiths).

49. See *The Selective Service Draft Law Cases*, 245 U.S. 366 (holding that clergy, theology students, and religious pacifist could be exempt from military draft consistent with Establishment

always been entirely logical, but the Justices have consistently reached the right result.

Nondiscrimination in General Programs of Aid

When the modern Supreme Court turns from religious exemptions to take up the constitutionality of general programs of government financial assistance, whether for education, health care, or social welfare, the Court's recent emphasis has been on nondiscrimination (or, if one prefers, "equal treatment"). The Court's focus is on the ultimate beneficiaries and their ability to receive the intended aid without penalty because of any religious leanings.⁵⁰ A qualified beneficiary of a government aid program ought to be free to choose from whom he receives the intended service, including services delivered by a faith-based provider. This is the principle that underpins the G.I. Bill and college student loans, and animates the push for school vouchers, Charitable Choice, and the Faith-Based Initiative.⁵¹ Enabling these private religious choices further differentiates and enriches American society, and thereby adjusts the administration of welfare programs to the religious desires of the people. So long as the religious character of faith-based providers is safeguarded, there is no reason to deny to

Clause); *Gillette v. U.S.*, 401 U.S. 437 (1971) (holding that religious pacifist opposed to all war could be exempt from military draft consistent with Establishment Clause); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (holding that nondiscrimination statute could exempt religious organizations from prohibition on religious discrimination in employment consistent with Establishment Clause); *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (holding that federal civil rights legislation requiring states to accommodate many religious practices of prison inmates was consistent with the Establishment Clause).

50. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell*, 530 U.S. at 801 (plurality opinion); *Agostini v. Felton*, 521 U.S. 203 (1997); *Bowen v. Kendrick*, 487 U.S. 589 (1988). These programs have a secular purpose, namely, education, health care, or social welfare services. Hence, funding the programs is clearly within the government's authority. It remains true, of course, that government cannot have as a legislative purpose the support of religion *qua* religion. An absolute in Establishment Clause jurisprudence is the "prohibit[ion against] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *Bowen*, 487 U.S. at 611 (quoting *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985)).

51. See U.S. Dept. of Justice (Carl H. Esbeck), *Statement Before the United States House of Representatives Concerning Charitable Choice*, before the Subcommittee on the Constitution, U.S. House Judiciary Committee (June 17, 2001), reprinted at 16 Notre Dame J.L., Ethics & Pub. Policy 567 (2002). When the regulations are followed, the Faith-Based Initiative generally, and Charitable Choice in particular, have been found to be consistent with the Establishment Clause. See *Freedom From Religion Found. v. McCallum*, 324 F.3d 880 (7th Cir. 2003) (upholding a state-funded addict rehabilitation program operated by a faith-based organization); *Am. Jewish Cong. v. Corp. for Natl. & Community Serv.*, 399 F.3d 351 (D.C. Cir. 2005) (upholding funding of federal AmeriCorps program operating in conjunction with religious university that was training teachers for inner-city schools).

qualified beneficiaries free choice with respect to their access to education, health care, and social service programs.

It is little noted today that in *Everson*, freedom of choice for the intended beneficiaries of a general program of aid was upheld. Words of strict separationism aside, the *Everson* majority said that it was not unconstitutional for New Jersey to permit parents of students to be reimbursed for the out-of-pocket cost of school transportation, including reimbursing the parents of students attending religious schools. But *Everson* was not the first case permitting beneficiary choice, nor the last. The Native American students in the 1908 case of *Quick Bear v. Leupp* voluntarily attended schools on their reservation that, as it happened, were religious schools; and their parents directed the federal government as trustee to make trust fund payments to cover the tuition.⁵² And, of course, this idea of beneficiary choice is reflected in the Court's modern cases involving income tax deductions for payments of school tuition,⁵³ provision of special education services,⁵⁴ and school vouchers.⁵⁵ So *Everson* stands as an early contribution to a now growing line of beneficiary-choice cases.

