WHEN ACCOMMODATIONS FOR RELIGION VIOLATE THE ESTABLISHMENT CLAUSE: REGULARIZING THE SUPREME COURT'S ANALYSIS

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110 West Virginia Law Review (issue no. 1, fall 2007) (forthcoming)

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In a modern, complex republic like ours, discretionary accommodations for the many and diverse religious beliefs that dot the land ought to be regarded as widely permitted except for a narrow range of cases that are disallowed by the Establishment Clause. This is because the Establishment Clause is ultimately about freedom for religious individuals and the religious organizations they form, and thus the clause's predisposition is rightly weighted toward what is permitted. As will appear below, the United States Supreme Court has indeed approached its modern accommodation cases permissively, and thus we will find that most legislation expanding religious freedom is upheld as constitutional.

Part I of this article brings to bear those foundational principles applicable to the question of religious accommodations that flow from the nature of the original Constitution of 1789, the Bill of Rights, and the text of the First Amendment. Part II identifies ten Black Letter Rules concerning discretionary religious accommodations, rules that are either derived from the foregoing principles or can be teased out of the case law of the Supreme Court. With only one exception, I am not a critic of the end result (if not always the rationale) of the work of the modern Supreme Court in this area of its Establishment Clause jurisprudence. Finally, Part III applies the principles from Part I and the rules identified in Part II to the Court's "hard cases" in a manner that shows the

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law to be fairly predictable, as well as responds to Professor Kent Greenawalt's article which is part of this symposium.

I. GENERAL PRINCIPLES

The United States Supreme Court says, and I agree, that government must be neutral with respect to religion. But neutrality in an absolute sense is likely not possible.[1] Nor is it required. Just like the First Amendment is pro-freedom of speech and pro-freedom of the press, the First Amendment is also pro-freedom of religion. Now, being pro-freedom of religion is markedly different from being pro-religion. The latter is prohibited by the modern Establishment Clause, thereby maintaining the requisite government neutrality. But the First Amendment is pro-religious freedom. Moreover, this is as true of the Establishment Clause as it is of the Free Exercise Clause. While commonplace to some, others will be surprised to have the Establishment Clause portrayed as pro-religious freedom. This is to say that the separation of church and state, properly conceived, is far more about protecting religious freedom than it is about furthering modernity's project to confine religion, or at least to cabin those religions which modernity regards as dangerous and thus best practiced only in private.

Important constitutional concepts like free speech or due process have a single text. When taking up the matter of religious freedom and the First Amendment, an initial difficulty is that we are dealing not with one religion text but two: free exercise and no-establishment. Are the free exercise and no-establishment texts in tension and, indeed, at times in outright "conflict" such that the courts must balance one against the other? Or should the courts shrink the applicability of one text, say the Free Exercise Clause, to

[1] *See* ROY A. CLOUSER, THE MYTH OF RELIGIOUS NEUTRALITY: AN ESSAY ON THE HIDDEN ROLE OF RELIGIOUS BELIEF IN THEORIES 1-4 (revised ed. 2005).

reduce its scope so that it no longer conflicts with the other clause?[2] Or is there really just one unified religion text in the First Amendment and, thus, it has just one meaning? Or, finally, do the two texts operate separate and independent of each other, as well as complimentary should their scope on occasion overlap? The correct rendering, I believe, is that there are indeed two religion texts, the two texts are independent but complimentary, and thus they do not conflict. Demonstrating that this is the correct response to these questions means first going back to the basics.

The United States Constitution is comprised of just two juridical components: rights and powers.[3] Rights vest in individuals, including groups or organizations of individuals. On the other hand, the fame or structure of the national government is the enumerated powers that are vested in the government, including the allocation and dispersal of these powers among three branches and various federal offices. Unlike rights which run in favor of the rights-holder, powers are disbursed (checks and balances) in order to restrain the various branches and offices of the government by other branches and offices, thereby limiting power. These structural checks on power then redound to the greater liberty of the entire body politic.

The frame of the Constitution of 1789 is that of a federalist republic. Its powers are not only limited, as befits any republic, but are also enumerated or delegated. Those

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[2] *See, e.g.*, William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 553-54, 557 n.68 (1983); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. OF PITT. L. REV. 673 (1980). Professor Marshall avoids the supposed conflict between the clauses, but does so by reducing the Free Exercise Clause to protecting little not already safeguarded by the Free Speech Clause. Conversely, Professor Choper avoids the supposed conflict between the clauses by narrowing the Establishment Clause so that it disallows religion accommodations only where their "purpose is solely religious" and the proposed accommodation "is likely to impair religious freedom by coercing, compromising, or influencing religious beliefs." 41 U. OF PITT. L. REV. at 675. The fundamental problem in both instances is the presumption that the Religious Clauses are in tension so that one clause has to be subordinated to the other to relieve the "conflict."

[3] It is actually rights and authority, authority being the legitimate use of power. But the longstanding convention is to slide over that important distinction and speak of rights and power.

powers not delegated were retained by the preexisting states, and new states upon their admission to the union, as a consequence of their residual sovereignty. That the federal government's powers are only those delegated to it was implicit in the 1789 Constitution, but was then made explicit in the Tenth Amendment.

The Bill of Rights, adopted by Congress in 1789, ratified by the states in 1791, delegated no new powers to the federal government.[4] Just the opposite was its purpose, namely the substantive clauses of the first eight amendments (the Ninth and Tenth Amendments being rules of construction) are all power-limiting clauses. These eight amendments were thought necessary by many Anti-Federalists to negate the possibility of Federalists improperly implying certain powers from the more open-textured clauses of the 1789 Constitution,[5] such as the Necessary and Proper Clause.[6] It follows that neither the Establishment Clause nor the Free Exercise Clause was a source of additional new federal power. This is still true today. Thus, if Congress is to legislate on a matter with respect to religion, the power to do so must first be found in the 1789 Constitution or in

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[4] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 315-21 (2005).

[5] *See* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 178-255 (2006). By the same token, Federalists maintained that the 1789 Constitution never gave the central government power over matters such as religion. Thus, Federalists could agree to the Bill of Rights because from their perspective the amendments negated uses of federal powers never delegated in the first place.

[6] U.S. CONST. Art. I, § 8, cl. 18. The entire congressional debate over the drafting of the Religion Clauses of the First Amendment is found in JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 80-89 (2nd ed. 2005). In the first discussion of the Bill of Rights before the House of Representative, James Madison, Jr., the bill's author, said concerning the Religion Clauses:

> Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enable them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.

Id. at 82.

amendments adopted subsequent to the Bill of Rights, such as in the Fourteenth Amendment.[7]

A. A "Clash" of the Clauses?

While agreeing that there are two Religion Clauses, many appear to assume the two texts are inevitably in tension: free exercise being protective of religion and no-establishment holding religion in check.[8] 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.[9] If that were so, it then becomes a judicial task to determine if the statute in question falls safely in the narrows where there is space for legislative accommodation neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause. Such a construct places the nine Justices of the Supreme Court in the power seat, balancing free exercise against no-establishment, in whatever manner a five to four majority deems fair and square on any given day. Such unguided

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[7] For example, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et al., is based on Congress' power to direct and control the actions of federal officers and employees. Similarly, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et al., is based on Congress' Commerce Clause and Spending Power, as well as on the Enforcement Clause in sec. 5 of the Fourteenth Amendment.

[8] 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 AND RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 752-53 (2d ed. Thomson West 2005).

[9] The notion of the no-establishment principle restraining religion and religious organizations makes no sense for an additional reason. The Establishment Clause, like all of the Bill of Rights, is a restraint on government and government alone. It does not restrain the private sector. Of course, government should act responsibly and not permit itself to be persuaded by the private religious sector to take some action that violates the Establishment Clause. But the forbearance required by the no-establishment principle is that of the government, not the private sector.

balancing accords maximum power to the Court (or worse, power to one "swing" Justice), while wrongly trenching into the power delegated to the elected branches.

A conceptual framework that has free exercise and no-establishment in outright war with one another is quite impossible. Each clause in the first eight amendments to the Bill of Rights 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.[10] Thus, for example, the Free Speech Clause further limited national power and the Free Press Clause did so as well. These two negatives on power—speech and press—can overlap and thus reinforce the work of the other clause, but they cannot conflict. Simply put, it is logically impossible for two negatives of a government's delegated power to conflict. Similarly, the Free Exercise Clause restricted the nation's powers delegated in the 1789 Constitution, and the Establishment Clause did likewise. These two negatives on power can overlap and thereby doubly deny the field of permissible government action, but they cannot conflict.[11] Imagining these two negations of governmental power as frequently clashing and having to be "balanced" is deeply at

[10] James Madison, Jr., as a member of the House of Representatives from Virginia, introduced the Bill of Rights and said their purpose was "to limit and qualify the powers of the Government, by excepting out of 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 (Joseph Gales ed., 1789).

[11] There was a time when there was broad agreement that the Free Exercise Clause required the government to provide chaplains in the military and inside prisons. The rationale was that the religious liberty of a prisoner or member of the armed forces overrode the duty on the government to not establish religion. This occurs, it was thought, because of the unusual situation where government had removed these individuals from the general society (prison or posting at a military base) thereby preventing them from securing their own access to spiritual resources. If that were still the law, then there would be an exception to the rule that the Religion Clauses do not conflict. However, the scope of the Free Exercise Clause was greatly reduced in *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990). *Smith* held that the Free Exercise Clause is violated only by legislation which purposefully discriminates against religion. It would seem that *Smith*'s reading of the Free Exercise Clause places no affirmative duty on the government to provide chaplains to military personnel or to those who are incarcerated.

odds with the fundamental nature of the 1791 Bill of Rights and the reason that the Anti-Federalists demanded the bill's addition to the 1789 Constitution.[12]

Not only are the Religion Clauses not in conflict, but the Establishment Clause is pro-freedom of religion same as the Free Exercise Clause. The Free Exercise Clause is rights-based and vests in an adherent to a religious faith. The modern Establishment Clause operates quite differently, as a power-negating clause that limits the government's net authority or jurisdiction. And as with the doctrine of separation of powers, a consequence of any structural limit on government is to expand the breathing room for the exercise of the people's liberty. Hence, while operating separate and independent of each other, the Religion Clauses do not conflict. In that somewhat rare occasion when their scope does overlap, the clauses compliment one another by doubly denying the government's authority in a religious matter.

Consider this illustration. Assume a third-grade public school teacher begins the classroom day by leading her class in a recitation of the Lord's Prayer. Of her thirty students, assume only a Muslim student openly objects to the exercise. A lawsuit is filed on behalf of the student asserting the Free Exercise Clause. Upon showing that it is a burden for one of Islamic faith to recite the words of this Christian prayer, the student will prevail. The remedy awarded by the court will be an order requiring that the public school permit the objecting student to opt out of the prayer exercise.[13] Now assume a lawsuit is filed by the same student asserting the Establishment Clause. Again the student will win, but the remedy awarded by the court will be an order enjoining the

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[12] An expansion of this argument appears in my essay, *"Play in the Joints between the Religion Clauses" and other Supreme Court Catachreses*, 34 HOFSTRA L. REV. 1331 (2006).

[13] *See* West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (school requirement to salute flag and recite pledge is invalid as applied to Jehovah's Witnesses because it denies freedom of speech and of belief).

prayer exercise altogether. Indeed, even if other students intervene in this second suit arguing that they have no objection to the prayer, even that they greatly desire the recitation of the Lord's Prayer to continue, still the court will enjoin the prayer altogether.[14]

In this illustration, the scope of the free exercise and no-establishment texts overlap and doubly deny the government's action. So the clauses are complimentary, yet they operate differently. The Free Exercise Clause runs in favor of a particular rights holder (our Muslim student), and so the remedy is focused on lifting the religious harm from that individual. This explains the limited scope of the court's order which granted relief only to the harmed student and only to opt out of the prayer. The Establishment Clause, however, is a clause that reduces the net power or jurisdiction of government. No-establishment brought about a carve-out of government jurisdiction for all time, not just with respect to the complaining party before the court, thereby reducing the otherwise plenary power of the government to operate its state schools.

