# RELIGIOUS LIBERTY AS A POSITIVE AND NEGATIVE RIGHT

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## I. INTRODUCTION

In several articles, Professor Fred Gedicks has argued that the rules governing the religious liberty interests vary depending on the application and functionality of that interest. For example, Gedicks writes in his "Two-Track Theory" that when the government is distributing benefits to a large class of individuals, neutrality should be the controlling paradigm, such that religious entities can participate in the receipt of benefits, and even use those benefits for religious purposes, without violating the Establishment Clause.[1] Conversely, when the government is speaking itself or advancing its own policy goals in a government administered program, that separationism should be the dominant paradigm.[2]

Gedicks schema, offered as an interpretative model for the Establishment Clause, is a refinement of a common approach to religion clause analysis generally: divide and conquer.[3] *Conquer* the religion clause analytical conundrum by *dividing* the clauses according to the values represented. A brief glance at the religion clauses quickly reveals that there are two clauses—free exercise and nonestablishment—suggesting (at least) two values. The fact that the religion clauses contain two or more principles lends itself to a comparative model.

The modern Supreme Court has struggled with whether the clauses represent primarily a unitary value, complementary values, or distinct values that may be at tension. On one hand, Justice

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[1] Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C.L. REV. 1071, 1090, 1104 (2002).

[2] *Id.* at 1090; *see also* Frederick Mark Gedicks, *Neutrality in Establishment Clause Interpretation: Its Past and Future*, *in* CHURCH-STATE RELATIONS IN CRISIS: DEBATING NEUTRALITY 191–210 (Stephen V. Monsma ed., 2002).

[3] *See* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1186 (2d ed. 1988); THOMAS C. BERG, THE STATE AND RELIGION 296–301 (2d ed. 2004).

Wiley Rutledge wrote in his dissent in *Everson v. Board of Education* that "'[r]eligion' appears only once in the [First] Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.'"[4] Relatedly, Justice William Brennan, a leading student of the religion clauses on the Court, viewed the clauses as promoting complementary values, declaring that the Establishment Clause was "a coguarantor, with the Free Exercise Clause, of religious liberty."[5]

More frequently, the Court has seen the clauses as promoting distinct values, though interrelated, that sometimes are in conflict.[6] The Court has said that the nub of a free exercise violation rests on coercion.[7] With respect to the Establishment Clause, however, the Court has generally been unwilling to restrict the purposes so narrowly. As Justice Hugo Black said for the Court in *Engel v. Vitale*:

> Although these two clauses may in certain instances overlap, they forbid two quite different kinds of government encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.[8]

The resistance of a majority of the Court to cabin the Establishment Clause value(s) too narrowly is exemplified in the exchanges between the majority, concurring, and dissenting opinions in *Allegheny County v. ACLU* and *Lee v. Weisman* that offered competing analytical paradigms of endorsement or coercion.[9] If all that the Establishment Clause protected against was coercion, remarked Justices Sandra O'Connor and Harry Blackmun in the respective cases, then the Establishment Clause would be

[4] Everson v. Bd. of Educ. 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

[5] School Dist. of Abington Township v. Schempp, 374 U.S. 203, 256 (1963) (Brennan, J., concurring).

[6] *See* Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) ("While the two Clauses express complementary values, they often exert conflicting pressures.").

[7] Bowen v. Roy, 476 U.S. 693, 699–700 (1986); Engel v. Vitale, 370 U.S. 421, 430 (1962).

[8] *Engel*, 370 U.S. at 430.

[9] Allegheny County v. ACLU, 493 U.S. 573, 592–594 (1989) (endorsement); *id.* at 659–60 (Kennedy, J., concurring in the judgment and dissenting in part) (coercion); Lee v. Weisman, 505 U.S. 577, 592 (1992) (coercion).

superfluous to the Free Exercise Clause, making the former a "redundancy."[10]

Thus, the Establishment Clause must serve an additional function beyond enhancing religious exercise. But merely acknowledging an additional purpose behind nonestablishment begs the question of whether it is still chiefly a different way to get to a common goal. The debate continues over whether enhancing religious liberty remains the primary unifying value of both clauses, such that those secondary values represented in Establishment Clause are subservient to the primary goal of enhancing religious exercise.