Religion is Exceptional, but Not Therefore an Object of Disfavor

The foregoing approaches of the Supreme Court to statutory religious exemption cases and to affirmative aid cases are not contradictory. Only in a superficial sense are the first line of cases "separation-based" and the second line of cases "equality-based" such that they might be seen as inconsistent. Rather, minimizing the government's influence on each individual's choices in religious matters is the unifying principle.⁵⁶ Reducing the government's influence on people's religious choices on where to receive government benefits expands their freedom, as do religion-specific exemptions from regulatory legislation. This unifying principle works to free people to follow any religious leanings they might hold.

52. See 210 U.S. 50, at 81-82 (1908) (upholding disbursement of money by the federal government of Indian trust funds, held by the government as trustee, to a Catholic mission operating religious schools for Indian children).

53. See *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding state tax deduction by religious school parents for education-related expenses).

54. See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (holding that a student that transferred from public to religious high school did not lose his special education assistance).

55. See *Zelman*, 536 U.S. 639 (upholding state school voucher plan for urban area).

56. See Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L. J. 43, 46 (1997).

In important respects, religion is unique or exceptional, and government sometimes has to treat it as such. Indeed, the First Amendment admits the exceptionality of religion by expressly safeguarding its free exercise. But exceptionality does not preclude a rule of nondiscrimination (or “equal treatment”) with respect to religion in the context of a government-provided forum for speech or a government’s general program of aid. One begins with the reality that the First Amendment is a negative freedom. A “negative freedom” focuses on what the government cannot do to a person, not what a person can demand of his or her government. But when the government elects to affirmatively extend welfare or educational services to a general class of beneficiaries, then the government should not exclude an individual from the class because she makes a religious choice over a secular choice. To take note of religion only in order to exclude it from modern civil society is not only not required by the Establishment Clause, but runs counter to the clause’s predisposition to enlarge religious freedom.

Universities and K-12 schools are complex organizations. So are hospitals. So are nursing homes, homeless shelters, halfway houses, drug rehabilitation centers, domestic violence shelters, and other faith-based social service providers. They all need money, and for nearly all of these sizable, complex organizations the task of meeting their fiscal needs necessarily entails some public money to supplement their private resources. The United States has not been a Night Watchman State for decades; rather, what we have is an affirmative Welfare State that is deeply involved in the people’s well-being, be it in health care, education, or social services. Private-sector but public-serving organizations that are entirely privately funded hardly exist except on a very small scale. In a modern Welfare State—the sort of state where Americans actually live—discriminatory funding programs are the worst possible form of government policy. Competition for scarce financial resources puts pressure on religious citizens and the faith-based organizations they have created to adapt their own religious choices to the government’s favored behaviors. That pressure turns discriminatory funding into an engine of secularization, no less damaging to religious freedom because of the absence of malice.

Genuine separation of church and state means keeping the Welfare State out of the business of regulating and shaping religious decisions by those operating faith-based organizations. Restraining the state, including its courts, from becoming entangled in determining which organizations are “secular enough” to be eligible for aid and which are

“too religious” to fund is to reinforce church-state separation. Providing generally available programs of public assistance, neutral with respect to the character of the many eligible recipients—be they pervasively religious, a little religious, or nonreligious—will help to keep Caesar out of God’s business. And that is good for both Caesar’s people and for expanding the people’s liberty to make religious choices.

The rule of nondiscrimination with respect to affirmative programs of aid was first built on cases involving religious speech and equal-access to a public forum.⁵⁷ When it comes to the matter of religious speech and symbols, the threshold question is whether the speech is private (in which case it is generally protected by the freedom of speech) or whether the speech is fairly attributable to the government. If the latter, then no-establishment limits the government’s authority to sponsor or promote any ritual or symbol that carries a specific religious message.⁵⁸ Government sponsorship of religious speech would be an instance of Caesar interfering in the marketplace of specifically religious ideas, a subject matter not within the cognizance of our limited republic.⁵⁹ This is voluntarism. On the other hand, if the religious speech is not fairly attributed to the government (and is thus private speech), then nondiscrimination (equal treatment) is required with respect to religious speech and secular speech of the same kinds.