The Establishment Clause is pro-religious freedom in the illustration. However, the court's injunction favors not just our Muslim student but works to roll back entirely the actions of the government which is exceeding its jurisdiction (i.e., government has no power with respect to a specifically religious matter such as prayer). The Establishment Clause also works a consequential expansion of the liberty of those students in the class who do not want the prayer but who are nonreligious, and thus they suffer no religious

[14] *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (disallowing practice of daily public school classroom prayer and devotional Bible reading); Engel v. Vitale, 370 U.S. 421 (1962) (disallowing state program of daily public school classroom prayer).

harm.[15] Here, no-establishment works to extend liberty to some additional students where the Free Exercise Clause was of no help. Finally, those students wanting the prayer (presumably Christian) have no free-exercise right to continuance of the teacher-led prayer.[16]

To summarize, the First Amendment is pro-religious freedom, which is quite different from being pro-religion. This predisposition includes the modern Establishment Clause, not just the Free Exercise Clause. The Religion Clauses do not conflict. Rather, both clauses work to safeguard religious freedom, albeit they operate differently to bring that about. The Free Exercise Clause is a rights-conferring clause that vests in religious individuals, including protection for any religious organizations they may form. On the other hand, the Establishment Clause is a power-negating clause that is about limiting in all cases the government's net power to legislate on matters more properly within the purview of organized religion.[17] This means that the Establishment Clause, unlike the Free Exercise Clause, will afford relief in some instances where there is "no injury in fact," a truism that the Supreme Court has adjusted for by allowing the fiction of taxpayer standing.[18]

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[15] To state a prima facie claim under the Free Exercise Clause, a claimant must sincerely hold to a religion. A nonreligious person cannot state such a claim. To not have a religion is certainly an exercise of freedom, but it is not an exercise of religion.

[16] Justice Clark, writing for the majority in *Schempp*, observed that, "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." 374 U.S. at 226.

[17] The power-negating nature of the modern Establishment Clause is further developed in my articles, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998), and *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J. OF LAW & POLITICS 445 (2002).

[18] *See* Flast v. Cohen, 392 U.S. 83 (1968) (holding that federal taxpayers have standing to sue in certain cases invoking the Establishment Clause notwithstanding the absence of "injury in fact" in the traditional sense). 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.

B. It Might be Old Fashioned, but the Words of the Text Still Matter.

Turn now to the relevant text of the First Amendment, which reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." We have here two participial phrases ("respecting an establishment" and "prohibiting the free exercise") modifying the object ("no law") of the verb ("shall make"). Each participial phrase is independent of the other, and of equal stature. That neither participial phrase is subordinate to the other but of equal stature is evident because the text makes perfect sense when either participial phrase is omitted.[19] Accordingly, it is grammatically incorrect to claim, as some do, that there is only one unified religion text, with the no-establishment text merely instrumental to the free-exercise text.[20]

Along with the text's object ("no law") of the verb ("shall make"), now focus on the first participial phrase in the First Amendment: "Congress shall make no law respecting an establishment of religion." It does not say, "Congress shall make no law respecting religion." It plainly follows that Congress may enact a law that is about religion, so long as the law is not one that more narrowly is "an establishment" of religion.[21] For example, in providing for the copyrighting of literature and music,[22]

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[19] The First Amendment would make sense if it read, "Congress shall make no law respecting an establishment of religion; or abridging freedom of speech . . . ." Likewise the amendment would make sense if it read, "Congress shall make no law prohibiting the free exercise of religion; or abridging freedom of speech . . . ."

[20] *See, e.g.,* Richard John Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 627-29 (1992); John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567, 567 (1992).

[21] Among other things, this demonstrates why law professor Philip Kurland's theory that what is constitutionally required is a "religion blind government" is deeply flawed, for his theory is contrary to the very text of the two Religion Clauses. *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 use as a basis for classification by the government).

[22] U.S. CONST. Article I, Section 8, clause 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

Congress may pass a law that expressly allows for religious music and religious literature (even sacred texts) to receive copyright protection. Likewise, when instituting the bankruptcy courts[23] Congress may expressly permit churches and other religious organizations to declare bankruptcy. In providing for a U.S. Postal Service,[24] Congress may not only contemplate use of the mails by religious organizations, but may expressly specify that reduced postal rates for nonprofits will be available to religious nonprofit organizations. In setting up a federal court system,[25] Congress may provide that under the rules of evidence the clergyperson privilege is to be acknowledged and honored. Further, these rules of evidence may provide that a witness' testimony is permitted only upon oath or affirmation, and that swearing on one's belief in God is the standard means for satisfying the required oath. Such congressional legislation—copyright, bankruptcy, postal services, the judiciary act—are all general laws that certainly are, *inter alia*, about religion. But these congressional statutes stop short of being more narrowly "an establishment" of religion. Indeed, it could be said that all these congressional acts are discretionary accommodations of religion, yet the statutes stop short of being "an establishment."

That accommodations for religion are generally permissible is also evident elsewhere in the text of the Constitution. The Free Exercise Clause is a law that most certainly is about accommodating religion, but it would be absurd to claim the Free Exercise Clause is "an establishment" of religion and thus in violation of the

[23] U.S. CONST. Article I, Section 8, clause 4 ("The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.").
[24] U.S. CONST. Article I, Section 8, clause 7 ("The Congress shall have Power . . . To establish Post Offices and post Roads.").
[25] U.S. CONST. Article I, Section 8, clause 9 ("The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court.").

Establishment Clause. Additionally, the 1789 Constitution explicitly speaks of religion in three places. The oaths of office set forth in the Constitution permit, in the alternative, affirmations.[26] This was done to accommodate the widely known scruples of Quakers, as well as Anabaptists such as Mennonites, who will not swear or take an oath.[27] The Sunday Clause[28] permits the President, contemplating a veto or "pocket veto," to take advantage of the full allotted ten days and yet to honor the Sabbath by not having to attend to the official duty of affixing a veto when the ten-day deadline happens to fall on a Sunday.[29] Finally, of greater moment in 1787-1789 than now, the Religious Test Clause[30] has an element of accommodation to it, albeit religious test laws then extant in some of the states were more in the nature of auxiliary props to existing establishments of religion.[31]

Under the First Amendment, therefore, the approach should be that it is generally a proper legislative purpose to accommodate individuals and religious organizations in

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[26] *See, e.g.*, U.S. CONST. Article I, Section 3, clause 6 and Article VI, clause 3.
[27] The practice is taken from a biblical passage in the gospel of Matthew 5:33-37.
[28] U.S. CONST. Article I, Section 7, clause 2 ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevents its Return, in which Case it shall not be a Law.").
[29] *See* David K. Huttar, *The First Amendment and Sunday*, 7 ENGAGE 166 (October 2006) (noting that the clause is not an accommodation to the President's Sabbath, whatever the day of the week happens to be of the current President's Sabbath; rather, the clause specifically singles out Sunday as the assumed Sabbath day of the President).
[30] U.S. CONST. Article IV, clause 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."). The Religious Test Clause limits not only the power of the national government, but also that of the states. When a state selects its U.S. Senators, Representatives, and electors for the Electoral College, the Test Clause is applicable. *See generally* Note, *An Originalist Analysis of the No Religious Test Clause*, 120 HARV. L. REV. 1649 (2007).
[31] In the period 1787-1789, eleven of the original thirteen states had religious tests for becoming a state official. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 81 (2d edit. 1994). Accordingly, it would seem that many Americans at that time did not opposed religious tests, but they just wanted their own state legislature to determine the requirement. And they had reason to believe that at the federal level, should there be an attempt to impose a religious test, achieving consensus on the terms of such a test would certainly be divisive and perhaps impossible. *See* Oliver Ellsworth, *The Landholder, No. 7* (Dec. 7, 1787), reprinted in 4 THE FOUNDERS' CONSTITUTION 640 (Philip B. Kurland & Ralph Lerner eds., 1987). Ellsworth was a delegate from Connecticut to the Constitutional Convention of 1787. He wrote several "Letters of a Landholder" in favor of the ratification of the Constitution, of which No. 7 was a defense of the Religious Test Clause.

the observance of religious practices by relieving them of burdens, notwithstanding that a similar governmental burden is placed on others. Congress (or the states) may pass a law that touches on or is about religion with the aim of accommodating religion, so long as the law is not more narrowly "an establishment" of religion. This is not pro-religion, but pro-religious freedom. The Establishment Clause is thus properly read as fairly permissive with respect to accommodations, albeit, as we shall see in Part II, the no-establishment principle has real bite when it comes to keeping government from favoring one religion over another, or from being actively involved in specifically religious matters.

C. The *Everson* Decision and the Voluntary Way.

Impermissible accommodations for religion are those laws the subject matter of which is "respecting an establishment" of religion. The present participial "respecting" means "with regard or relation to."[32] So what is "an establishment"? Since the United States Supreme Court's 1947 decision in *Everson v. Board of Education of Ewing Township*,[33] no-establishment means the enforcement of the principle of voluntaryism. In *Everson*, all nine Justices were of the mind that the carve-outs from net federal power represented by the Establishment Clause were the same as the ideas that emerged from the disestablishment struggles in the several states, with special attention to the Virginia experience.[34] The disestablishment efforts in the states, which took place from 1774 to

[32] WEBSTER'S NEW INTERNATIONAL DICTIONARY 2123 (2d ed. unabridged 1952).
[33] 330 U.S. 1 (1947) (holding for the first time that the Establishment Clause is applicable to state and local governments via the Fourteenth Amendment).
[34] On the Virginia disestablishment, see THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776−1787 (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) (1910); CHARLES F. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA (Da Capo Press, 1971) (1900); WILLIAM LEE MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 3-75, 96-106 (1986).

1833, involved nine of the original thirteen states, as well as Vermont and Maine.[35] Disestablishment—most importantly the cutting off of tax assessments for the Anglican Church in the South and the Congregational Church in the New England states—was the first big step in the implementation of a larger principle that was then called (and spelled) voluntaryism. Historian Jack Rakove nicely phrases disestablishment in the states as having worked a "deregulation" of religion.[36]

From America's earliest colonial days organized religion was heavily regulated, and the state-by-state disestablishments changed that. In altering the relationship between state government and organized religion, the movement toward disestablishment had a two-fold purpose. First, disestablishmentarians decried the state establishments as interfering with religion, corrupting the role of clergy, using the church as an instrument to carry out state policy, and oppressing dissenters. They argued that establishment misconceived the scope of government. Specific religious beliefs and observances "are not within the cognizance" of civil government, as James Madison succinctly stated the matter.[37] A state church was thought to be bad for authentic faith, disestablishment the opposite. Second, disestablishmentarians believed that for state laws to take sides in disputes over creedal tenets and specific forms of religious observance was to dangerously risk dividing the body politic. This was of no small moment, because at the

[35] 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 (2004).
[36] JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 311-12 (1997).
[37] James Madison, Jr., *A Memorial and Remonstrance Against Religious Assessments* ¶¶ 1, 8 (1785), *in* THE PAPERS OF JAMES MADISON 8:299, 301-02 (Robert A. Rutland & William M.E. Rachal, eds., 1973).

time of the American founding republics were still experimental and thought to be unstable.[38]

Voluntaryism is where religion is supported voluntarily by those in the private sector—which is to say, not by the government. Voluntaryism goes well beyond prohibiting attempts by government to force religious belief or to coerce religiously informed conscience. Voluntaryism is about rejecting active government support for religion, whether or not that support results in coercion. This is why a law can undermine voluntaryism, yet there is not always an individual or organization with "injury in fact," and thus no standing to sue.[39]

While the principle of voluntaryism was increasingly being embraced in the new nation from 1774-1833, once disestablishment was completed there remained a gap between the actual practice of voluntaryism and the larger principle when it came to government support of religious symbols and observances agreeable to the then dominant Protestants.[40] That is where matters stood for over a century, more or less, until the *Everson* Court in 1947 uncovered a near dormant Establishment Clause,[41] and put it to

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[38] The founders knew, for example, how sectarian division contributed to the failure of the English Commonwealth (1649-1658). 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 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, cl. 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. (13 Wall.) 679 (1872) (no civil court jurisdiction with respect to disputes over religious doctrine, polity, or church discipline).

[39] *See, supra*, note 18, and accompanying text (discussing the legal fiction of taxpayer standing).

[40] SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 134-55 (1963); ROBERT T. HANDY, A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES 82-133 (2d ed. 1984).

[41] Limited to restraining only the actions of the federal government, the Establishment Clause was not taken up and applied by the Supreme Court until well into the nation's second century. *See* Bradfield v. Roberts, 175 U.S. 291 (1899). The *Bradfield* Court upheld the use of federal funds for construction at a Catholic-affiliated hospital corporation situated in the District of Columbia. Only two of the Supreme Court's 20th Century cases up to the time of its decision in *Everson* relied on the no-establishment text. *See* The Selective Service Draft Law Cases, 245 U.S. 366, 389-90 (1918) (upholding exemptions from military draft for clergy, theology students, and pacifist denominations); Quick Bear v. Leupp, 210 U.S. 50, 81-82 (1908)

the task of social clearing in the interest of a government (now state and local governments as well) that was suppose to be "neutral" with respect to religion. With the decision in *Everson*, 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 subject to federal judicial review. We had, so to speak, a court-initiated nationalization of American religious-juridical culture.

