THE SEPARATION OF HIGHER POWERS

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ABSTRACT

The very first words of the very first amendment to the United States Constitution continue to frustrate the quest for constitutional clarity. The Bill of Rights' Establishment Clause commands in plain terms that "Congress shall make no law respecting an establishment of religion," but the legal interpretation and political implications of the Clause remain contested today as ever before. What may government require of religion? What may religion demand of government? How much of its independence must religion cede to government? And how closely may government collaborate with religion? These enduring questions admit of no definitive answers, at least not without an organizing logic that can bring coherence and purpose to the Establishment Clause. In this Article, I suggest that the concept of the separation of powers can help do just that. Using separation of powers theory, I construct a framework for clarifying the meaning of the Establishment Clause, giving political actors guidance for crafting policy pursuant to it, and making predictable its interpretation in courts.

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I. INTRODUCTION

THE very first words of the very first amendment to the United States Constitution continue to frustrate the quest for constitutional clarity. The Establishment Clause commands in plain terms that "Congress shall make no law respecting an establishment of religion,"[1] but its legal interpretation and political implications remain unclear today as ever before.[2] What may government require of religion? What may religion demand of government? How much of its independence must religion cede to government? And how closely may government collaborate with religion? These enduring questions admit of no definitive answers, at least not without an organizing logic that can bring coherence and purpose to the Establishment Clause.

Separation of powers theory can help. Few scholars have ever observed the connection between the separation of powers and the separation of Church and State—and the few who have observed the connection have gone no further than that.[3] Yet the separation of powers offers a useful framework for clarifying the meaning of the Establishment Clause, giving political actors guidance for crafting policy pursuant to it, and making predictable its interpretation in courts. The three democratic values we aspire to achieve by separating the branches of the national government—personal liberty, institutional equality, and departmental

1. U.S. CONST. amend. I.

2. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring); Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 4 (2006); Mark S. Kende, *Free Exercise of Religion: A Pragmatic and Comparative Perspective*, 55 S.D. L. REV. 412, 415–16 (2010); Bruce Ledewitz, *Could Government Speech Endorsing a Higher Law Resolve the Establishment Clause Crisis?*, 41 ST. MARY'S L.J. 41, 108 (2009); Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1241 (2010).

3. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 94 (1980); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445, 468 (2002); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 10 n.35 (1998); Patrick M. Garry, *The Democratic Aspect of the Establishment Clause: A Refutation of the Argument that the Clause Serves to Protect Religious or Nonreligious Minorities*, 59 MERCER L. REV. 595, 596–97 (2008); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 470 (1995); Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 808 (1999); Timothy K. Kuhner, *The Separation of Business and State*, 95 CALIF. L. REV. 2353, 2355–56 (2007); Feisal Abdul Rauf, *What Is Islamic Law?*, 57 MERCER L. REV. 595, 614 (2006).

independence—resonate just as intensely when applied to the relationship between God and man, our two masters. These two higher powers compel our conduct and command our conscience, not unlike the way the public institutions to which the Constitution assigns functions constrain our comportment.

The most useful way to understand how separation of powers theory can help clarify the relationship between Church and State is to begin by visualizing it. Picture a block of clay that consists of X units.[4] That block of clay represents all conceivable powers that may be exercised in a given jurisdiction. Consider first the national separation of powers, pursuant to which the United States Congress exercises its constitutionally delegated powers, the President exercises his or her executive authority, and the federal courts exercise their judicial functions. The block of national powers would be divided into three parts such that the X units of exercisable powers would be allocated among the three branches of the national government. In the context of the separation of Church and State, the separation of higher powers—between religion and government—would begin from the same point of departure of X units of exercisable powers. But instead of conceiving of the separation of powers as among four entities—the three national branches plus religion—the separation of higher powers invites us to understand the universe of power-exercising entities as a duality: government on the one hand and religion on the other. We may therefore picture our block of clay divided into two parts: one part consisting of the powers exercisable by religion and the other part consisting of the powers exercisable by government, for instance the national government. Under this scenario, the national government would see its allocation of exercisable powers further divided into three parts among the Legislature, Executive, and Judiciary.

Speaking in the same breath of religion and the separation of powers may admittedly strike a dissonant chord. After all, how can we translate the logic of a rigid constitutional structure into the vocabulary of a sacred belief that often defies delimitation? The discomfort this incommensurability arouses is the very reason the separation of powers is the best vehicle to referee contests about the variable permeability and impregnability of the constitutional perimeter surrounding our higher powers. The separation of powers presupposes among the separated powers reciprocal respect, mutual benefit, and the freedom to act with plenary power within their respective spheres of authority. Whether we wish to protect the integrity of religion, the state, or both, the high ambitions of preserving the secular character of the state and respecting the sacrality of religion demand deference only the separation of powers can afford.