Everson’s Detractors

There are many detractors among both the left and the right to what the Supreme Court has done post-*Everson*. For example, Justice Clarence Thomas has created a stir by renewing interest in the

57. The first in this line of speech equal-access cases is *Widmar v. Vincent*, 454 U.S. 263 (1981) (striking down under Free Speech Clause state university restrictions on student religious groups meeting in university classroom buildings; exclusion not required by the Establishment Clause). The most recent speech equal-access case is *Good News Club v. Milford C. Sch.* 533 U.S. 98 (2001) (striking down under Free Speech Clause a K-12 public school’s denial of after-school access to classrooms for religious group seeking to meet with children upon first obtaining parental permission; exclusion not required by Establishment Clause). A case involving equal access to a speech forum and thereby access to government financial aid that partly defines the forum is *Rosenberger v. Rector & Visitors of U. Va.*, 515 U.S. 819 (1995).

58. The Free Speech Clause does not, of course, protect speech attributable to the government. The government has constitutional powers and duties, but no constitutional rights. Rights are to protect people from the government, not the other way around.

59. Depending on the facts, it can be a close call whether the speech in question is private or governmental. An example of the private versus government question being difficult is student-initiated prayer at the opening of a public high school football game. In *Santa Fe Indep. Sch. Dist. v. Doe*, a divided Court attributed the student’s prayer to the government. 530 U.S. 290, 315-317 (2000). That seems rightly decided.

“federalism theory” of the Establishment Clause.⁶⁰ The “federalism theory” is that the Establishment Clause was originally meant to leave matters involving religion and government in the hands of the states, and thus the clause does not apply to limit state or local law. In evaluating Justice Thomas’ line of argumentation, however, it is important to remember that, as reported out by the First Congress in September of 1789 for ratification by the states, the Establishment Clause denied power to the new national government in two respects. For clarity, I will call these the vertical denial and the horizontal denial of federal power. Confusion has come about because some have seemingly realized only the vertical denial, or what is called the “federalism theory.” When the vertical denial is thought to also negate federal power with respect to laws about “an establishment” in the District of Columbia and federal territories, then it is better termed the “jurisdictional theory.”

By its terms, one of the objects of the Establishment Clause was to act as a vertical denial preventing the national government from interfering with the governments of the states and the ways in which each state dealt with the matter of religion.⁶¹ The purpose of this disavowal of power was to protect the residual sovereignty of the states from the newly formed central government. This residual sovereignty was important but narrow, confined to laws about “an establishment” of religion. Nevertheless, the denial meant, for example, that Congress had no power to disturb the Congregational establishments in New England. It also meant, for that matter, no congressional power to overturn laws auxiliary to an establishment, such as state religious oath and test clauses, state-approved liturgy and prayer books, the licensure of clergy to preach and marry, and the approval of meeting houses for worship. Scholars delight in pointing out this purpose of the Establishment Clause, for it is an embarrassment to the Supreme Court, which completely overlooked this feature when deciding *Everson*. The no-establishment principle was said by the *Everson* Court to be binding on state and local governments pursuant to the Due Process Clause of the Fourteenth Amendment, a complete inversion of the vertical denial of power that is the Establishment Clause.⁶² Those who tout the

60. *Cutter*, 544 U.S. at 727-728 (Thomas, J., concurring); *Elk Grove United Sch. Dist.*, 542 U.S. at 50 (Thomas, J., concurring in the judgment).

61. See Esbeck, *Establishment Clause as Structural*, *supra* n. 26, at 15-17 (collecting authorities).

62. Recognizing only the vertical denial, law professor Kurt Lash proposed a means whereby the vertical denial or “federalism theory,” meant to protect the states from the national government, can nevertheless be understood today as an individual right to religious liberty, and

“federalism theory” (or “jurisdictional theory”) have a powerful criticism of *Everson*. However, some of these critics themselves overlook a second aspect to the Establishment Clause.