Voluntaryism is a claim about the right ordering of state and church, each properly having its own center of authority. For juridical purposes, church-state relations operate not unlike the doctrine of separation of powers where each of the three branches has its own focus of jurisdiction and the court's task is to keep them in right order. The popular term for voluntaryism today is "the separation of church and state." And the American people, as do the post-*Everson* courts, associate that separation concept with the modern Establishment Clause. Hence, I often place the adjective "modern" before "Establishment Clause" to distinguish the Court's post-*Everson* interpretation of the clause from the Establishment Clause in its original meaning.[42]

I do not mean to imply that it is always easy to know when a religious accommodation violates the modern Establishment Clause, which is to say, to know

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(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 examination into the meaning of no-establishment.

[42] I acknowledge that in America's early national period Congress took some actions that belie voluntaryism as the principle behind a power-negating Establishment Clause. *See* 84 IOWA L. REV., *supra*, n.17, at 19-20 (citing examples). But that does not contradict the argument here. My argument is that by the time *Everson* was decided, likely even before, the thinking of the U.S. Supreme Court was that the notion of church-state relations had become conterminous with voluntaryism. And when *Everson* came down, the Court (rightly or wrongly) read into the Establishment Clause the voluntary way. In doing so, the Court expressly said it was borrowing from the ideas that prevailed during the state-by-state disestablishment, with special attention to Virginia. It is equally interesting to note what period in history the Court did not borrow from. The Court did not go back to examine the original intent of the First Congress, which drafted the clause, or the initial application (or disregard) of the clause by the early congresses, for guidance into the meaning of the Establishment Clause. I am not trying to justify what the Court did, but merely to observe that this is what happened.

when an accommodation violates the principle of voluntaryism. There will be easy cases and close cases. There will be cases where there is agreement on the facts but disagreement on the meaning of the facts in terms of legislative purpose or effect. There will be cases where there is disagreement over whether the church-state entanglement is tolerable or excessive. But that there is a line between church and state, that the line embodies the principle of voluntaryism, and that most religious accommodations are permitted because their purpose and effect is to expand religious freedom should not be seriously disputed. The level of indeterminacy in Establishment Clause jurisprudence is exaggerated. Of course, large numbers of Americans, left and right, do not accept the modern Establishment Clause as properly embodying the principle of voluntaryism or as pro-religious freedom. But that is a different dispute than whether voluntaryism draws a fairly predictable line between church and state. I believe it does. And, apparently, the United States Supreme Court thinks so as well, which makes possible the rule-oriented approach in Part II of this article.

II. BLACK LETTER RULES FOR RELIGIOUS ACCOMMODATIONS

Notwithstanding restraints in the United States Constitution on church-state relations, most government actions[43] with respect to religion are left to the discretion of legislatures and public officials.[44] As discussed in Part I, this is because the environment

[43] Because it is the subject of a different panel at this conference, I am putting to one side government speech as distinct from nonexpressional actions by government. Obviously government can use its power to speak in an attempt to accommodate religion, and in some instances the government's speech will violate the Establishment Clause. For example, public school curriculum is government speech. Concerning curricula decisions, an accepted rule is that public schools may teach about religion but they may not engage in the teaching of religion. This is a good rule, one originally suggested by Justice Goldberg, concurring in *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 306 (1963).

[44] Because the scope of this part of the conference is limited to constraints imposed by the Establishment Clause, for the most part I put to one side constraints imposed elsewhere by the U.S. Constitution. Likewise, I am not addressing restraints in state law on church-state relations, the most important of which appear in the constitutions of the states.

for church-state relations created by the First Amendment is far more permissive than it is prohibitive of discretionary religious accommodations. The case law bears this out. Moreover, while the topic of religious accommodations is important, we should guard against thinking it is overly complex. Some call the Supreme Court's cases confusing and contradictory, when that characterization is really a proxy for disagreement with the Court in some fundamental respects.

What follows are ten Black Letter Rules that fairly restate the cases. Rules 1 through 5 are about what government may do, whereas Rules 6 through 10 are about what government may not do.

1. **Government may refrain from imposing a burden on religion, while imposing the burden on others similarly situated.**

Instances of this sort are often identified as "religious exemption" cases. A religious individual or organization is relieved of a burden. A "burden" here typically means a regulation, a tax, or a criminal prohibition.

The leading case is *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[45] *Amos* upheld a statutory exemption in title VII of

[45] 483 U.S. 327 (1987). *See also* Cutter v. Wilkinson, 544 U.S. 709 (2005) (holding that the Religious Land Use and Institutionalized Persons Act, which accommodates religious observance by prisoners, did not violate the Establishment Clause); Gillette v. United States, 401 U.S. 437 (1971) (religious exemption from military draft for those who oppose all war does not violate Establishment Clause); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding property tax exemptions for religious organizations); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding a release-time program for students to attend religious exercises off public school grounds); The Selective Draft Law Cases, 245 U.S. 366 (1918) (upholding, *inter alia*, military draft exemptions for clergy and theology students).

In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality opinion), a three-Justice plurality struck down a state sales tax exemption available on purchases of sacred and other literature promulgation a religious faith. *Texas Monthly* is not contrary to *Amos* and the other cases cited in this note. The plurality expressly went out of its way to say that *Amos* and *Zorach* were distinguishable. *Id*. at 18 n.8. The plurality even opined that it would be constitutional if the U.S. Air Force adopted a religious exemption from the military's otherwise exclusive rule on the wearing of official head gear. *Id*. The Air Force illustration was in reference to *Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding that Free Exercise Clause did not require accommodation by armed forces the wearing of religious head covering while on duty an in uniform).

the Civil Rights Act of 1964,[46] as amended in 1972, permitting religious discrimination in employment by religious organizations.[47] Title VII prohibits employers from discriminating against their employees on various bases, such as race and national origin, including on the basis of religion. As originally adopted in 1964, title VII had a narrow exemption that allowed religious employers to staff on a religious basis only when the duties of the job were religious. Congress expanded the exemption in 1972 to allow religious staffing with respect to all the jobs at a religious organization.

Mayson, a custodian employed at a gymnasium owned and operated by the Mormon Church, was discharged when he no longer was a church member in good standing. That title VII classified using expressed religious terms, including the challenged exemption being exclusive to religious organizations, gave the *Amos* Court little pause.[48] Rather, the salient distinction for the Supreme Court was between government being pro-religion, which is prohibited, and the government being pro-religious freedom, which is permitted,[49] perhaps even encouraged, by the Establishment Clause.

The Court in *Amos* began by reaffirming that the modern Establishment Clause means government must be "neutral" as to religion, meaning that the government must not "act[] with the intent of promoting a particular point of view in religious matters."[50] But the broader exemption supplied by Congress in the 1972 amendment was not "abandoning neutrality" with respect to religion, for "it is a permissible legislative

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[46] 42 U.S.C. §§ 2000e et al.
[47] 42 U.S.C. § 2000e-1(a).
[48] 483 U.S. at 338. Thus, *Amos* is properly dismissive of law professor Philip Kurland's test which would not permit classifications on the basis of religion. *See, supra*, note 21.
[49] Permitted, that is, when pursued by the proper means. The proper means to that end are the subject of Black Letter Rules 6 through 10, in Part II, *infra*.
[50] 483 U.S. at 335.

purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[51] The Court acknowledged that "[u]doubtedly, religious organizations are better able now to advance their purposes than they were prior to the 1972 amendment," but "religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster."[52] Legislation that seeks to expand religious freedom, insisted the Court, "is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose."[53] It is to be expected that a law seeking to protect religious freedom might be used by a church to advance its religion. However, "[f]or a law to have forbidden 'effects' [under the Establishment Clause], it must be fair to say that the *government itself* has advanced religion through its own activities and influence,"[54] not government merely having advanced religious freedom. "In such circumstances," reasoned the Court, "we do not see how any advancement of religion achieved by the Gymnasium can be fairly attributed to the Government, as opposed to the Church."[55]

The *Amos* Court could be understood as making a distinction in reliance on the "state action" doctrine. Such a distinction will be helpful to some, but it may mislead others into thinking *Amos* is a "state action" ruling.[56] The Bill of Rights, including the Establishment Clause, checks only government, not private sector actors such as a

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[51] *Id*.
[52] *Id*. at 336.
[53] *Id*. at 337.
[54] *Id*.
[55] *Id*.
[56] Professor Greenawalt obliquely criticizes this way of thinking as allowing the government to avoid taking First Amendment responsibility for its legislative accommodation. Kent Greenawalt, *Establishment Clause Limits on Free Exercise Accommodations*, 110 W.VA. L. REV. ___ (forthcoming 2007) [hereinafter Greenawalt]. [Greenawalt manuscript at 28-29.] While possibly misleading to some, I do not think it is wrong to note the parallel to "state action" doctrine, and it can be helpful. It is imperative that the Mormon Church here not be treated as a state actor. If the church were regarded as a state actor, then the church would be responsible for the religious coercion clearly suffered by Mason and thus in violation of the Free Exercise Clause. That is the sort of confusion that ensnared the federal district court in *Amos*.

church. The adoption of the 1972 amendment was "state action," of course, but it is an action that does not violate the Establishment Clause. That is, although the Establishment Clause prohibits government from being pro-religion, it permits government to be pro-religious freedom. True, the Mormon Church here acted in a way that was pro-religion, but the church, being in the private sector, is not a state actor and thus is not restrained by the Establishment Clause. "Undoubtedly, Mayson's freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of changing his religious practices or losing his job."[57]

Looking back over its prior cases, the *Amos* Court said it had never held that a statutory accommodation that "singles out" religion was unconstitutional, nor had the Court ever said that a religious exemption must be accompanied by a similar exemption for others. The Court was correct on both accounts.[58] So long as the "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."[59] Once again, a government that is properly "neutral as to religion" may be pro-religious freedom, just not pro-religion.

In *Amos*, a regulatory burden first imposed in 1964 was lifted in 1972.[60] This answers the so-called baseline issue, with a government's legislative "purpose" and

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[57] *Id*. at 337 n.15.
[58] Cutter v. Wilkinson, 544 U.S. 709 (2005) (holding that the Religious Land Use and Institutionalized Persons Act, which accommodates religious observance by prisoners, did not violate the Establishment Clause); Gillette v. United States, 401 U.S. 437 (1971) (religious exemption from military draft for those who oppose all war does not violate Establishment Clause); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding a release-time program for students to attend religious exercises off public school grounds); The Selective Draft Law Cases, 245 U.S. 366 (1918) (upholding military draft exemptions for clergy and theology students).
[59] 483 U.S. at 338.
[60] *Id*. at 335-36.

"effect" in religious advancement to be measured against an original position of no government-imposed burden on religion.[61] Moreover, *Amos* makes it clear that for a government to "refrain from imposing a burden" is logically no different from "lifting a burden" imposed in the past. That is, a burden imposed in 1964 and lifted in 1972 does not move the baseline.

Finally, rather than "impermissibly entangl[ing] church and state," as Mayson argued was a consequence of the 1972 amendment, the Court found the obvious, namely that the expanded 1972 exemption "effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious beliefs that the District Court engaged in in this case."[62] The 1972 exemption ran to all religious staffing by the church, thus reinforcing the desired church-state separation by leaving organized religion where it found it, which is to say, unregulated with respect to religious staffing. Government does not establishment a religion by leaving it alone.[63]

To reduce civil-religion tensions and to minimize church-state interactions are matters that enhance the separation so very prized by the modern Establishment Clause. This goes to the matter of church autonomy, one of two underlying purposes of the Establishment Clause. Less contact between church and state may not always be constitutionally required, but it does mean less opportunity for the regulatory state to

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[61] For government to remain at the baseline is to be "neutral" with respect to religious advancement. It follows that when a legislature affirmatively moves to lift a religious burden imposed by the private sector the legislation is to be regarded as an affirmative step by government away from the baseline. Such an affirmative move makes the government's "purpose" or "effect" appear more supportative of religion. This in turn raises greater concern that the accommodation is "an establishment." However, this factor alone is not individually fatale. *See* text accompanying notes 165, 178 and 181, *infra* [additional discussion concerning the "neutral" baseline].

[62] *Id*. at 339.