This Article takes a different approach to this debate about whether distinct values are represented in the two religion clauses. The differences between the clauses turn not so much on distinct substantive values particular to each clause but in the means of achieving those shared values. The Establishment Clause is primarily for purpose of enhancing religious liberty writ large: ensuring religious equality; guaranteeing disentanglement of religion and government; ensuring the legitimacy of the secular democratic order; and diffusing religious divisiveness. As Justice Blackmun remarked in his *Lee* concurrence: "The Establishment Clause protects religious liberty on a grand scale: it is a social compact that guarantees for generations a democracy and strong religious community—both essential to safeguarding religious liberty."[11]

Conversely, the Free Exercise Clause has a purpose of protecting religious liberty on a small scale: protecting freedom of conscience and the ability to practice one's religious beliefs by preventing government coercion.[12] Thus, absent a crossover to protect the autonomy of religious institutions that has both Free Exercise and Establishment Clause qualities, nonestablishment ensures distinct qualities of religious liberty *unrelated* to free exercise and does so on a grander scale.

In this sense, nonestablishment is the superior religious liberty clause. So understood, religious free exercise *is* the second-class religion clause right, as the title to this symposium asks.

Second—and to the heart of my thesis—the Establishment and

[10] *Allegheny*, 492 U.S. at 628 (O'Connor, J., concurring); *Lee*, 505 U.S. at 604, 606 (Blackmun, J., concurring).

[11] *Lee*, 505 U.S. at 606 (Blackmun, J., concurring).

[12] *Engel*, 370 U.S. at 430; Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 144 (1987).

Free Exercise clauses interact with and respond to government in different ways. Free exercise, by virtue of its more limited quality, is essentially a *negative right*—a shield against government coercion, but one that does not place any affirmative obligations on the government.[13] As stated by Professor Carl Esbeck: "As with all freedoms guaranteed by the Bill of Rights, the Free Exercise and Establishment Clauses protect 'negative' rights. That is, the Religion Clauses tell the government what it may not do."[14]

Professor Esbeck is half right; whereas government may sometimes permissively accommodate religious practice,[15] government generally is under no duty to enhance free exercise and is only required to remove government burdens on that practice.[16] In essence, the "Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government."[17]

But unlike free exercise, the nonestablishment value can tell the government what it *must* do. Thus, nonestablishment has both *negative* and *positive* qualities, not only preventing government from engaging in conduct that endorses, favors, advances, or disparages religion, but also imposing affirmative obligations on government to act in ways that enhance Establishment Clause values.[18] This latter obligation of enhancement is unique to the nonestablishment religious liberty value.[19]

## II. WHY THIS SCHEMA

As stated, the nonestablishment value is concerned with ensuring religious equality, guaranteeing disentanglement of religion and government by protecting the autonomy of religious institutions, ensuring the legitimacy of government, and diffusing religious

[13] Bowen v. Roy, 476 U.S. 693, 699–700 (1986).

[14] Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 592 (1995).

[15] Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970); Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987).

[16] Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. 439, 452 (1988); Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 392 (1990).

[17] *Bowen*, 476 U.S. at 700 (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

[18] Capitol Square Review v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and in the judgment).

[19] *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 227 (1963) (Douglas, J., concurring) ("While the Free Exercise Clause of the First Amendment is written in terms of what the State may not require of the individual, the Establishment Clause, serving the same goal of individual religious freedom, is written in different terms.").

divisiveness.[20] These values place affirmative obligations on the government to act in a particular, non-religious manner, to tailor its policies and programs in particular, non-religious ways. Thus, as we saw in the high school football game prayer case, *Santa Fe Independent School District v. Doe*, the government at times must affirmatively disassociate itself from impressions of religious endorsement, even when it is not itself speaking. Although the *Santa Fe* Court majority viewed the student-led prayer as comparable to government speech due to the extensive school control over the football game, the holding did not turn on such a finding.[21] Rather, the Court held that due to the heightened school involvement in and control over the game and pre-game activities, observers would perceive the private religious messages as being delivered with the approval of the school administration.[22] The school was obligated to diffuse such impressions of endorsement. Endorsement, therefore—assuming it still remains as a nonestablishment value—prohibits more than the government's own religious speech and also bars the government from associating itself with the religious speech of private individuals: "Indeed, the very concept of 'endorsement' conveys the sense of promoting someone else's message."[23] This requirement not to associate with private religious messages in turn places obligations on the government to act in some remedial fashion. As Justice O'Connor remarked in her controlling concurring opinion in *Capitol Square Review v. Pinette* (the Klan cross case in front of the Ohio Statehouse):

> The [Establishment] Clause is more than a negative prohibition against certain narrowly defined forms of government favoritism; it also imposes affirmative obligations that may require a State, in some situations, to take steps too avoid being perceived as supporting or endorsing a private religious message.[24]

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[20] *See* Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 360 (1996); Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech*, 13 NOTRE DAME J. L. ETHICS & PUB. POL'Y 243, 256–67 (1999); Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C.L. REV. 1111, 1125, 1132 (2002).