The text of the Establishment Clause also worked a horizontal denial, one that writers often miss or at least prefer to minimize. Justice Thomas, for example, gives it no mention. The horizontal work of the clause is to act as a negation of federal power when the national government is dealing with expressly delegated federal matters.⁶³ For example, when Congress first provided for an Army and a Navy, it might have asked, with an eye to the Establishment Clause, what (if anything) it could do concerning facilities for soldiers and sailors to worship, or for the provision of military chaplains? Or, in drafting the judiciary act that created the lower federal courts, Congress might have asked, with an eye to the Establishment Clause, whether the rules of evidence could permit testimony only upon taking an oath that acknowledges belief in a Supreme Being. Additional questions that an early Congress may have faced are: Might the Postmaster General suspend operations for postal delivery on Sundays? In passing a copyright law, may original works with religious themes be protected as a matter of intellectual property? Can a church file for bankruptcy?

thus fairly incorporated via the Fourteenth Amendment. Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 Ariz. St. L.J. 1085 (1995) (arguing that how the American people thought about the Establishment Clause changed between 1791 and 1868, and that it is the thinking of 1868 that is relevant when incorporating the clause and applying it to the states). However, the evidence that the meaning of the Establishment Clause changed during this period is thin and not altogether convincing, as is the evidence that the Reconstruction Congress gave much thought to the current meaning of the Establishment Clause. See Philip Hamburger, *Separation of Church and State* 436 n. 112 (Harv. U. Press 2002) (discussing why it is unlikely that the Fourteenth Amendment was meant to alter the meaning of the Establishment Clause); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 253, 385 n. 91 (Yale U. Press 1998) (historical evidence sparse and members of reconstruction Congress did not list non-establishment among their catalogue of rights); Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 Ohio N.U. L. Rev. 1, 17-29 (1998) (reviewing the congressional history of the post-Civil War debate over drafting the Fourteenth Amendment and certain religion questions, and concluding that in 1867 and 1868, the Establishment Clause continued to be viewed as a power-limiting clause rather than as a rights-based clause).

63. Ralph Ketcham, *Framed for Posterity: The Enduring Philosophy of the Constitution* 103 (U. Press Kan. 1993); Bernard H. Siegan, *The Supreme Court's Constitution: An Inquiry into Judicial Review and Its Impact on Society* 114 (Transaction Books 1987); Esbeck, *Establishment Clause as Structural*, *supra* n. 26, at 15-22, 26-27 (citing additional authorities). For example, the 1789 Constitution gave Congress express power to legislate with respect to the admission of new states into the union. And in doing so, such legislation could touch on the matter of religion, so long as the law did not create “an establishment.” Indeed, the Northwest Ordinance of 1787, which the First Congress reenacted, did touch on the matter of religion in Articles 1 and 3, but did so in a manner that was not “an establishment.” See *An Act to Provide for the Government of the Territory Northwest of the River Ohio*, 1 Stat. 50, 52 (1789).

Many of those who warm to the “federalism theory” (or “jurisdictional theory”) assume that the vertical denial of federal power with respect to religion is fairly broad, seemingly having left the states to do as they will with the entire field of religion and law. But when the horizontal denial of federal power is acknowledged at all, these critics write as if the scope of denial is narrow—often merely preventing the federal government from establishing a national church. However, the breadth of the vertical denial and horizontal denial must be identical because they are governed by the same words, the key being the meaning of “an establishment.”

As noted earlier, the clause’s terms deny to Congress only the power to make a law with respect to “an establishment” of religion, thus leaving it free to legislate more generally with respect to religion. It follows, for example, that Congress had the authority, without running afoul of the clause, to exempt religious pacifists from military service and thereby allow Quakers and others to exercise their religion.⁶⁴ And Congress had the authority to permit the copyrighting of religious books and music. These would have been laws that were, inter alia, about religion, but the laws would not have amounted to “an establishment” of religion.⁶⁵

64. The Court sanctioned such an exemption in *The Selective Service Draft Law Cases*, 245 U.S. 366 (holding, inter alia, that exemption from military draft of pacifists sects was constitutional), and again in *Gillette*, 401 U.S. 437 (holding that Congress may exempt a person from military service if he opposes all war but not those persons who object to participation in a particular war).