[63] *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church-Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1416 (1981) ("The state does not support or establish religion by leaving it alone.").

interfere with those matters in the sole purview of the church. The potential for interference with the religious employer under the narrow 1964 exemption was "to require [the religious organization], on pain of substantial liability, to predict which of its [jobs] a secular court will consider religious"[64] and thus exempt, and which jobs are sufficiently nonreligious and thus subject to title VII. The Court understood that fear of getting embroiled in litigation and incurring monetary liability "might affect the way an organization carried out . . . its religious mission" because of a real concern that a civil "judge would not understand its religious tenets and sense of mission."[65] By reinforcing the separation of church and state, the 1972 amendment was a win for religious freedom.

2. **Government may confer benefits to eligible individuals with respect to education, health care, or social service programs, who exercise personal choice in selecting where to use their benefit to obtain program services, whether from a public or private organization, including a religious organization.**[66]

Some will argue that a general government program of financial assistance, one equally open to a wide array of providers, including religious providers, is not properly seen as a "discretionary religious accommodation." Fair enough, if one wants to define "accommodation" narrowly. But any discussion of the Establishment Clause will be seriously incomplete if we do not also discuss these government "benefit cases" and whether equal-treatment with respect to religion is at least a permitted accommodation. It is for this reason that I include here Rules 2, 3, and 4.

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[64] 483 U.S. at 336.
[65] *Id*.
[66] "Benefit" as used here means affirmative financial aid or other assistance for a secular purpose in the nature of a subsidy, grant, contract, entitlement, loan, or insurance, as well as a tax credit or deduction. A tax exemption, such as that upheld for religious organizations in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), is to be distinguished from tax credits and deductions. A tax exemption is government's election to "leave religion where it found it," and thus exemptions are a "declining to impose a burden" case rather than the "extension of a benefit" case.

There are numerous familiar programs that illustrate Rule 2: individual income tax deductions for contributions to charitable organizations, including those that are religious; the G.I. Bill and other federal aid to students attending the college of their choice, including religious colleges; and federal child-care certificates issued to low income parents who enroll a child in a participating preschool of their choice, including a religious preschool program.

The leading case is *Mueller v. Allen*,[67] which upheld a state income tax deduction for parents paying school tuition and other expenses associated with the enrollment of a child in an elementary or secondary school of the parent's choice, including a religious school. *Mueller* established the logic of this line of cases, which more recently culminated in the Supreme Court sustaining the constitutionally of the hard fought issue of vouchers for K-12 schools, including religious schools.[68]

The *Mueller* Court began by noting that the state income tax deduction was "available for educational expenses incurred by all parents, including those whose

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[67] 463 U.S. 388 (1983). *See also* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding a state voucher plan for urban students enrolled in K-12 schools, including religious schools); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (providing special education services to Catholic student not prohibited by Establishment Clause); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (upholding a state vocational rehabilitation grant to disabled student choosing to use grant for training as cleric); Central Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (upholding loan of secular textbooks to parents of school-age children, including parents who enroll their children in religious schools); Everson v. Board of Educ., 330 U.S. 1 (1947) (upholding state law providing reimbursement to parents for expense of transporting children by bus to school, including parochial schools); Cochran v. Louisiana St. Bd. of Educ., 281 U.S. 370 (1930) (upholding state loan of textbooks to parents with students enrolled in public and private schools, including religious schools).

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (plurality opinion) (three-Justice plurality struck down a state sales tax exemption available on purchases of sacred and other literature promulgating a religious faith), is not to the contrary. The three-Justice plurality suggests at points in the opinion that it views the exemption as if it were a benefit or subsidy for the purchasers of these materials. *Id*. at 18. If the tax exemption is indeed properly characterized as a subsidy, one specially extended to purchasers of religious materials alone, then it clearly is violative of the Establishment Clause. Such a subsidy would not be a neutral benefit program. Justice Blackmun's separate opinion also seems to adopt the view that the exemption is a subsidy or "statutory preference," and as such one violative of the Establishment Clause. *Id*. at 26, 28-29 (Blackmun, J., concurring in the judgment, joined by O'Connor, J.).

[68] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

children attend non-sectarian private schools or sectarian private schools,"[69] as well as public schools. Unlike aid-to-education programs earlier rejected by the Court, the benefit here was "neutral" in availability and hence not facially targeted on getting aid to religious schools.[70] The Court conceded that from an economic standpoint it did not make any difference whether the tax benefit was directly supplied to the parent or directly to the religious school. But economic impact is not conclusive. It is also true that the "public funds become available only as a result of numerous, private choices of individual parents of school-age children."[71] Accordingly, any financial aid that flows to a religious school is fairly characterized as "attenuated," thought the Court, for the matter is "ultimately controlled by the private choices of individual parents."[72]

As with *Amos*, the logic of *Mueller* could be understood as employing the rationale of the "state action" doctrine. The constitutionally salient cause of any potential benefit to religion is due to the self-determination of numerous parents of school-age children who choose a religious school, not any decision by the government. Merely enabling private religious choice cannot fairly be attributable to the government and, thus, is not "state action" by the government to advance religion. Moreover, because the government's "state action" does not extend to the point where the program beneficiaries exercise their choice of where to obtain educational services, it does not matter if the financial benefit is ultimately used by the religious school as part of an integrated educational curriculum that, *inter alia*, entails specifically religious beliefs or practices.

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[69] 463 U.S. at 397.
[70] *Compare* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (striking down state aid to private education the benefits of which went almost entirely to religious schools) *with Mueller*, 463 U.S. at 394, 396 n.6, 398-99 (explaining and distinguishing *Nyquist*).
[71] 463 U.S. at 399.
[72] *Id*. at 400.

For example, a regular school day might include prayer, chapel, or a catechism class. All that matters, from the government's point of view, is that the student actually receives the intended program benefit from the selected school.

Finally, as in *Amos*, the *Mueller* Court rebuffed the claim of "excessive entanglement" because, *inter alia*, the indirect nature of the aid reduces the potential for church-state interaction and hence intrusive government oversight of matters more properly within the purview of organized religion.[73] It is not that no regulation by state authorities with respect to the tax deduction was contemplated, nor is that required. In a complex society, some regulatory interaction between church and state is inevitable, even desirable. However, although the potential for regulatory intrusion remained theoretically possible, on the record in *Mueller* the level of interaction was no greater than had been upheld in prior cases involving the loan of secular textbooks.[74] For now, intrusion into church autonomy was not a problem.

Commentators have suggested that Rule 2 is at odds with the underlying premise of Rule 1, namely, the exceptionality of religion.[75] The argument is as follows: Rule 1 upholds a religious exemption from general regulatory legislation, and such exceptional treatment for religion is okay because discretionary exemptions reinforce the separation of church and state. However, Rule 2 concerns a general program of financial aid or other benefit and its rationale appeals to equal treatment as the rationale for regarding religious organizations the same as nonreligious service providers. "Is it exceptional

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[73] *Id*.
[74] *See* Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding state law requiring secular textbooks be provided to public and private K-12 schools, including religious schools); Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930) (same).
[75] *See, e.g.*, Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1417 (2003).

treatment you want, or is it equal treatment?" is how the commentators pose the seeming conflict.

There is no inconsistency. The common thread is the First Amendment's predisposition in favor of religious freedom, a matter explored above in Part I. In the application of both Rules 1 and 2, that predisposition means government should seek to minimize its own influence over the private religious choices of individuals, as well as over any religious organizations they should form.[76] With Rule 1, that common thread means government leaving religion unregulated so as not to hinder private religious choices. And with Rule 2, the common thread means that government is to treat religious and nonreligious providers equally so that individuals wanting to receive their program services at a religious provider have that option open to them. Exceptionality and equality are a false dichotomy. Rather, the unifying aim is a government that is pro-religious freedom, that is, one that minimally influences private choices with respect to religion.

Rule 2 can also be reconciled with the fundamental nature of federal constitutional rights being "negative rights." That is, the Free Exercise Clause tells the government what it cannot do to us. The clause does not say what we can affirmatively demand of our government. Similarly, the modern Establishment Clause is a power-negating clause.[77] It tells the government that its net powers (or "jurisdiction" or "cognizance") do not include making a law about "an establishment" of religion. The

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[76] Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990). *See also* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L. J. 43, 46 (1997), and my article, *A Constitutional Case For Governmental Cooperation With Faith-Based Social Service Providers*, 46 EMORY L. J. 1, 24-27 (1997).

[77] There are a few power-negating clauses in the U.S. Constitution, Article I, Section 9 (negating federal powers) and Article I, Section 10 (negating state powers). Such clauses prevent officials from wrongfully implying powers from open-ended clauses that delegate power.

clause does not say what we can affirmatively demand of our government by way of financial benefits or other support for religion.

All of the above is true, yet for Rule 2 to permit equal treatment still makes sense. Consider a parallel line of cases decided under the Free Speech Clause. The free speech right is a "negative right." Nevertheless, when the government affirmatively chooses to create a limited public forum in order to expand opportunities for private speech, then the government cannot exclude from the forum an individual's speech of religious content or viewpoint because it is religious.[78] Discrimination against the religious viewpoint is not required by the Establishment Clause (the clause is pro-religious freedom, after all), nor is such discrimination allowed by the Free Speech Clause. The claimant has an affirmative right to forum access. In like manner, Rule 2 comes into its own when the modern Welfare State affirmatively chooses to create general programs of aid for education, health care, and social services. Having elected to affirmatively create such programs, the government need not exclude religious providers because of their religious character. Discrimination against religious providers is not required by the Establishment Clause (once again, the clause is pro-religious freedom), and religious discrimination is constraining for those individual beneficiaries wanting to exercise freedom of choice and receive their services from a religious provider.

3. Government may confer benefits to similarly situated education, health care, or social service organizations, public or private, including religious

[78] The first in this line of the speech equal-access, limited-forum 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 Central School*, 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 equal access to government financial aid that partly defines the forum is *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995).

organizations, who in turn provide these services to eligible individuals; however, there must be safeguards in place to prevent diversion of the benefit to the transmission of specifically religious beliefs or practices.

The leading case is *Mitchell v. Helms*.[79] *Mitchell* upheld a general federal program to provide educational materials to K-12 schools, including religious schools. Because *Mitchell* is a plurality opinion, Justice O'Connor's concurring opinion, joined by Justice Breyer, is controlling because it worked the lesser alteration to the prior law.[80]

The federal program in *Mitchell* entailed aid to K-12 schools, public and private, secular and religious, allocated on a per-student basis. Justice O'Connor started by announcing that she will follow the analysis first used in *Agostini v. Felton*.[81] She began with the two-prong test: is there a secular purpose and is the primary effect to advance religion? Plaintiffs did not contend that the program failed to have a secular purpose, so she moved on to the second prong under the test.[82] Drawing on *Agostini*, Justice O'Connor noted that the primary-effect inquiry is guided by three criteria. The first two criteria are whether the government aid is actually diverted to the indoctrination of specific religious beliefs and whether program eligibility is neutral with respect to religion. The third criterion is whether the program creates excessive administrative entanglement, now clearly downgraded to just one more factor to weigh under the

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[79] 530 U.S. 793 (2000) (plurality opinion). *See also* Agostini v. Felton, 521 U.S. 203 (1997) (upholding provision of remedial education at the parochial school campus); Bowen v. Kendrick, 487 U.S. 589 (1988) (upholding, on its face, a federal program providing grants for teenage sexuality counseling, including counseling done by religious centers). Contrariwise, the government may not confer a benefit on religious organizations if the benefit is not available to others similarly situated. Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 702-08 (1994) (legislation favoring one particular religious sect is unconstitutional).

[80] *See* Marks v. United States, 430 U.S. 188, 193 (1977) (when Supreme Court fails to issue a majority opinion, the opinion of the members who concurred in the judgment on narrowest grounds is controlling).

[81] *Mitchell*, 530 U.S. at 837, 844. *Agostini v. Felton*, 521 U.S. 203 (1997), upheld a program whereby public school teachers go into K-12 schools, including religious schools, to deliver remedial educational services.