For over two centuries, the Supreme Court of the United States has been called to mediate competing claims of authority pitting Church against State. In fixing the constitutional balance of power between

4. I am grateful to Chad Flanders for this useful analogy, and to Jessie Hill for helping to develop it.

them, the Court has created and recreated a number of constitutional tests to demarcate the boundary separating God from man. Those tests—the neutrality principle, the *Lemon* test, the endorsement test, and the coercion test—have emerged from noble efforts to construct an analytical framework to bring constitutional clarity to the Establishment Clause.[5] But what has gone unnoticed is that the separation of powers is the common thread that runs through each of these tests. The consequence of missing the forest for the trees has been to probe narrowly the elements of a particular test instead of, more advisedly, to reflect broadly on the larger political purpose and institutional profit of the Establishment Clause.

Yet the separation of powers entails as much peril as it does promise for the future of the Establishment Clause. Without an operational blueprint or guiding vision for how to apply the separation of powers to the separation of Church and State, the Establishment Clause risks remaining enveloped in its current haze. That is why the battleground in applying separation theory to the Establishment Clause will require the Court to choose between the two ways in which the separation of powers manifests itself in the Constitution: vertically or horizontally. The horizontal separation of powers refers to the tripartite division of authority among the legislative, executive, and judicial branches of the same level of government. As coordinate departments possessing constitutionally allocated powers, the three national branches of government are equal partners in the project of governing under the Constitution. In contrast, the vertical separation of powers refers to the federal arrangement between the national and state governments. What follows from the vertically divided powers of federalism is first, that the national institutions stand above their state counterparts in the hierarchy of constitutional authority, and second, that states are subject to the intrusive reach of the national government when deemed necessary to the national interest. Consistent with this second implication, national nullification of state laws or practices is authorized by the Constitution's Supremacy Clause.[6]

Whether the Court adopts a vertical or horizontal theory of separated powers depends on whether the Court understands God and man as occupying competing or complimentary spheres of influence. Were the Court to conceive of Church and State as vertically separated powers, one would necessarily stand above the other as is the case in the federal hierarchy of governmental powers. Alternatively, were the Court to see Church and State as horizontally separated powers, each would be entitled to the powers and immunities of an equal partner in the venture of American nationhood. There is a third possibility: the Court could choose an amalgam of horizontal and vertical separation, casting Church or State in the role of *primus inter pares*, or first among equals. Each of these three renderings of separation theory could have significant rever-

5. *See infra* Part III.
6. U.S. CONST. art. VI; La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368–69 (1986).

berations on the course of the Establishment Clause. Therefore, although separation theory could bring much needed clarity to the Establishment Clause, that clarity would not come without consequences, which is why the Court must both choose carefully between vertical and horizontal separation and remain consistent in applying that choice.

This Article serves both as an invitation and a warning. It is, first, an invitation to the Court to rely on the separation of powers as its conceptual framework for interpreting the Establishment Clause. Though the separation of powers analogy does not map perfectly onto the separation of Church and State, the differences do not undermine the larger theory of separation that could fruitfully inform the task of constitutional interpretation. I offer the Court a tripartite taxonomy of separated higher powers that can serve as the backdrop for situating and interrogating the relationship between religion and government: Church *and* State, Church *over* State, and Church *under* State. Second, this Article should also raise a flag to the Court. Despite the strident calls for the Court to clarify its establishment case law, it is not entirely certain that clarity would serve the interests of either the Court or the nation. The consequences—both beneficial and problematic—of constitutional clarity will become clear in the pages to follow.

The task I have given myself is to bring to bear the insights of separation theory to the Establishment Clause. Insofar as my ambition is to provide useful guidance to the Court, I will for the most part mirror the Court's formalist, rather than functional, approach to the separation of powers.[7] I will begin, in Part II, by examining the founding wisdom of separated powers with special attention to the democratic values they serve. In Part III, I will show that each of the Court's Establishment Clause tests is animated above all by the very same democratic values we seek to vindicate with the separation of powers. This Part will moreover detail the deep interconnections between the separation of powers and the separation of Church and State. Part IV will illustrate the stakes in applying either a vertical or horizontal theory of separation of powers to the Establishment Clause. Part V will conclude that the separation of powers does indeed hold promise for finally bringing purpose and coherence to the Court's religion jurisprudence. Only with a consistent application of either vertically or horizontally separated powers may we at last find peace in the constitutional law of religion and government.