[21] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310 (2000).

[22] "In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration." *Id.* at 308.

[23] *Allegheny*, 492 U.S. at 600–01; *accord Santa Fe*, 530 U.S. at 308.

[24] Capitol Square Review & Advisor Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J.,

This requirement of affirmative disassociation is not based solely on principles of nonadvancement of religion. The Establishment Clause, as well as the overall structure of our Constitution, recognizes that America has a *secular* democratic government. The Constitution contemplates a secular public order, one in which government may promote liberal democratic principles to the exclusion of other ideologies, including religious ones.[25] Thus government may and should promote secular goals over religious goals.[26] This also means an affirmative obligation on government to maintain a secular public order, and a collective right of citizens to enforce this arrangement, which was underscored by the Court's reconsideration of taxpayer standing in the *Hein v. Freedom From Religion Foundation* case.[27]

Free exercise, in contrast, is more closely linked to other expressive interests found in the First Amendment. As with free speech, there is no affirmative obligation on the government to support or enhance free exercise rights. The closest parallel would be the public forum doctrine in free speech jurisprudence. Early on, the Court intimated that some government property—quintessential public forums—must be kept available for private discourse, a form of a public subsidy for speech.[28] Any requirement for government to facilitate private speech has been eroded in recent years. The rationale supporting an affirmative aspect to public forum doctrine is grounded primarily in notions of democratic participation and accountability. But the Court has not been inclined to expand upon those rationales to support an affirmative obligation for other free expression interests.[29]

concurring in part and in the judgment) (citation omitted).

[25] Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 UNIV. CHI. L. REV. 195, 197–98 (1992); Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 484 (1996).

[26] Statements by Court members suggesting that the religion clauses bar the government from preferring secularism over religion—such as are found in Zorach v. Clauson, 343 U.S. 306, 314 (1952) (citing a "callous indifference to religious groups" where a school district declined to allow for release time instruction)—have not withstood the test of time or subsequent case law. Generally, courts have refused to concede that secularism is the antithesis of religion, that it is a zero-sum gain, such that the government cannot prefer secular approaches over religious approaches. The test enunciated in Lemon v. Kurtzman, 403 U.S. 602, 612 (1971), where the Court requires that government act with a secular purpose in mind, establishes as much.

[27] 127 S. Ct. 2553 (2007).

[28] See Hague v. CIO, 307 U.S. 496, 515 (1939); Perry Educ. Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37 (1983).

[29] *See* Regan v. Taxation with Representation of Washington, 461 U.S. 540, 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."); *see also* National Endowment for the Arts v. Finley, 524 U.S. 569, 587–

To be sure, as Cass Sunstein has written, it is disquieting to view the First Amendment as promoting only negative rights. As he argues with respect to free expression, the "positive dimension" of the Amendment "consist[s] of a command to government to take steps to ensure that the system of free expression is not violated by legal rules giving too much authority to private citizens," such as expansive libel laws or those enforcing hostile audience constraints.[30]

Certainly, a parallel exists with free exercise as well in that government may be required to take affirmative steps to enhance religious "liberty" by preventing religious discrimination or harassment (or promoting religious tolerance in public schools). But these obligations to act—if they do exist—occur usually within the context of government workplaces or schools where the government otherwise imposes restrictions on private conduct, such that the failure to prevent discrimination or harassment may be equivalent to an affirmative acquiescence of the wrongful conduct.[31] Also, this obligation to act is little different from requiring the government to remove private burdens on religion, just as the Free Exercise Clause may require the government to remove official burdens.[32] Obligations to act when religion has been burdened ("substantially" is the standard) is different from obligations to act in non-burdensome situations. The affirmative, constitutional obligation on the government to prevent private religious discrimination outside its own controlled environments is questionable; even so, laws designed to minimize religious intolerance and harassment are qualitatively and quantitatively different from an obligation to enhance religious exercise through programs such as Charitable Choice or school release time. In the former, discrete statutes create neutral environments in which religious belief or practice may flourish or die on its own; any enhancement of religious practice is a secondary affect. Laws designed to enhance religious belief (short of removing a discernable burden) put the government in the role of promoting religious belief, which is neither its duty nor within its purview.

Thus outside of mandatory expressive forums, government is not

88 (1998); Rust v. Sullivan, 500 U.S. 173, 192–193 (1991).