[82] 530 U.S. at 845. Plaintiffs were well-counseled not to argue that the program lacked a secular purpose. The secular-purpose prong of the test is easily satisfied. *See, e.g.,* Bowen v. Kendrick, 487 U.S. 589, 602 (1988) ("a court may invalidate a statute only if it is motivated wholly by an impermissible purpose").

primary-effect prong. The plaintiffs in *Mitchell* did not contend that the program created excessive administrative entanglement.[83]

Because the K-12 educational program under review in *Mitchell* was facially neutral, that is, available to K-12 schools generally, including religious schools, and administered evenhandedly as to religion, Justice O'Connor spent most of her analysis on the remaining factor, namely, diversion of grant assistance to religious indoctrination. She noted that the educational aid in question was, by the terms of the statute, required to supplement monies received from other sources, that the nature of the aid was such that it could not reach the "coffers" of places of religious inculcation, and that the use of the aid was statutorily restricted to "secular, neutral, and nonideological" purposes.[84] Concerning the form of the assistance, she noted that the aid consisted of educational materials and equipment rather than cash, and that the materials were on loan to the religious schools.[85]

Justice O'Connor proceeded to reject a rule of unconstitutionality where the character of the aid is merely capable of diversion to religious indoctrination, hence overruling prior cases.[86] As the Court did in *Agostini*, Justice O'Connor rejected employing such presumptions of unconstitutionality and indicated that henceforth she will require proof that the government aid was actually diverted to indoctrination.[87]

Given that Justice O'Connor requires that no government funds be diverted to religious indoctrination, religious organizations receiving direct funding will have to separate their social service program from their intensely religious practices.[88] If the

[83] 530 U.S. at 845. Prior to *Agostini*, entanglement analysis was a separate, third prong of the test.
[84] *Id*. at 839, 847-48.
[85] *Id*. at 848.
[86] *Id*. at 846-60.
[87] *Id*. at 857.
[88] *Id*. at 859-60.

government assistance is utilized for educational functions without attendant sectarian activities, then there is no problem. If the aid flows into the entirety of an educational program and some "religious indoctrination [is] taking place therein," then the indoctrination "would be directly attributable to the government."[89] Hence, if any part of a faith-based organization's activity involves "religious indoctrination," such activities must be set apart, by location or time, from the government-funded program. In this way any specifically religious activity is privately funded.[90]

A welfare-to-work program operated by a church illustrates how this can be done successfully. Assume that teachers in the program conduct readiness-to-work classes from 8 a.m. to 5 p.m. in the church basement during weekdays pursuant to a government social service grant. During a free-time lunch break the pastor of the church holds a voluntary Bible study in her office on the ground floor. The sectarian instruction is privately funded and separated in both time and location from the welfare-to-work classes. There is no Establishment Clause violation.[91]

In the final part of her opinion, Justice O'Connor explained why safeguards in the federal educational program at issue in *Mitchell* reassured her that the program, as applied, was not violative of the Establishment Clause. A neutral program of aid need not be failsafe, nor does every program require pervasive monitoring.[92] The statute limited aid to "secular, neutral, and nonideological" assistance and expressly prohibited

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[89] *Id*. at 860.
[90] *See* 45 C.F.R. § 260.34(c) (2006) (Charitable Choice regulations based on *Mitchell* and applicable to direct grant funds awarded under the Temporary Assistance for Needy Families social-services program).
[91] *See also* Christianson v. Leavitt, 482 F. Supp. 2d 1237 (W.D. Wash. 2007) (upholding federal grant program to assist the poor in developing and sustaining healthy marriages, including a grant to a faith-based program that successfully kept separate its funded program from its faith intensive ministry).
[92] 530 U.S. at 861.

use of the aid for "religious worship or instruction."[93] State educational authorities required religious schools to sign Assurances of Compliance with the above-quoted spending prohibitions being express terms in the grant agreement.[94] State authorities conducted monitoring visits, albeit infrequently, and did a random review of government-purchased library books searching for sectarian content.[95] There was also monitoring of religious schools by local public school districts, including a review of project proposals submitted by the religious schools and annual program-review visits to each recipient school.[96] The monitoring did catch instances of actual diversion, albeit not a substantial number, and Justice O'Connor was encouraged that when problems were detected they were timely corrected.[97]

Justice O'Connor said that various diversion-prevention factors such as supplement/not-supplant, no aid reaching religious coffers, and the aid being in-kind rather than monetary were not talismanic.[98] Rather, effectiveness of these diversion-prevention factors, and other devices doing this prophylactic task, are to be sifted and weighed given the overall context of and experience with the government's program.[99]

The four-Justice plurality in *Mitchell*, written by Justice Thomas and joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, embraced, without reservation, the beneficiary-choice principle. That is, the plurality would collapse Rule 3 into Rule 2.

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[93] *Id*.
[94] *Id*. at 861-62.
[95] *Id*. at 862.
[96] *Id*.
[97] *Id*. at 865-66.
[98] She made a point not to elevate them to the level of constitutional requirements. *See id*. at 867 ("[r]egardless of whether these factors are constitutional requirements . . .").
[99] Payments in "cash" are just a factor to consider, not controlling. This makes sense given Justice O'Connor's concurring opinion in *Bowen v. Kendrick*, wherein she joined in approving cash grants to religious organizations, even in the particularly "sensitive" area of teenage sexual behavior, as long as there is no actual "use of public funds to promote religious doctrines." Bowen v. Kendrick, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring).

The commonsense argument for doing so is that the program benefit need not be portable (like a voucher) for the religious choice by the eligible beneficiary to be genuine. It makes little difference whether the parents of school-aged children are handed a voucher that they tender to the school of their choice, or whether these parents first enroll their child in the school of choice and then the state aid flows directly to the school where the child is enrolled. Certainly the economic impact is the same. Moreover, less focus on the portability of the benefit does not increase or decrease the authority of state regulators to become entangled in the religious aspects of a religious school.[100]

The deeper rationale for the plurality's approach in *Mitchell* is that the educational and social service initiatives of the modern Welfare State should treat religious organizations in a nondiscriminatory manner in order to avoid putting pressure on the religious choices of individual beneficiaries by way of government financial incentives. For example, if an individual wants to obtain drug rehabilitation counseling at his or her church, rather than from a secular agency, the beneficiary ought to have that choice. The common thread is to minimize government's impact on religious choice. If that is to be possible, then faith-based programs have to be eligible to compete for government funding. This is not a rule of equal funding, however, but a plea only for the equal opportunity to compete for funding.

Primary and secondary schools, as well as universities, are complex organizations. So are hospitals. So are nursing homes, homeless shelters, halfway houses, drug rehabilitation centers, and domestic violence shelters. They all need money, and for nearly all of these sizable, complex organizations the task of meeting their fiscal

[100] *See* Grove City College v. Bell, 465 U.S. 555 (1984) (holding that a private college receiving only indirect federal aid was nevertheless subject to civil rights regulation).

needs necessarily entails some public money to supplement their private resources. We have not had a Night Watchman State for decades; we have an affirmative Welfare State that is deeply involved in the people's welfare, be it health care, education, or social services. Complex private-sector but public-serving organizations that are entirely privately funded no longer exist. In a modern Welfare State, discriminatory funding programs are the worst possible of government policies. This is because the competition for scarce tax resources puts pressure on individuals, as well as the faith-based organizations they have created, to adapt their religious choices to the government's favored behaviors. Hence, under Rule 3 there is enormous pressure on faith-based public-serving organizations to "secularize" in order to qualify for much-needed government aid. That makes discriminatory funding programs an engine of secularization, no less damaging to religious freedom because of the absence of malice. It is also counter pluralistic, for discriminatory funding acts to reduce differentiation in the private sector that otherwise would exist in America's civil society.

4. **Government may choose to benefit only government agencies, thereby excluding similarly situated private organizations both nonreligious and religious; accordingly, for government to decide to fund only public schools does not violate the First Amendment.**[101] **However, once the government exercises its discretion and confers a benefit on similarly situated organizations, public and private, except government excludes religious organizations, such a law ought to be, in my view, *prima facie* violative of the Free Exercise Clause.**

Rule 4 asks whether Rules 2 and 3 are merely permissive accommodations, or whether the equal treatment of religion is required. Absent a substantial governmental interest, I believe that equal treatment is required by the Free Exercise Clause.

[101] Luetkemeyer v. Kaufmann, 364 F. Supp. 376 (E.D. Mo.), *aff'd mem.*, 419 U.S. 888 (1974); Brusca v. State Bd. of Educ., 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd mem.*, 405 U.S. 1050 (1972).

The parallel to a rule of required equal treatment is found in cases where a tangible benefit is available as part of a government forum to enlarge private expression.[102] The government benefit may be free access to meeting space, the use of a bulletin board, or use of the mailboxes of state university students. Or the government forum may entail a student organization's access to money useful for bringing in a speaker to campus or printing handbills. Access for religious organizations cannot be denied based on their speech being of a content or viewpoint that is religious. Denial of access is not required by the Establishment Clause, nor is it permitted by the Free Speech Clause. Despite persistent litigation by public school and other civic authorities to exclude the religious voice, the Supreme Court has been unflagging in insisting that true church-state separation is not the same as forced privatization of religious expression.

It is true, of course, that a general education, health care, or social service program is not a public forum to enlarge the opportunity for speech, and thus the equal treatment rules with respect to the Free Speech Clause do not necessarily apply.[103] Unlike the Free Speech Clause, however, the Free Exercise Clause protects both expressive and non-expressive conduct.[104] And in protecting non-expressive conduct by individuals acting out of reasons of faith, as well as the religious organizations they form,

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[102] *See* Good News Club v. Milford Central School, 533 U.S. 98 (2001); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995); Capitol Sq. Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (plurality in part); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (plurality in part); Westside Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (plurality in part); Widmar v. Vincent, 454 U.S. 263 (1981).

[103] Locke v. Davey, 540 U.S. 712, 720 n.3 (2004).

[104] Justice White observed in Welsh v. United States, 398 U.S. 333 (1970) (plurality opinion):

> It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech.

Id. at 372 (White, J., dissenting).

the Free Exercise Clause ought to shield individuals and religious organizations from intentional religious discrimination by the government.[105] To the extent *Locke v. Davey*[106] is to the contrary, I believe it is wrongly decided. More importantly, *Locke v. Davey* can be narrowly construed, and should be, as discussed below.

The basic Free Exercise Clause rule set down in *Employment Division of Oregon v. Smith*,[107] is that the government may not "impose special disabilities on the basis of religious views or religious status."[108] Although the *Smith* Court held that neutral, generally applicable laws are not typically subject to strict scrutiny, both the majority and dissenting Justices agreed that a state's facially religious discrimination is presumptively unconstitutional.[109] As the Court unanimously said in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[110] the "minimum requirement of neutrality is that a law not discriminate on its face."[111] Thus, laws that intentionally discriminate against religion "must undergo the most rigorous of scrutiny;" that is, they "must advance interests of the highest order, and must be narrowly tailored in pursuit of those interests."[112]

The Court in *Locke v. Davey* confronted a longstanding provision in the constitution of the State of Washington construed to require discrimination on a religious basis. The state awarded Promise Scholarships to its high school graduates based on academic merit. The scholarships could be used at any institution of higher education in

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[105] *See* Peter v. Wedl, 55 F.3d 992, 996 (8th Cir. 1998) (affirming ruling that both Free Exercise Clause and Free Speech Clause are violated by Minnesota regulation that provided aid to special education students except when the student is enrolled in a religious school); Hartman v. Stone, 68 F.3d 973 (6th Cir. 1995) (striking down, as violative of the Free Exercise Clause, a U.S. Army regulation that extended benefits to private day-care centers except for religious day-care centers).
[106] 540 U.S. 712 (2004).
[107] 494 U.S. 872 (1990).
[108] *Id.* at 877; *see also* McDaniel v. Paty, 435 U.S. 618, 628 (1978) (striking down state constitutional provision that disqualified clergy from seeking public office).
[109] 494 U.S. at 877; *id*. at 894 (O'Connor, J., concurring in judgment); *id*. at 909 (Blackmun, J., dissenting).
[110] 508 U.S. 520 (1993).
[111] *Id*. at 533.
[112] *Id*. at 546 (internal quotations omitted).

the state, public or private, including private religious colleges. A Promise Scholarship could be used to pursue any program except for a degree in "devotional theology." This one very narrow exception was justified by reliance on a no-aid-to-religion provision in the state's constitution.

The Supreme Court began *Locke v. Davey* by expressly reaffirming *Lukumi*.[113] The Court noted that the ordinary "presumption of unconstitutionality" did not apply when the government was not in fact discriminating between similarly situated religious and nonreligious persons.[114] The Court stated how the matter in *Locke v. Davey* was unique in this way: "training for religious professions and training for secular professions are not fungible. Training someone to lead a [church] congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling."[115]

The Court thus reasoned that comparing college training for ecclesiastical ordination to college training for a secular vocation is not comparing apples to apples. And because "[t]he State ha[d] merely chosen not to fund a distinct category of instruction," the Court held that "deal[ing] differently with religious education for the ministry than with education for other callings" was "not evidence of hostility toward religion."[116] Rather, the fact that the scholarship "exclude[d] only the ministry from receiving state dollars reinforced [the Court's] conclusion that [clerical] instruction [was] of a different ilk."[117]

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[113] Locke v. Davey, 540 U.S. 712, 720-21 (2004).
[114] *Id*. at 721-25.
[115] *Id*. at 721.
[116] *Id*. at 712, 721.
[117] *Id*. at 723.