65. In a helpful recent article, law professor Steven Smith critiques others and further explains his own position with respect to the “jurisdictional theory.” See Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 Notre Dame L. Rev. 1843 (2006) [hereinafter Smith, *The Jurisdictional Establishment Clause*]. Smith’s earlier arguments for the “jurisdictional theory” had come in for criticism. See Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 45-48 (Oxford U. Press 1995) (concluding that the historical search for a substantive rule or principle underlying the Religion Clauses is doomed to fail because the clauses were intended to be no more than a jurisdictional allotment of power to the states; hence the provocative title suggesting that the many scholars who have searched for a substantive rule or standard to guide the courts when applying the Establishment Clause were foreordained to fail). In his most recent contribution, Smith: (1) acknowledges the horizontal denial (not just the vertical) that the Establishment Clause worked on federal power; and (2) notes that jurisdictional allocations necessarily have substantive consequences. Smith, *The Jurisdictional Establishment Clause*, *supra* n. 65, at 1861, 1874-1880. From the outset this meant, as Smith seems to acknowledge, that at the horizontal level Congress had no power (or “jurisdiction”) with respect to making laws about “an establishment,” but that Congress could draw on one of its original enumerated powers with respect to making laws more generally about religion. For example, using its expressed power to regulate the armed forces Congress could provide for military conscription, but then could also exempt religious pacifists. Such a law is within Congress’ power (or “jurisdiction”) whereas the exemption, while about religion, is not “an establishment” of religion. Smith’s reappraisal gets it right, it seems to me, but drains his original 1995 argument of much of its force. We see that Congress in 1791 and going

So what is “an establishment”? At a minimum, in regard to this horizontal denial, the Establishment Clause meant that the new central government could not establish a national church. It likely meant more than this minimalist reading. Even in 1791, the horizontal restraint of the clause would have prevented Congress from providing for an exemption from the military draft for Protestant pacifists but not Jews, or for permitting the copyrighting of Protestant sacred texts but not those of Catholics. Such favoritism of one religion over another not only burdens an individual’s exercise of religion, but also tends to favor and thus establish one religion over another. That would have been understood in 1791, much as it is apparent to us today. Moreover, if Congress had used the Taxing Clause to enact a nationwide version of Patrick Henry’s general assessment bill for the support of clergy,⁶⁶ surely that too would have violated the Establishment Clause as understood in 1791. Congressional passage of Henry’s bill would not have established a national church, but it would have been a law regarding “an establishment” of religion.

In the hands of the Supreme Court, however, the horizontal denial on the use of national power with respect to expressly enumerated federal subject matters came to mean much more—and this happened well before the *Everson* decision. Consider *Quick Bear v. Leupp* (1908), which involved federal trust fund payments to religious schools enrolling children of Native American parents who chose the schools,⁶⁷ and *Bradfield v. Roberts* (1899), which involved an appropriation of federal funds to pay the construction costs of a Catholic-affiliated hospital in the District of Columbia.⁶⁸ In both cases, the complainants argued that the Establishment Clause was violated by providing tax

forward has to work out a definable line between when it has jurisdiction to legislate about religion and when it does not have jurisdiction to legislate about religion because the desired act is “an establishment.” Call it jurisdictional or call it a substantive rule, is not this line-drawing the working out of a theory of church-state relations? As such, the Establishment Clause is about the separation of church and state or, more to the point, the clause is about properly ordering relations between church and state. Each has its own center of cognizance. Whether one calls it a “jurisdictional” or a “structural” Establishment Clause, they are one and the same. See generally Esbeck, *Establishment Clause as Structural*, *supra* n. 26. Moreover, this development ought to come as little surprise because the dual-authority pattern of divided jurisdiction between government and church has been part of the Western legal tradition since the Fourth Century. See Esbeck, *Dissent and Disestablishment*, 2004 BYU L. Rev., *supra* n. 6, at 1391-1392 1401-1432.