[30] Cass R. Sunstein, *A New Deal for Speech*, 17 HASTINGS COMM. & ENT. L.J. 137, 145 (1994).

[31] *See* Davis ex rel. LaShonda D. v. Monroe Co. Bd. of Educ., 526 U.S. 629 (1999).

[32] Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (discussing how the federal law in question "alleviates exceptional government-created burdens on private religious exercise").

obligated to support private expression, religious or otherwise. Similarly, government is not obligated to enhance religious liberty, only not to burden its practice. This is historically true; our experience has taught that government is often ill-equipped to enhance religious liberty without reverting to favoritism and inviting those concerns that drive the Establishment Clause.[33]

This is why permissive accommodation of religion is a narrow field. *Amos* tied the government's ability to accommodate religion to relieving potential free exercise burdens, as have later holdings.[34] While the scope of the accommodation in *Amos* was broader than the actual burden itself, it was still tied to a potential burden on religion.[35] That "religious groups have been better able to advance their purposes" due to permissive exemptions from general laws has sometimes been a by-product, but has not been a justification for legislative accommodations.[36] Also, the Court's cases reveal a concern about accommodations imposing burdens on third persons.[37] But more than anything, a permissive accommodation is not obligatory.[38] That the government may, in some instances, accommodate religion without violating the Establishment Clause does not turn free exercise into a positive right.

## III. PRACTICAL APPLICATIONS OF SCHEMA

This part discusses practical applications of this positive-negative right dichotomy within religion clause jurisprudence. To do so, it focuses on three contemporary examples of where these issues arise: government religious displays, government funding of religious social service programs ("Charitable Choice"), and military chaplains. On first blush, the first two examples would not commonly be considered to raise free exercise issues; rather, government religious displays and Charitable Choice cry out for Establishment Clause analysis. The government provision of military (and prison and hospital) chaplains more clearly raises free exercise considerations—which, as argued, likely represents that singular instance where the Free Exercise Clause may be thought of as having a positive quality. But as with the other two examples,

[33] *See* Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994).

[34] *See Cutter*, 544 U.S. at 720; *Kiryas Joel*, 512 U.S. at 705;

[35] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987).

[36] *Id.*

[37] Texas Monthly v. Bullock, 489 U.S. 1 (1989); Thornton v. Caldor, 472 U.S. 703 (1985).

[38] *See* Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986).

government chaplaincies require a threshold analysis under the Establishment Clause. What ties the three examples together, and makes them relevant to the topic of this Article, is that all three have been characterized recently as possessing a positive free exercise component. The argument that has appeared in all three contexts is that the government should be required to affirmatively accommodate religious expression or practice through its own activities and policies, even though (as in the first two examples) there has been no burden on religion that would justify either a mandated or permissive accommodation. Finally, the issues of government religious displays and government funding of religious social services represent applications of the positive quality of nonestablishment.

To be sure, other examples may make stronger cases for a positive free exercise component. Over the years, the courts have been presented with several opportunities to discover such an interest but they have always backed away. In *Goldman v. Weinberger*, the Court found no free exercise violation in a military dress regulation that prohibited an Orthodox Jewish Air Force psychologist from wearing his yarmulke while in uniform.[39] The military could easily have accommodated Rabbi Goldman's religious attire, as it had done so earlier or as it was later required to do by Congress. But Goldman did not argue that there was an affirmative aspect to free exercise—supported by a value of pluralism—to assist him in the enjoyment of his religion. Rather, he claimed that the regulation burdened the exercise of his religious beliefs.[40] The Court avoided addressing the degree of any burden on Goldman's beliefs, deferring to the military's authority over internal matters such as a dress code.[41] The Court suggested, however, that irrespective of a viable free exercise claim, no positive aspect to free exercise existed either: "the First Amendment does not require the military to accommodate such practices in the face of its [policy]."[42]

*Lyng v. Northwest Indian Cemetery Protective Association*[43] also presented a potentially compelling case for identifying a positive quality to the Free Exercise Clause. There, several Native Americans claimed that the proposed upgrade of an unpaved road in the Six Rivers National Forest near sacred archeological sites

[39] *Id.*
[40] *Id.* at 506.
[41] *Id.* at 509.
[42] *Id.* at 509–10.
[43] 485 U.S. 439 (1988).

would infringe on their ability to engage in spiritual rituals. The plaintiffs asserted a burden on their religion by the road upgrade and, this time, the Court demurred that the government "threat to . . . some religious practices is extremely grave."[44] Despite so finding, however, the Court characterized the claims in broader terms with broader implications. Highlighting that the claimants sought to restrict the government's uses of "*its* land," with implications for a host of other government programs, the Court extracted the religious burden from the analysis.[45] Rather, the question became whether the government had any *affirmative* obligation to enhance the claimants' religious practice through its operations. The Court's religion clause jurisprudence did not imply, according to Justice O'Connor,