While the federal Establishment Clause did not require the state to withhold the scholarship from divinity students,[118] nevertheless the state could do so given the ancient origin of the many state constitutions and statutes that treat clergy as *sui generis* for reasons of church-state separation.[119] Moreover, the restriction was narrow: scholarship students could still attend a religious college or university, including a "pervasively sectarian" college,[120] and a scholarship holder could take classes in theology or religious studies.[121] The only restriction on the scholarship was it could not be used to seek a degree in theology.

As I have said, I think *Locke v. Davey* was wrongly decided. The ancient origins of a discriminatory rule, even one long-embedded in a state's constitution, should not, as the Court properly ruled in *McDaniel v. Paty*[122] and *Torcaso v. Watkins*,[123] immunize from constitutional challenge intentional discrimination on account of religion. But in any event, *Locke v. Davey* ought to be applied narrowly, lest it become a ready opening to excuse religious discrimination of modern invention as well as of ancient pedigree.

5. **Government may protect individuals and religious organizations from discrimination on the basis of religion.**

Ready examples of this type of discretionary accommodation are found in venerable federal civil rights acts prohibiting religious discrimination in employment,[124] public accommodations,[125] housing and other real property interests,[126] municipal and

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[118] *Id*. at 719.
[119] *Id*. at 722-23.
[120] *Id.* at 724.
[121] *Id.* at 724-25.
[122] 435 U.S. 618, 628 (1978) (striking down state constitutional provision that disqualified clergy from seeking public office).
[123] 367 U.S. 488 (1961) (state constitutional provision requiring oath of belief in God as requirement of public office violates First Amendment).
[124] Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-1. There is a private right of action.
[125] Title II of Civil Rights Act of 1964, 42 U.S.C. § 2000a(a). There is a private right of action.

other public-operated facilities,[127] public primary and secondary schools and public colleges,[128] the benefit of contracts,[129] the extension of credit by financial institutions,[130] the commission of certain bias crimes,[131] and the exercise of speech of religious content or viewpoint.[132] Once again, this is the government being pro-religious freedom, which the Establishment Clause permits, as distinct from being pro-religion, which the clause disallows.

* * *

The foregoing Rules 1 through 5 were about what the government may do with respect to accommodating religion. Notwithstanding the permissive nature of the government's power, the government must still select proper means to achieving this permissible end. What follows are Black Letter Rules 6 through 10 which state the case law of the modern Establishment Clause that show accommodations must be secured by proper means.

6. Government may not purposefully discriminate among religions.

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[126] Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604. There is a private right of action.
[127] Title III of the Civil Rights Act of 1964, 42 U.S.C. § 2000b et seq. There is no private right of action under this title. Rather, the U.S. Department of Justice may enforce the title.
[128] Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c et seq. There is no private right of action under this title. Rather, the U.S. Department of Justice may enforce the title.
[129] 42 U.S.C. §§ 1981 and 1982. *See* Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (holding § 1982, which prohibits racial discrimination in the holding and conveyance of property, may redress discrimination against Jews).
[130] The Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq. There is a private right of action.
[131] The Church Arson Prevention Act, 18 U.S.C. § 247, criminalizes two types of conduct: (1) intentionally damaging religious real property because of its religious character; and (2) intentionally obstructing, by force or threat of force, any person in the enjoyment of that person's free exercise of religious beliefs. The Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, has a religious freedom amendment. *Id*. at § 248(a) (2), (3). The prohibitions and punishments in the act that apply to unlawful protest activity at abortion clinics, also apply to those who disrupt services at houses of worship.
[132] The Equal Access Act of 1983, 20 U.S.C. §§ 4071-4074. It was upheld in Westside Bd. of Educ. v. Mergens, 496 U.S. 226 (1990), as not in violation of the Establishment Clause. The No Child Left Behind Act of 2001, amending § 9524 of the Elementary and Secondary Education Act of 1965, requires the Secretary of Education to issue guidance on constitutionally protected prayer in public elementary and secondary schools. 20 U.S.C. § 7904. These schools must annually certify to the Department of Education compliance with the guidelines. The current guidelines can be found at the Department of Education's web site (http://www.ed.gov/index).

A legislature may exempt religion from a burden imposed by general legislation, so long as the primary purpose is to serve religious freedom. That is Rule 1. However, legislative exemptions are hard to secure, especially for minority or unpopular religions. The safeguard for minority or unpopular religions is that the Establishment Clause operates much like the Equal Protection Clause does for racial and ethnic minorities. Accordingly, legislative exemptions cannot be granted to politically powerful religions without being extended as well to minority religions.[133] To permit government to favor one religion tends to establish that religion.

The Establishment Clause protects religious minorities at the same high level as those from large or powerful religious groups. That is, the clause is first and foremost about the matter of religious freedom verses government, not about the religiously powerful verses the religiously weak. Any claim that the clause is especially solicitous of religious minorities is mistaken. The fundamental value behind the Establishment Clause, as well as the Free Exercise Clause, is religious freedom for all religions, large and small. That said, however, in its application Rule 6 does often work to the benefit of the religious minority.

7. Government may not utilize classifications based on denominational or sectarian affiliation to impose burdens or to extend benefits.[134]

The rationale for this rule is that the Supreme Court wants to avoid making membership in a religious denomination more or less attractive. If this was not the law,

[133] Larson v. Valente, 456 U.S. 228 (1982) (finding unconstitutional discrimination against new religious movements); Fowler v. Rhode Island, 345 U.S. 67 (1953) (ordinance permitting church services in park but not other religious meetings was a way of unconstitutionally preferring some religious groups over others based on a given sect's type of religious gatherings or occasion for delivering sermons); Niemotko v. Maryland, 340 U.S. 268 (1951) (unconstitutional to deny use of city park for Bible talks when use permits were issued to other religious organizations and for Sunday-school picnics).

[134] Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 702-08 (1994); Gillette v. United States, 401 U.S. 437, 450-51, 454 (1971); *see* Larson v. Valente, 456 U.S. 228, 246 n.23 (1982) (distinguishing and explaining *Gillette*).

then merely holding religious membership in a particular church would result in the availability of a desired civil advantage.[135] For example, it would violate Rule 7 if Congress were to confer conscientious objector draft status "on all Quakers," for that may induce conversions (real of *pseudo*) to Quakerism.[136] Although unintended, that would have establishment implications.

Rule 7 is not to be confused with defining the availability of an accommodation with respect to an individual's religious belief or practice. For example, Congress may confer conscientious objector draft status "on religious pacifists" based on an individual's religious opposition to all wars. The latter exemption is pro-religious freedom, hence without establishment implications.[137]

8. **Government may not utilize classifications that single out a sect-specific religious practice (as opposed to language inclusive of a general category of religious observance) thereby favoring that practice.**

For government to focus too narrowly on a particular religious observance or practice can have the effect of establishing that practice to the exclusion of other religious practices or observances similarly situated. For example, if Sunday is legislatively required to be accommodated, within reason, by employers as the Sabbath day of rest for employees, then all Sabbath days must be so accommodated. Equal freedom for all who suffer this type of religious burden avoids the implication of "an establishment" by favoring Sunday over Saturday as the proper day to observe Sabbath. If a Kosher diet is

[135] *Cf*. Frazee v. Illinois Dept. of Empl. Security, 489 U.S. 829 (1989) (holding that state could not deny free exercise claimant because he was not formal member of a church or denomination that reserved Sunday as religious Sabbath).
[136] Gillette v. United States, 401 U.S. 437, 448-60 (1971); *see* Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 715-16 (1994) (O'Connor, J., concurring in part and concurring in the judgment).
[137] *See* Gillette v. United States, 401 U.S. 437, 454-60 (1971) (Congress permitted to accommodate "all war" pacifists but not "just war" inductees because to broaden the exemption invites increased church-state entanglements and would render almost impossible the fair and uniform administration of the selective service system).

required by the Federal Aviation Authority to accommodate those who are passengers on a commercial airline, then all religious dietary practices must be so accommodated. If a student absence from a public school is excused for Good Friday observance, then so must absences for other holy days be excused.[138]

9. **Government may not delegate its sovereign authority to govern to a religious organization.**

The separation of church and state has its parallel in the doctrine of separation of powers. Separation of powers is about constitutional structure keeping in right order two centers of authority. Rule 9 reflects a similar structural operation. There are powers that are exclusively governmental and cannot be delegated to the church, just as there are powers that are exclusively religious and cannot be interfered with by the state.

The leading case for application of this rule of nondelegation is *Larkin v. Grendel's Den, Inc.*[139] In *Larkin*, a state had enacted a zoning statute that sought to protect houses of worship, schools, and hospitals from the tumult of close proximity to taverns and bars. Under the statute, when a proprietor applying for a liquor license selected a site within 500 feet of a house of worship, the affected church or synagogue was notified and permitted to veto the license's issuance.[140] The Supreme Court overturned the statute as exceeding the restraints of the Establishment Clause.[141]

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[138] *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (plurality opinion) (three-Justice plurality struck down a state sales tax exemption available on purchases of sacred and other literature promulgating a religious faith). *Texas Monthly* is supportive of the rule here. The plurality suggests that one of the problems with the tax exemption is that it is too narrow. *Id*. at 15 n.5, 16 n.6. The sales tax exemption favored sacred writing and "writings promulgating the teaching of the faith," as opposed to all religious writings. As such, the exemption had a tendency to favor some religions and their sacred writings over the practices of other religions that did not have writings of this sort.

[139] 459 U.S. 116 (1982). *See also* Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 689-702 (1994) (plurality opinion) (striking down the creation of public school district along religious lines).

[140] 459 U.S. at 120-22.

[141] *Id*. at 123.

The Court began by noting the mutual objectives internal to the no-establishment restraint. One objective is to prohibit government from propagating religion or sponsoring its sacerdotal activities. The complimentary objective is to prohibit government from intruding into the precincts of the church.[142] Both objectives require vigilant boundary keeping, the task of the modern Establishment Clause. The statute in *Larkin* violated the first objective. The Court held that the sovereign power vested exclusively in the agencies of government could not be delegated to a religious organization, as in the veto power assigned to churches by this zoning legislation.[143] Moreover, the manner of a church's exercise of the veto power was arbitrary, for there were no standards to which the church was to conform.[144]

The Court framed the prohibition in terms of forbidden "enmesh[ment],"[145] "fusion,"[146] or "union"[147] of religion and government. These characterizations of resulting illicit church-state relationships are alone not helpful. A better understanding follows from the Court's explication of the harm that the nondelegation rule is designed to prevent: "At the time of the Revolution, Americans feared . . . the danger of political

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[142] The Court in *Larkin* said:

> [T]he objective is to prevent, as far as possible, the intrusion of either Church or State into the precincts of the others. . . .
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> . . . The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.

Id. at 126 (internal quotations and citations omitted).
[143] *Id*. at 127 ("The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.").
[144] *Id.* at 125. *See also id.* at 127 (The veto "substitutes the unilateral and absolute power of a church for the reasoned decision making of a public legislative body acting on evidence and guided by standards").
[145] *Id.* at 126, 127.
[146] *Id*. at 126.
[147] *Id.* at 127 n.10.

oppression through a union of civil and ecclesiastical control."[148] In *Larkin*, the serious risk of political oppression took the form of ecclesiastical control over a valuable business license. Matters of commercial licenses are ordinarily for regulation pursuant to state police power; permits to engage in ordinary commerce are not favors to be doled out by a church.[149]

The rule in *Larkin* is that sovereign power ordinarily vested in government cannot be delegated to a religious organization. When viewed in combination with the Court's cases holding that a state must not interfere with the internal governance of a church,[150] the modern Establishment Clause is thus seen as a power-negating clause that arrests abuses running in either direction: government delegating away a public function to organized religion or government intruding into matters that are in religion's exclusive purview. These two types of abuses result in two different kinds of harm: the first is the political oppression (hence, harm to the body politic) that follows when government helps organized religion to aggrandize civil power, and the second is the undermining of religion and religious groups that follows from government's interference with matters exclusive to the church.

Conceptually, these reciprocal boundary-keeping objectives necessarily entail regarding the Establishment Clause as structural, rightly ordering church and state. However, it is commonplace for government to delegate to the private sector. It is hard

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[148] *Id.*

[149] A violation of the nondelegation rule is infrequent because it is uncharacteristic for government (or any entity or individual for that matter) to attempt to give away its power. Hence, at the Supreme Court level only one case besides *Larkin* had nondelegation as a problem. *See* Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 689-702 (1994) (plurality opinion) (state creation of public school district to meet the needs of one particular Jewish sect is "tantamount to an allocation of political power on a religious criterion").