66. See Patrick Henry, *A Bill Establishing A Provision for Teachers of the Christian Religion* (Dec. 24, 1784) in Thomas E. Buckley, *Church and State in Revolutionary Virginia 1776-1787*, at 188-189 (U. Press Va. 1977).

67. 210 U.S. at 81-82. The Court said “we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the Government is necessarily undenominational.” *Id.* at 81.

68. 175 U.S. at 292.

funds to programs operated by a religious organization. In reply, the United States Attorney made no attempt to defend the case by arguing that the prohibition of the Establishment Clause was merely to stop the national government from establishing a national church. Rather, the litigants on both sides, and the Supreme Court as well, simply presumed a broader meaning of no-establishment: that the national government could not directly finance specifically religious (“sectarian”) activity. These cases were won by the federal government on the basis that the clause did not extend to these particular objects of financial support—the construction of a hospital available for the treatment of the local poor, and the payment of funds held by the government for the benefit of Native Americans and directed by Native American parents to the school of choice for their children’s education.

Other detractors of *Everson*’s incorporation of voluntarism believe that the Religion Clauses are in inevitable tension: free exercise is protective of religion and no-establishment holds religion in check.⁶⁹ This manner of framing the First Amendment presumes that the Free Exercise Clause and the Establishment Clause run in opposing directions, and indeed will often conflict. If this were so, it then would become the judicial task to determine if the law in question falls safely in the narrows where there is space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.

This conceptual framework holding that the free-exercise and no-establishment texts are in frequent tension, and at times are in outright war with one another, is quite impossible. Each clause in the first eight amendments to the Bill of Rights (the Ninth and Tenth Amendments being rules of construction) was designed to anticipate and negate the assumption of certain implied powers by the national government—a government already understood to be one of limited, enumerated powers. Thus, for example, the Free Speech Clause further limited national power and the Free Press Clause did so as well. These two

69. A typical example is as follows:

There can be a natural antagonism between a command not to establish religion and a command not to inhibit its practice. This tension between the clauses often leaves the Court with having to choose between competing values in religion cases. The general guide here is the concept of neutrality. The opposing values require that the government act to achieve only secular goals and that it achieve them in a religiously neutral manner.

Unfortunately, situations arise where the government may have no choice but to incidentally help or hinder religious groups or practices.

John E. Nowak & Ronald D. Rotunda, *Principles of Constitutional Law* 752-753 (2d ed., Thomson West 2005).

negatives on power—speech and press—can overlap and thus reinforce one another but they cannot conflict. Simply put, it is logically impossible for two negations of a government’s net delegated power to conflict. Similarly, the free exercise provision further restricted the nation’s delegated powers and no-establishment did likewise. These two negatives can overlap and thereby doubly deny the field of permissible governmental action, but they cannot conflict. To be sure, each Religion Clause in its own way works to protect religious freedom. And when circumstances are such that the scope of the clauses overlap, they necessarily complement rather than conflict with each other. However, imagining these two negations of governmental power as frequently clashing and having to be “balanced” and thus reconciled is deeply at odds with the fundamental nature of the federal Bill of Rights and the reason that the public demanded its addition to the 1789 Constitution.⁷⁰

Still other detractors of the post-*Everson* Court argue that there is but one Religion Clause, with no-establishment being instrumental to the free exercise of religion.⁷¹ That there is but one clause is grammatically correct. That is, up to the first semicolon of the First Amendment there is one clause with two participial phrases (“respecting an establishment” and “prohibiting the free exercise”) modifying the object (“no law”) of the verb (“shall make”). But it is incorrect to argue, as these commentators do, that the first participial phrase is instrumental to the second participial phrase. Rather, each phrase is grammatically equal to and operates independent of the other. Their equal status is evident because either participial phrase can be removed and the sentence still makes sense.