> that incidental effects of government programs, which make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit."[46]

Government, Justice O'Connor remarked, "simply could not operate if it were required to satisfy every citizen's religious needs and desires."[47] The Court's minimizing of the coercive aspect of the government action was arguably inconsistent with its own acknowledgment that the proposed project "could have devastating effects on traditional Indian religious practices."[48] But the Court was taking the long view by considering the potential impact of a government obligation to affirmatively accommodate religious needs outside of burdensome situations. No affirmative obligation existed on the government to promote religious pluralism or to protect a class of persons whose religious beliefs and practices had long been excluded from the cultural mainstream and had been all but destroyed by official government policy and a European-American hegemony.[49] As sympathetic as the claim was in this context, the Court opined that once recognized, a positive quality to free exercise

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[44] *Id.* at 451.

[45] *Id.* at 453 ("Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.").

[46] *Id.* at 450–51.

[47] *Id.* at 452.

[48] *Id.* at 451.

[49] *See* Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twehtieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 776–805 (1997).

would quickly place obligations on a "board range of government activities – from social welfare programs to foreign aid to conservation projects," the accommodations which would either hamstring government functioning or risk the government assessing the strength or weakness of particular religious claims. "The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours."[50]

It is not that the Court reached the wrong conclusion in *Lyng*—the government's interest in the control over "its land" would likely prevail under even a *Sherbert* analysis—rather, the Natives' strong showing of a religious burden made the Court's "affirmative right" rhetoric overstated and misplaced. The Court's difficulty reconciling the burden issue—along with its "slippery slope" concerns for the management of other government property—prevented it from squarely considering whether in that situation, which involved a people who have had a historic trust relationship with the government and have been subjected to cultural genocide, a positive aspect could exist to free exercise in the absence of a cognizable burden on religious practice.

A third context where courts have occasionally grappled with whether there exists a positive aspect to the Free Exercise Clause has been with religiously-based objections to secular public schooling. In his *Schempp* dissent, Justice Stewart argued that the policies providing for prayer and Bible reading facilitated the free exercise rights of those students who wished to engage in religious activity and that this interest might limit the Establishment Clause's ban on state supported religion.[51] Stewart was vague whether the absence of organized prayer and Bible reading rose to level of a free exercise burden or constituted some lesser religious infringement. Even less clear in Stewart's opinion was whether states had an affirmative obligation to permit the practices in view of the potential "establishment of a religion of secularism" that would result from the prayer ban. The "desire" of parents to have their children exposed to religious influences plus the willingness of states to accommodate those majority norms (plus the absence of evidence of compulsion behind the prayer and readings) obviated the need for Steward to explore the headier issue, which was

[50] *Id.* at 452.

[51] Abington Township Sch. Dist. v. Schempp, 374 U.S. 203, 311–12 (1963).

unfortunate.[52] Stewart's musings, however, led the Court majority to respond that schools could be neutral on religious matters without evincing hostility toward religion, though some accommodation about religious matters might be permissible.[53] But the majority also asserted that the Constitution did not obligate the state to facilitate the religious desires of the majority: "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."[54] That banning the religious practices imposed no burden on free exercise, and that to allow them would constitute an establishment violation, obviated the need to consider whether some positive aspect to free exercise existed in between the Scylla and Charybdis of the two clauses. Stewart was on to something by asking whether the school might be obligated to facilitate religious practice as a counter-balance to its secular curriculum; unfortunately, he let the matter drop.

Most later challenges to secularism in public schools have claimed direct burdens on religious belief and practice, thus relieving courts from having to address whether any affirmative accommodation requirement exists in the absence of a free exercise burden.[55] Finding no burden ends the analysis, and the specter of an Establishment Clause violation as the alternative has always loomed large. *Edwards v. Aguillard* presented a possible opportunity; there, the justification for teaching creation science was not to accommodate the burdened religious beliefs of the pro-creationist children and their parents but to promote "academic freedom," which the Court found to be a sham.[56] The absence of a burden claim could have provided an opportunity for the Court to consider whether schools should, rather than merely could, facilitate the religious beliefs of the putative majority as a counterweight to secularism. Any such inquiry was doomed, however, in light of the machinations of the Louisiana legislature to promote fundamentalist religious doctrine.[57] Justice Scalia raised

[52] *Id.* at 312–13.