[150] *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (civil courts are not to take jurisdiction over claims that cause them to probe into disputes over church polity or the removal of clerics); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872) (civil courts may not adjudicate disputes over matters of church doctrine, discipline, or polity).

to imagine modern government without out-sourcing by way of contracts, grants, and similar arrangements. It is also difficult to define just when the government has "delegated a sovereign function" to religion, as distinct from the delegation of a lesser function which the government could do for itself but would rather out-source. It may be of some significance that the delegation in *Larkin* was expressly to churches (along with schools and hospitals), as opposed to a general delegation to private sector organizations which also happen to included some churches. The expressed singling out of churches for special regard is perhaps reason for heightened scrutiny.

Illustrations of where the nondelegation rule likely would be violated are vesting in a church the power to tax, the power of eminent domain, or the power to issue municipal parking tickets for automobile parking near the church. However, describing just where to draw the line is of considerable theoretical difficulty. Nevertheless, the infrequency with which Rule 9 arises is such that perhaps we can more easily abide the ambiguity.

10. Government may not regulate the private sector with the purpose of creating an unyielding preference for religious observance over competing secular interests.

The leading case for this rule is *Estate of Thornton v. Caldor, Inc.*[151] In *Thornton*, the State of Connecticut had recently amended its Sunday closing laws to permit more retail stores to be open on Sunday. Out of a concern for the many retail workers who would now be pressured to work on their Sabbath, the state adopted a law

[151] 472 U.S. 703 (1985). *See also* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (holding that airline is not required as a reasonable accommodation under title VII to let an employee work a four-day work week in order to avoid working on his Sabbath); *id*. at 90 (Marshall, J., dissenting) (observing that the constitutionality of the title VII religious accommodation exemption is "not placed in serious doubt simply because it sometimes requires an exemption from a work rule"); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1987) (finding that title VII did not require employer to agree to an employee's preferred religious accommodation, just a reasonable accommodation).

that addressed employees who desired to be observant. The statute read: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day."[152]

Donald Thornton was an employee for Caldor, Inc., a retail clothing department store. He was a Presbyterian and observed Sunday as his Sabbath. For several months after Caldor began opening its stores on Sunday, Thornton worked once or twice a month on Sunday. Thereafter Thornton invoked his right of accommodation under the Connecticut statute. Caldor refused the Sabbath accommodation, and when an impasse was reached Thornton resigned. Thornton filed a grievance against Caldor, which in time led to a lawsuit filed on Thornton's behalf brought by the state Board of Mediation and Arbitration.[153] Caldor, *inter alia*, argued that the Connecticut statute violated the Establishment Clause. Caldor's standing to raise this claim was its economic harm.[154] The United States Supreme Court agreed, finding that the law violated the Establishment Clause.

The Supreme Court observed that the Connecticut "statute arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designated as their Sabbath."[155] The Court also noted that "the Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of

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[152] 472 U.S. at 706.
[153] *Id*. at 705-07.
[154] Unlike the Free Exercise Clause, which protects only against religious harm to those with a religion, the Establishment Clause protects against both religious harm and other sorts of harm. For example, there is standing to raise under the Establishment Clause economic or property loss (*see* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)), constraints on academic freedom and inquiry by teachers and students (*see* Edwards v. Aguillard, 482 U.S. 578 (1987); (Epperson v. Arkansas, 393 U.S. 97 (1968)), and restraints on free-thinking atheists (*see* Torcaso v. Watkins, 367 U.S. 488 (1961)).
[155] 472 U.S. at 709.

the Sabbath the employee unilaterally designates."[156] And, redundantly, the Court said that the law granted an "unyielding weighting in favor of Sabbath observers over all other interests."[157] Obviously the Supreme Court was seized by the absolutist character of the statute. The unyielding nature of the accommodation worked a hardship, not for those who were distant abstractions but for those well within the view of the Court: Thornton's employer and co-employees. The statute will "cause the employer substantial economic burdens" and it did not account for what an employer is to do "if a high percentage of an employer's workforce asserts rights to the same Sabbath."[158] Additionally, the Sabbath law did not supply a rule of reason or ability to balance the requested accommodation against the nonreligious, yet weighty, preferences of other employees.[159] For example, employees with more seniority may want weekends off because those are the days a spouse also has off or the days when their children are not in school.[160]

Finally, the Court noted that Thornton, as the religious claimant, was not merely seeking to be left alone by the state. Rather, he sought the state's affirmative assistance so as to better secure his observance of the Sabbath. This is the baseline issue. The religious burden in *Thornton* was not imposed by the government, but were imposed by the commercial demands of the private sector. The Connecticut law clearly had the state "moving off the baseline" and siding with the religious claimant, Thornton. The Court said "a fundamental principle of the Religion Clauses" is that the First Amendment "gives no one the right to insist that in pursuit of their own interests others must conform

[156] *Id*.
[157] *Id*. at 710.
[158] *Id*. at 709-10.
[159] *Id*.
[160] *Id*. at 710 n.9.

their conduct to his own religious necessities."[161] Now actually that "fundamental" proposition is contrary to some of the Court's prior holdings. For example, in *Trans World Airlines, Inc. v. Hardison*,[162] an employer was affirmatively required to make "reasonable accommodation" for the religious practices of employees—adjustments that will often affect co-employees. Accordingly, the baseline factor, while relevant, is not necessarily determinative on the constitutional question. Conversely, a religious claimant—such as the Mormon Church in *Amos*—that only wants to be left alone by the state—hence, no asking the state to move off the baseline—will strengthen its argument for the constitutionality of the accommodation.

The task then becomes how to distinguish *Thornton* from other accommodation cases. Some assistance arrived two years later in *Hobbie v. Unemployment Appeals Commission*.[163] *Hobbie* was the third occasion to have before the Court the application of the Free Exercise Clause to an employee seeking benefits under a state's unemployment compensation law.[164] On each occasion, the state had denied benefits because the employee in question declined out of religious duty to take a job for which the employee was qualified. In *Hobbie*, the employee was discharged when she refused to work on Saturday, her Sabbath. In the two prior cases, and in *Hobbie*, the Court sided with the religious claimant holding that the state's denial of unemployment compensation was in violation of the Free Exercise Clause. The employer in *Hobbie*, as well as the State of Florida, argued that to accommodate the employee's Sabbath would violate the

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[161] *Id*. at 710 (internal citations and quotations omitted).
[162] 432 U.S. 63 (1977) (construing title VII employer accommodation requirement with respect to religious practices of employees).
[163] 480 U.S. 136 (1987).
[164] *See* Thomas v. Review Bd., 450 U.S. 707 (1981) (holding that denial of unemployment compensation because religious beliefs precluded continuing job that contravened religious beliefs violated Free Exercise Clause); Sherbert v. Verner, 374 U.S. 398 (1963) (same).

Establishment Clause. They cited the holding in *Thornton* that the Sabbath accommodation law in Connecticut was unconstitutional. The Supreme Court rejected that argument, distinguishing *Thornton* from *Hobbie* as follows:

> In *Thornton*, we . . . determined that the State's "unyielding weighting in favor of Sabbath observers over all other interests . . . ha[d] a primary effect that impermissibly advance[d] a particular religious practice," . . . and placed an unacceptable burden on employers and co-workers because it provided no exceptions for special circumstances regardless of the hardship resulting from the mandatory accommodation.
>
> In contrast, Florida's provision of unemployment benefits to religious observers does not single out a particular class of such persons for favorable treatment and thereby have the effect of implicitly endorsing a particular religious belief. Rather, the provision of unemployment benefits generally available within the State to religious observers who must leave their employment due to an irreconcilable conflict between the demands of work and conscience neutrally accommodates religious beliefs and practices, without endorsement.[165]

Thus the statute in *Thornton* is said to have violated the boundary between church and state for two combined reasons. First, in lifting the religious burden, the accommodation favored the religious claimant in every instance, thus disregarding the interests of the employer and co-employees. Second, the nature of the accommodation had government leaving the "neutrality" baseline by affirmatively moving to lift a burden on religion imposed in the private sector. For government to move off the baseline has greater implications in the nature of "an establishment." It is as if the government was actively taking sides in favor of religious observance. These two factors, when combined, brought down the Connecticut accommodation statute.

III. HOW THE RULES APPLY IN "HARD CASES," AND A COMMENT ON KENT GREENAWALT'S PAPER

Rules 1 through 10 in Part II of this article constitute a systematic approach to determining when a legislative accommodation for religion crosses the line separating

[165] *Id*. at 145 n.11 (internal citations omitted).

church and state and is thus an unconstitutional establishment. But first I want to turn to Professor Kent Greenawalt's article entitled *Establishment Clause Limits on Free Exercise Accommodations*.[166] Professor Greenawalt begins by characterizing the constitutionality of discretionary religious accommodations as "[a]mong the most vexed questions in the law of the religion clauses," indeed a "complex [matter where] the Supreme Court has given us no theory, or no tenable theory."[167] Following a thorough review of the major cases, Professor Greenawalt again returns to this unflattering description of the U.S. Supreme Court's case law as lacking in clarity. While he allows that "[s]ometimes [the Court's] analysis can be categorical," far more "often [we] must assess subtle nuances and matters of degree to determine" whether the Establishment Clause has been violated.[168] Professor Greenawalt is therefore of the belief that the Court has left scholars and practioners alike with hard to reconcile cases and ad hoc balancing tests.

I respectfully disagree. There is certainly enough complexity here that discretionary religious accommodations are a worthy topic for this panel. But I caution against overstating the law's complexity. I do think that the Supreme Court's cases can be properly seen as having regularized analysis with respect to religious accommodation. The law does not turn on matters of degree, with "a little bit" of accommodation being constitutional but "too much" accommodation being too much. There is indeed a "tenable theory" of religious accommodations, and it can be found here and more

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[166] Greenawalt, *supra*, note 56.
[167] Greenawalt, *supra*, note 56, at 1. *See also* Kent Greenawalt, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS vol. 1, p. 442 (2006), wherein he says that "determination[s] of when accommodations involve impermissible support and endorsement is one of the most complicated problems in the law of the religion clauses."
[168] Greenawalt, *supra*, note 56, at 32-33.

generally in most all the Court's modern Establishment Clause cases. These cases promote religious freedom understood as voluntaryism, meaning that government is not to be actively involved in funding or otherwise supporting organized religion as religion.[169] In this respect, accommodation cases, such as *Amos* and *Thornton*, arise out of the principle of voluntaryism every bit as much as do the Court's cases having to do with religion in the public schools (e.g., *Schempp* and *Engel*) and those having to do with government support for religious schools (e.g., *Mueller* and *Mitchell*). With regard to religious accommodations, here, as elsewhere, voluntaryism is the Court's overarching theory of church-state relations.[170]

Professor Greenawalt observes in passing that no discretionary accommodation can survive unless it has the object of lifting a burden on the practice of religion,[171] as contrasted with lifting a purely economic or other nonreligious burden. This is because the First Amendment is foremost about religious freedom, not about reducing barriers to free enterprise or some other nonreligious objective. This is best illustrated by the three-Justice plurality in *Texas Monthly, Inc. v. Bullock*,[172] which involved a sales tax exemption for retail purchases of publications consisting of a religious group's teachings or the group's sacred writings. The plurality found the sales tax exemption in violation of

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[169] *See, supra*, text accompanying notes 32-42 (discussing the Court's adoption of voluntaryism in *Everson* and its progeny).

[170] *See, infra*, text accompanying notes 183 and 184 (discussing special environments such as prisons or the armed forces where voluntaryism's assumption, i.e., that anyone wanting religion can freely obtain it on his or her own, may not work).

[171] Greenawalt, *supra*, note 56, at 4, 11, 14. In their article, Professors Lupu and Tuttle also emphasize that the accommodation must truly relieve a religious burden. *See* Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. __, __ (forthcoming 2007) [hereinafter Lupu & Tuttle] Lupu & Tuttle manuscript 7, 47-49.