Of course the aim of the one-Religion-Clause argument is not to correct the Court’s grammar, but to keep no-establishment and free-exercise from conflicting and thus working at cross-purposes. That objective is right-minded. It is the solution that is wrong. There is a far more plausible, historically grounded, and grammatically correct way of keeping the two participial phrases from conflicting while giving each phrase essential, independent work to do in the service of religious freedom. The clauses-in-conflict problem can be solved by a rights-based free exercise principle that protects the cause of conscience and a

70. See Carl H. Esbeck, “*Play in the Joints between the Religion Clauses*” and other *Supreme Court Catachreses*, 34 Hofstra L. Rev. 1331 (2006) (providing an expansion of this argument).

71. See e.g. Richard John Neuhaus, *A New Order of Religious Freedom*, 60 Geo. Wash. L. Rev. 620, 627-629 (1992); John T. Noonan, Jr., *The End of Free Exercise?*, 42 DePaul L. Rev. 567, 567 (1992).

structural no-establishment clause that recognizes the negation of power in the government with an eye to ordering church-state relations.⁷² Voluntaryism is about negating the power of government, and it was to the voluntaryism played out state-by-state during America's early nationhood that *Everson* adopted to give substantive meaning to the Establishment Clause.

CONCLUSION

What, then, is America's church-state proposition ushered in by *Everson* and its progeny? While many Americans robustly debate religious beliefs and doctrine, it is the promise that our government will not throw its weight behind one side or the other of these debates. We have a free and unregulated market, so to speak, in religious ideas, practices, and expression. The government is barred from active involvement—either helping or hindering organized religion—in that marketplace. The government, rather, is to maintain a form of “neutrality.” Neutrality in this sense does not mean that government promotes the secular, for secularism is not neutral. Nor is governmental indifference to religion a position of neutrality, for Americans are a religious people and the government need not shut its eyes to what is there for all to see.

There is, one must suppose, no governmental “neutrality” in an absolute sense. But that is not required. Just as the very text of the First Amendment is pro-freedom of speech and pro-freedom of the press, in like manner the First Amendment is pro-freedom of religion. That is different, of course, from the government being pro-religion. Rather, the First Amendment is pro-freedom of religion, hardly a startling proposition for a liberal democracy populated by many religions and many religious people.

In this sense, “neutrality” after *Everson* means that government, one predisposed to enlarge freedom, including religious freedom, should

72. See Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. Church & St. 311, 323-325 (2000) (explaining in greater detail that the clauses-in-conflict problem is avoided by a rights-based Free Exercise Clause and a structural Establishment Clause, each in its own way protecting religious freedom). Further, the courts, commentators, and indeed, nearly everyone, presently speak and write in terms of two Religion Clauses. That convention will be virtually impossible to change. Finally, given the sharp cut-back in free exercise protection as a result of the decisions in *Empl. Div. of Ore.*, 494 U.S. 872 (limiting protection of Free Exercise Clause to intentional discrimination against religion) and *Locke*, 540 U.S. 712 (long-standing state constitutional provision prohibiting state funding of those training for the clergy was held sufficient to support exclusion of divinity student from state scholarship program without violating the Free Exercise Clause), it is a foolish tactic to argue that the freedom of the church rests primarily on the free exercise text.

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work to minimize its influence over the people's religious choices. For many Americans, their faith—and not just their individual faith but their understanding of the nature of the church (or other house of worship) and their membership therein—is an essential part of defining their place in the world and how they practice their religion with others of like mind. Nearly always religion has a large communal component. The organized religious group is where much of the life of faith is meaningfully lived out. The central value of the First Amendment is, then, freedom in two senses—not only in the cause of conscience in spiritual matters, but also, as suggested by the two-fold good that comes from separating state from church, the necessity of having the government step back so as to let the church be the church.