[53] *Id.* at 225 ("[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization.").

[54] *Id.* at 225–26.

[55] *See* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987); Grove v. Mead Sch. Dist., 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1986).

[56] Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987).

[57] *Id.* at 593 ("[T]he purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint.").

the issue in his dissent, noting that religious accommodations are "not only permissible, but [also] desirable," even in the absence of a burden on religion, and that it was acceptable for legislatures to mandate such accommodations through law.[58] Though coming close to suggesting a positive quality to free exercise, Scalia couched his understanding of the accommodation zone as permissive rather than obligatory.[59] With his narrow reading of the Establishment Clause bar in *Edwards*, Scalia had no reason to venture into unchartered waters by arguing for an affirmative accommodation interest.

Perhaps the ever-present specter of an Establishment Clause violation in the school context will always short-circuit any consideration of a positive aspect to free exercise in the absence of a clear burden on student religious expression.[60] The point to be taken from the above examples is that the Court has had ample opportunity within arguably free exercise contexts to consider any positive quality to free exercise beyond relieving government-imposed burdens. Although the analysis has often been lacking, the message has been clear: while the clause may require government to refrain from burdening religious practice, it does not obligate the government to change its own conduct or facilitate religious belief and practice.

With that rule in mind, we turn to three recent situations where arguments have been made for a positive quality to the free exercise interest.

### *A. Religious Displays*

Government owned or sponsored religious displays should present one of the easier examples of the positive quality to nonestablishment. A sympathetic Court has struggled to identify rationales for permitting some government use of religious discourse and symbolism, looking at times to tradition, long-standing historical uses, and/or ceremonial deism.[61] I do not seek

[58] *Id.* at 618 (Scalia, J., dissenting).

[59] *Id.*

[60] Relatedly, in Board of Education v. Mergens, 496 U.S. 226, 239 (1990), the Court upheld the Equal Access Act not as an accommodation of religion but as an effort by Congress "to address widespread discrimination against religious speech in the public schools" once the schools otherwise make allowance for student speech. By finding no Establishment Clause bar, the Court deferred to Congress' determinations without considering any countervailing free exercise arguments.

[61] *See* Van Orden v. Perry, 545 U.S. 677 (2005); Lynch v. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983).

here to offer a general theory for resolving such cases or a bright line of how to distinguish government acknowledgments of our religious past and traditions from endorsements of faith.[62] But assuming we can distinguish permissible acknowledgments of religion from impermissible endorsements, the obligations imposed by the Establishment Clause become clear. The government's use of religious discourse and symbolism should be prohibited; as Justice Stevens argues, there should be "a strong presumption against the display of religious symbols on public property" outside of a clear public forum.[63] But more for the topic of this Article, the government has a duty to disassociate itself from impressions of government endorsement of religion, either its own religious messages or the messages of private persons. As Justice O'Connor has stated, the Establishment Clause imposes affirmative obligations on the government "to take steps too avoid being perceived as supporting or endorsing a private religious message."[64] The Establishment Clause "forbids a State from hiding behind the application of formally neutral criteria and remaining studiously oblivious to the effects of its actions."[65]

This is why the Texas Ten Commandments decision—*Van Orden*—is wrong. Except for those rare situations where the imagery is indisputably aesthetic—National Gallery Madonnas; the frieze in the Supreme Court chamber—the government should not expropriate, use, or even associate itself with inherently religious symbols. When the government is speaking—and there was no claim in *Van Orden* that Texas had created a public forum for free expression on the state capitol grounds—it must support a secular public order.

It is therefore surprising that within this context, with its strong claim for a positive application of the Establishment Clause, that some critics have argued for a positive free exercise application as well. Supporters of this neutrality theory have made claims, to a large degree unchallenged, of government's obligation to treat religion as favorably as non-religion, even within its own programs or speech. In the words of Stephen Monsma, "[t]he key to governmental neutrality is that government does not recognize,

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[62] One good source is B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491 (2005).

[63] *Van Orden*, 545 U.S. at 708 (Stevens, J., dissenting).

[64] Capitol Square Review v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and in the judgment).

[65] *Id.*

accommodate, or support any one particular religion over any other nor either religious or secular worldviews and groups over one another."[66] As Professor Suzanna Sherry has summed up the argument:

> The claim that the Establishment Clause should be subordinated when it conflicts with religious or speech rights of believers is really a claim that . . . the government must remain neutral not only on the potential truth of religious claims but also on their epistemology. It is a claim that the government should not be permitted to privilege reason over faith as a method of obtaining and verifying truth claims.[67]

In essence, a neutrality approach insists the government must take affirmative steps to facilitate religious values, even in the absence of a free exercise burden, once it has decided to advance comparable secular ones. Thus, a government may be obligated to include those religious representations of Christmas if it decides to sponsor a holiday display containing only secular representations (e.g., a Santa Claus; a Christmas tree; garland).