[172] 489 U.S. 1 (1989) (plurality opinion). Separate opinions concurring in the judgment were filed by Justice White and Justice Blackmun, the latter joined by Justice O'Connor. Being a plurality opinion, *Texas Monthly* "makes law" only on the facts as presented in the case. Accordingly, drawing broad legal rules from *Texas Monthly* is just not possible, except where the Supreme Court has elsewhere reaffirmed the same principle of law.

the Establishment Clause. In significant part the tax exemption was held unconstitutional because the accommodation lifted a purely pecuniary burden on retail consumers rather than lifting a religious burden. The plurality wrote, "In this case, the State has adduced no evidence that the payment of a sales tax by subscribers to religious periodicals or purchasers of religious books would offend their religious beliefs or inhibit religious activity."[173] And, again "because the tax is equal to a small fraction of the value of each sale and payable by the buyer, it poses little danger of stamping out missionary work involving the sale of religious publications" by religious groups.[174] The state offered no evidence that the religious faith of any purchaser prohibited the paying of the sales tax. These findings by the plurality are consistent with the Court's dismissal of Free Exercise Clause claims in cases where the putative burden was purely economic rather than bearing on religiously formed conscience.[175]

Texas Monthly is also of interest because the plurality believed the tax exemption increased administrative entanglement by the text of the statute focusing on the religious literature being consistent (or not) with the teachings of the relevant religious group or was sacred to the religion.[176] That, in turn, cast tax authorities in the impossible role of having to determine whether, as a matter of religious doctrine, a particular book or magazine "consist[s] wholly of writings promulgating the teaching of the faith" or if the publications were "wholly of writings sacred" to the religion. To increase church-state

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[173] *Id*. at 18.
[174] *Id*. at 24.
[175] *Compare* Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378 (1990) (sales and use taxes on sales of religious literature do not impose a religious burden and hence claimant cannot state prima facie claim under the Free Exercise Clause), *with* United States v. Lee, 455 U.S. 913 (1982) (Amish employer stated prima facie claim under the Free Exercise Clause that social security tax imposed burden on the Amish practice of self-insurance).
[176] 489 U.S. at 20 (the exemption "appears, on its face, to produce greater state entanglement with religion than the denial of an exemption").

entanglement is a strike against an accommodation. This is the reverse of *Amos*, where the accommodation in question reduced church-state entanglement and thereby enhanced the accommodation's likelihood of being constitutional.[177]

Drawing on *Thornton* as explained in *Hobbie*, as well as cases such as *Texas Monthly*, *Amos*, *Hardison*, and *Larkin*, seven factors appear to be relevant to the Supreme Court in determining when a religious accommodation violates the Establishment Clause: (1) does the accommodation pertain only to a single type of religious observance, or does it have within its scope a broader array of religious practices; (2) does the accommodation pertain only to religious claimants, or does it have within its scope a broader array of similarly situated nonreligious claimants; (3) is the accommodation absolute and unyielding, or is there a rule of reason where the competing nonreligious interests of others in the private sector can be weighed and given account; (4) is the religious claimant asking only to be left alone by the state, or is the claimant asking for the state's affirmative assistance to effectuate the desired religious observance notwithstanding contrary private-sector interests (i.e., the "neutral" baseline issue); (5) does the accommodation result in increased administrative entanglement between church and state, or conversely does the accommodation reduce entanglement and thereby enhance the desired separation; (6) is the accommodation reasonably designed to lift a burden on religious practice, as contrasted with lifting a purely economic or other nonreligious burden; and (7) does the accommodation delegate civil authority to religious organizations to exercise power in an abusive manner unguided by standards and without due process. While none of these factors are individually fatal, the failure of multiple factors in a given case will lead the Court to conclude that the accommodation in

[177] *See, supra,* text accompanying notes 62-63 (discussing *Amos*).

question is unconstitutional.[178] And, of course, all seven factors will not likely be applicable in any one case.

Professor Greenawalt characterizes *Estate of Thornton v. Caldor, Inc.*, as "the puzzle" of accommodation cases,[179] so I will begin with *Thornton* by way of illustrating the multifactor analysis. Donald Thornton's claim under the Connecticut Sabbath law came up short on factors 1, 2, 3, and 4. Factor 5 was not involved and, therefore, entanglement did not weigh in the religious claimant's favor or disfavor. Such a negative tally with respect to the seven factors doomed in the mind of the Court the Connecticut law as one that "has a primary effect that impermissibly advances a particular religious practice."[180] By way of contrast, the *Hardison* Court upheld the requirement in title VII of the 1964 Civil Rights Act mandating employers to offer a reasonable religious accommodation to employees who request it. That title VII requirement rang up a positive tally with respect to factors 1, 2, 3, and 6. And, as with *Thornton*, factor 5 was not involved and thus entanglement did not weigh negatively or positively. Similarly, the statutory accommodation in *Amos* rang up a positive tally with respect to factors 1, 4, 5, and 6. This greatly helps to distinguish both *Hardison* and *Amos*, where the accommodation was upheld, from *Thornton*, where the accommodation was struck down. The accommodation in *Texas Monthly* likewise failed several of the factors, namely 1, 2, 3, 5, and 6.

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[178] Professors Lupu and Tuttle also identify multiple factors to test religious accommodations ("four criteria"), but their factors are less comprehensive than those identified here. Lupu & Tuttle, *supra* note 171, at manuscript pages 7, 47-59.

[179] Greenawalt, *supra*, note 56, at 5. I agree with Professor Greenawalt's rejection of Justice O'Connor's concurrence in *Thornton* where she says that: (1) a religious accommodation must also accord a similar accommodation to ethical beliefs and practices; and (2) a religious accommodation is limited to lifting burdens imposed by government, not those imposed by the private sector. *Id*. at 7-9. Justice O'Connor's first point is contrary to factor 1 and her second contention would wrongly make factor 4 determinative rather than just a factor.

[180] 472 U.S. at 710.

In *Walz v. Tax Commission of the City of New York*,[181] the Court faced the claim that municipal property tax exemptions for churches and other houses of worship advance religion and thus violate the Establishment Clause. But the exemptions caused the government to just leave religion alone, a "neutral" baseline. And the exemptions were available to other secular nonprofits. Finally, the exemptions avoided greater administrative entanglement between church and state. Because the accommodation in *Walz* rang up a positive tally with respect to factors 1, 2, 4, 5, and 6, it is not surprising that the Court upheld the tax exemption.

Notwithstanding *Thornton* and *Texas Monthly*, many if not most religious accommodations will be found to be constitutional (*e.g., Hardison, Amos*, and *Walz*) so long as they do not, as did the Connecticut Sabbath law in *Thornton* or the sales tax exemption in *Texas Monthly*, ring up high negative tallies with respect to the seven factors. It follows that most religious accommodations are constitutional, provided that a proper classification or means (i.e., heeding Black Letter Rules 6 through 10) has been selected to achieve the desired accommodation. This is entirely consistent with the Establishment Clause being pro-religious freedom, and therefore meets our expectation stated in Part I that the First Amendment is generally permissive with respect to religious accommodations.

The seven factors have been identified by the Supreme Court based on its understanding of religious freedom as voluntaryism, which is to say that the Establishment Clause is violated when the government affirmatively aids or otherwise supports organized religion qua religion. This answers Professor Greenawalt when he says the Supreme Court appears to be guided by no "tenable theory" of church-state

[181] 397 U.S. 664 (1970).

relations.[182] Voluntaryism assumes that persons who want religion in their lives can simply seek it out on their own—so there is no need for the government's help or other involvement. That is true in most places and most circumstances. However, if we have an environment where voluntaryism cannot operate freely (e.g., prisons, the armed forces, and children in foster homes), then the seven factors will not govern with the same force.[183] Indeed, if the seven factors are followed without major adjustment for unique environments like the military, application of the factors will lead to unintended and unjust results.[184]

CONCLUSION

Professor Greenawalt raises many of the right concerns by way of a list of five "crucial questions."[185] But he does not attempt to definitively answer these five questions and then build on his responses to regularize the Supreme Court's analysis.[186] I will conclude by using his list of "crucial questions" to illustrate the systematic approach to discretionary religious accommodations discussed in Part III of this article.

Professor Greenawalt asks, "1) Must the burdens that [an] accommodation relieves be ones that the government itself has imposed?" The answer is no. The question is answered by factor 4, which is the "neutral" baseline issue. In both *Amos* and *Hardison* the religious burden was imposed by the private sector, yet the accommodation was constitutional. While factor 4 is relevant, standing alone it is not fatal that the

[182] Greenawalt, *supra*, note 56, at 1.
[183] For a recent case struggling with one such specialized environment, *see* Freedom From Religion Foundation, Inc. v. Nicholson, 469 F. Supp. 2d 609 (W.D. Wis. 2007) (upholding the constitutionality of chaplaincy program operated by the U.S. Veteran's Administration in Veteran's Hospitals).
[184] *Cf.* Lupu & Tuttle, *supra*, note 171 (writing on military chaplaincies and questioning whether such chaplaincies qualify as permissible accommodations).
[185] Greenawalt, *supra*, note 56, at 4-5.
[186] Professor Greenawalt suggests instead a three-prong list of "requisites" of a permissible accommodation. *Id*. at 11. But in the end, he concludes that applying these "requisites" often demands nuanced judgment and far too subtle matters of degree. *Id*. at 32-33.

accommodation entailed an action by the government moving off the baseline so as to affirmatively accommodate religious freedom. That is a good thing. If this were not so many of the civil rights acts listed under Black Letter Rule 5 would be unconstitutional when applied to the private sector.

Professor Greenawalt asks, "2) Are all concerns about establishment removed if the classification for an exemption or other [accommodation] is in nonreligious terms?" The answer is no. As with the Establishment Clause generally, the seven factors apply to an accommodation's effects as well as its purpose. That said, with respect to many of the seven factors it is difficult to see how an accommodation could be drafted that did not, in some form, expressly name or identify a class of religious observances or religious organizations.

Professor Greenawalt asks, "3) What determines whether a classification may permissibly be in terms of religion?" The thrust of factor 2 is that accommodations are more likely constitutional when the scope of the legislative exemption also accommodates nonreligious claimants. But as with the other factors, factor 2 is not individually determinative. For example, the accommodation in *Amos* was religion-specific, but it was still upheld by the Court. Indeed, the Court has upheld five religion-specific accommodations.[187] More generally, there is no requirement that accommodations must avoid making religious classifications. Professor Kurland proposed such a rule in 1961, and the Court has never followed it—nor should it entertain the idea now, for to do so flies in the face of the express words of the First

[187] *See, supra*, note 45 (collecting cases).

Amendment.[188] Of course, one has to remember that religious classifications must be drafted so as to pursue constitutional means as acknowledged by Black Letter Rules 6-10.

Professor Greenawalt asks, "4) May the state accommodate by imposing burdens on private individuals and companies?" The answer is yes. This is similar to Professor Greenawalt's first "crucial question." In both *Amos* and *Hardison* the religious burden was imposed by the private sector. The accommodation thus had the effect of imposing burdens on private individuals and companies. However, while factor 4 is relevant, it alone is not sufficient to cause the accommodation to violate the Establishment Clause. Factor 3 and the result in *Thornton* is testimony to any one factor alone not being either sufficient or fatal. In *Thornton*, it was only the combined failure of factors 3 and 4 that brought down the Connecticut Sabbath law.[189]

Professor Greenawalt asks, "5) Are the distinctions between permissible accommodations and impermissible promotions of religion ones of qualitative difference or of degree, or of both?" The seven factors, taken together, regularize the Court's analysis with respect to religious accommodations. The seven-factor approach, along with Black Letter Rules 1-10, portend a high level of predictability with respect to how the Supreme Court will pass on the constitutionality of a religious accommodation. A resort to ad hoc balancing and matters turning on "subtle nuances" should be rare.

I do not want to be understood as overly simplifying the important topic of discretionary religious accommodations nor exaggerating my disagreement with Professor Greenawalt. As I have previously stated, Professor Greenawalt ably identifies most all of the salient questions. But I believe he is too reticent in responding to those

[188] *See, supra*, text accompanying notes 21-25.
[189] *See, supra*, text accompanying note 165.

questions with sureness, and thereby misses the opportunity to regularize an approach to religious accommodations to the full extent permitted by precedent.

In summary, the fault I find with Professor Greenawalt's article is a gentle one: he is more puzzled than conclusive with respect to the work of the Supreme Court on religious accommodations. What the Court has done is to recognize that the Establishment Clause (along with the Free Exercise Clause) is pro-religious freedom. This is most obvious and explicit in an accommodation case like *Amos*. Moreover, the Court has recognized that by the very wording of the Establishment Clause a government remains free to legislate on matters about religion generally, so long as the legislation does not more narrowly touch on a matter "respecting an establishment." Building on these two principles, the law of religious accommodations is fairly permissive—as indeed it should be. And, finally, since the decision in *Everson*, the modern Supreme Court (with some unevenness, to be sure) has read into the Establishment Clause the principle of voluntaryism. That is as true with respect to the Court's regularization of the law of religious accommodations as it is elsewhere with issues involving church-state relations. So I find, contrary to Professor Greenawalt, that the Court is guided by a "tenable theory," namely the principle of voluntaryism.

August 6, 2007
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