This argument is inconsistent with the secular nature of democratic government, under which the government is entitled to privilege secular values over religious ones. The government may favor rational approaches to policy formation over alternative epistemologies, including religious systems. The government need not be neutral or evenhanded toward religion in administering its programs; it may prefer rational, empirically-based solutions and outcomes over religiously based ones.

Importantly, the preference for and advancement of secular policies over religious policies is not the same as discrimination against religion.[68] Where government promotion of secularism crosses the line into coercion is when the government requires private citizens to agree with its positions or policies. Government must also avoid taking sides on matters of contested religious belief. But this on its own does not disable the government from promoting secular policies and perspectives to the exclusion of comparable religious ones.[69] In essence, government is generally not required to treat religion equally with nonreligion, only not to treat religion unfairly.

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[66] STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX 178 (1996).

[67] Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEG. ISSUES 473, 477 (1976).

[68] *See* Sullivan, *supra* note 24, at 201.

[69] Rust v. Sullivan, 500 U.S. 173, 193 (1991).

This is an important distinction that is worth repeating. Government may advance secular ideals without disparaging religion. Contrary to what some may claim, the boundary between secularism and religion is not a zero-sum game, such that every secular value is advanced at the cost of a comparable religious value.[70] Neither government nor society operates in a Manichaean framework. While government should not consciously disparage religion or religious choices, it may create incentives for secular ones. And, it follows, the government may be required to take affirmative steps to advance those values. But a comparable positive quality to free exercise does not exist.

### *B. Charitable Choice*

Similarly, the federal government was under no obligation to change the rules with respect to the eligibility of Faith-Based Organizations (FBOs) to compete for government grants and contracts when it enacted Charitable Choice in 1996.[71] Whether the Faith-Based Initiative will survive as a permissive accommodation of religion remains to be seen. Because the statute is not facially unconstitutional, it will likely survive as a constitutional accommodation in theory, though some applications may fail in fact.[72]

But the rhetoric surrounding the enactment of Charitable Choice and the Bush Administration's promotion of the Faith-Based Initiative has been full of claims of government *obligations* to include more religious groups. The implication has been that the failure to expand the offering infringes on free exercise principles, even though there is no arguable burden on the religious practices of either the FBOs or beneficiaries.[73] The strength of this argument may depend on whether one characterizes a particular government funded program as an open forum (as in *Rosenberger v. Rector*, such that government cannot discriminate on the basis of a religious viewpoint) or more restricted government offering over which

[70] *See* CARL H. ESBECK, THE NEUTRAL TREATMENT OF RELIGION AND FAITH-BASED SOCIAL SERVICE PROVIDERS: CHARITABLE CHOICE AND ITS CRITICS, IN WELFARE REFORM AND FAITH-BASED ORGANIZATIONS 181 (Derek Davis & Barry Hankins eds., 1999).

[71] *See* Personal Responsibility and Work Opportunities Reconciliation Act, 42 U.S.C. § 604a (2000).

[72] *See* Americans United v. Prison Fellowship Ministries, 432 F. Supp. 2d 862 (S.D. Iowa 2006).

[73] *See* Steven K. Green, *"A Legacy of Discrimination"? The Rhetoric and Reality of the Faith-Based Initiative: Oregon as a Case Study*, 84 OR. L. REV. 725, 735–36 (2005).

government goals dominate (*Rust v. Sullivan*).[74] Even if it is classified as the former, the evidence is overwhelming that prior to Charitable Choice the government did not discriminate against religious providers or beneficiaries, but rather only against certain religious uses.

But more fundamentally, considering the positive quality of nonestablishment with the negative quality of free exercise, the federal government was under no obligation to restructure its funding goals to include religious alternatives. No free exercise burden would be presented by a secular-only program, neither with respect to beneficiaries nor potential religious providers. To quote former Chief Justice Burger:

> Never . . . has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. . . . "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government."[75]

### *C. Military Chaplains*

Chaplains for quartered service men and women and inmates in prisons and hospitals may represent the only example of a positive right aspect to the Free Exercise Clause. The argument is that the structure of military service, by closely regulating the activities and personal freedoms of its employees, "deprive[s] such persons of the opportunity to practice their faith at places of their choice."[76] Thus "in order to avoid infringing [on] the free exercise guarantees," the government may "provide substitutes" to meet those religious needs.[77] Commonly, this accommodation of servicemembers' religious needs via the chaplaincy system is viewed as not merely being permissive, but as a mandate in order to prevent a free

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[74] *See* Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); Rust v. Sullivan, 500 U.S. 173 (1991).

[75] Bowen v. Roy, 476 U.S. 693, 699–700 (1986) (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1962) (Douglas, J., concurring)).

[76] Abington Township Sch. Dist. v. Schempp, 374 U.S. 203, 297–98 (1963) (Brennan, J., concurring).

[77] *Id.*

exercise violation by the government. As the one decision that has directly addressed the constitutionality of the chaplaincy system remarked:

> It is readily apparent that th[e] [Free Exercise] Clause . . . obligates Congress, upon creating an Army, to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them. Otherwise the effect of compulsory military service could be to violate their rights under both Religion Clauses of the First Amendment.[78]

Although the *Katcoff* court did not say in so many words, it effectively held that the organization and structure of the military *burdens* a servicemember's "right under the Free Exercise Clause to practice his freely chosen religion."[79] The assumption that the chaplaincy system functions as an accommodation to prevent an otherwise free exercise violation has been readily embraced by courts and most commentators.

The free exercise burden has been overstated; while it is possible to view the chaplaincy system as a mandatory free exercise accommodation, it is better to consider it as an accommodation to address interferences with religious practice that fall short of actual burdens on religion.[80] Unlike the burden imposed on Ms. Sherbert that required her to choose between employment and a central tenet of her religious faith—observing the Sabbath by not working (more was involved than merely the ability to attend Saturday worship)—servicemembers are not coerced to violate tenets of their faith. The burdens on religious practice imposed by military life are not so comprehensive or encompassing. In most if not all situations, servicemembers have opportunities to engage in aspects of their religious faith.[81]

But whether military service imposes a free exercise burden or something less, the accommodation undertaken by the government has taken on a unique, positive quality. The negative quality of free exercise normally requires that the government exempt the religious practitioner from complying with the burdening law or regulation.[82] Because the military cannot exempt servicemembers

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[78] Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985).

[79] *Id.* at 232.

[80] *See* Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Establishment Clause*, W. VA. L. REV. (forthcoming 2007).

[81] *See* Steven K. Green, Reconciling the Irreconcilable: Military Chaplains and the First Amendment, W. VA. L. REV. (forthcoming 2007).

[82] *See* Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

from the burdening requirement—i.e., military service—the free exercise interest takes on a positive quality: the highly structured and financially costly chaplaincy system. At least in this narrow context, courts *have* "interpreted the First Amendment to require the Government itself to behave in ways that the individual believes will further his or her spiritual development."[83]

A more controversial application of this principle involves the religious expression of military chaplains themselves. Recently, controversy has erupted over proposed requirements at the Air Force Academy and the Navy that would restrict the ability of chaplains to engage in proselytizing activity. These proposed regulations were partially in response to reports from the Air Force Academy about chaplains disparaging the religious beliefs of non-evangelical cadets. The initial proposals—to place some restrictions on the chaplains to engage in religious activity—were generally appropriate. The interference by Congress and the back-tracking by the Pentagon has been disappointing.[84] While some free exercise issues are at stake, they belong chiefly, if not exclusively, to the cadets and sailors. The purpose of the Chaplain Corps is not to enhance the free exercise of chaplains; moreover, they are serving as government actors and their speech is effectively government speech.[85] A prohibition on proselytizing by chaplains does not burden their free exercise interests because there is no positive free exercise obligation on government to enhance their religious beliefs.

## IV. CONCLUSION

Understanding free exercise as a negative right and nonestablishment as encompassing both negative and affirmative qualities would go far to remediating many church-state controversies and misunderstandings. This does not mean that free exercise is an unimportant right—it is no less important than free expression generally. I still believe that *Employment Division v. Smith* was wrongly decided and that free exercise claims of indirect government burdens should be allowed. But ameliorating a cognizable burden on religion is different from extracting an obligation from government to enhance one's religious practice. While I cannot require the government to help me be more religious,

[83] Bowen v. Roy, 476 U.S. 693, 699 (1986).

[84] *See generally* Heather Cook, *Service Before Self? Evangelicals Flying High at the U.S. Air Force Academy*, 36 J. L & EDUC. 1 (2007).

[85] *See* Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).

I can obligate the government to be secular. That is the positive quality of nonestablishment that free exercise lacks.