II. THE DEMOCRATIC VALUES OF SEPARATED POWERS

The separation of powers is the cornerstone of the American constitutional edifice. No principle is more constitutive of American constitutionalism. Yet the separation of powers is nowhere expressly referenced

7. *See, e.g.*, Clinton v. New York, 524 U.S. 417 (1998) (illustrating the Court's formalist approach to the separation of powers); *see also* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 608–11 (2001) (distinguishing between formalism and functionalism in separation of powers theory).

in the text of the United States Constitution. The separation of legislative, executive, and judicial powers must instead be inferred from the structure of the Constitution, which simultaneously creates each of the three departments and confers upon them powers that appear across different parts of the Constitution.[8] The separation of powers therefore inheres in the very architecture of the text itself,[9] delegating the powers and rooting the prerogatives of the political actors created by the Constitution.[10] This constitutional design was not happenstance. The revolutionary statesmen who gathered in Philadelphia to write America's Constitution drew their inspiration from the man they called the great "oracle who is always consulted and cited,"[11] Montesquieu, a leading French philosopher whose work counseled making separated powers the organizing logic of liberal democracy.[12] The founding framers therefore set the separation of powers as the blueprint for the new Republic.

A. WHY SEPARATE?

Separating powers was a wise choice. Constitutional designers have long believed that liberty demands separated powers. Ancient Greek and Roman philosophy originally adopted the theory of "mixed government" to accommodate the dissimilar interests of stratified social classes.[13] This was a personified separation of powers. But that later gave way to the more complicated and democratic model of separation that governs today: the personified and functional separation of powers. As early as the *Magna Carta*, constitutional drafters divided authority over multiple loci, believing both that the bodies exercising official power would enjoy greater freedom to act within their respective spheres of jurisdiction and that those individuals and groups subject to the exercise of official power would lead freer, more enjoyable, and more predictable lives. That was the result of granting to the English Church certain rights and privileges and delegating others to the King.[14] The same was true of the eighteenth-century *French Declaration of the Rights of Man and of the Citizen*, which proclaims that the separation of powers is so indispensable to de-

8. U.S. CONST. arts. I, II, III. (creating, and vesting powers in, the Legislature, Executive and Judiciary, respectively).

9. Akhil Amar has coined the evocative term *architexture* to refer to the structural and textual continuities of the constitutional text. *See* Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 672 (2002).

10. The Constitution is therefore an illustration of impliedly separated powers. In this respect, the Constitution is quite unlike the constitutions of other western liberal democracies whose constitutional texts state in plain terms that governmental powers shall remain separated. *See, e.g.*, CONSTITUIÇÃO FEDERAL tit. IV, § VIII, art. 60, para. 4.III (Braz.); PERUSTUSLAKI ch. 1, § 3 (Fin.); CUMHURIYETI ANAYASASI pmbl. (Turk.).

11. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961).

12. *See* CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. 11, Ch. 6, at 157 (Anne M. Cohler et al. eds., 1989).

13. Gavin Drewry, *The Executive: Towards Accountable Government and Effective Governance?*, *in* THE CHANGING CONSTITUTION 280, 282 (Jeffrey Jowell & Dawn Oliver eds., 5th ed. 2004).

14. Magna Carta cl. 1 (1215).

mocracy that no constitution can exist without it.[15] Today, the constitutional commitment to the separation of powers remains firmly entrenched in the political soul of liberal democracies, so much so that scholars maintain, correctly in my view, that democracy demands separated powers.[16] But this chorus of scholarly agreement tells us nothing about why separating powers matters.

Constitutions separate powers in the service of democracy and the values that we deem minimally constitutive of democracy. The separation of powers is the engine that allows the body politic to uphold its twin commitments to liberty and good government.[17] The U.S. Constitution's principal interest is not efficiency; this is obvious from the intricate system of interlocking checks and balances that frustrate institutional consolidation and slow the process of legal and constitutional change.[18] Its principal interest is instead the entrenchment of liberty. It achieves this high ambition in many ways, but no way is more important than one: the separation of powers. Separating official power prevents the concentration of power and the tyrannical abuse of authority that the accrual of power makes possible.[19] It also tames the state and frees individuals from the fear of autocracy. But the simple act of dividing power among multiple sites of authority does not on its own foster liberty. There are two prerequisites to achieving that liberty: first, the sites of authority must be mutually respectful and equal, and second, they must also stand independently and apart from the others. Those, then, are the democratic values that the separation of powers manages to serve so well.

Consider the first of three reasons generally invoked for separating powers: to preserve and promote the rule of law is perhaps the overriding purpose of separating powers.[20] The rule of law is the very basis of constitutional democracy. The rule of law rests on predictability in the administration of the law, employing reason instead of emotion in the application of the law, and insisting on accountability of the officeholders

15. Declaration of the Rights of Man and of the Citizen art. 16 (1789).

16. *See, e.g.*, Aharon Barak, *Human Rights in Israel*, 39 ISR. L. REV. 12, 20 (2006); Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 54–55 (2001); Reynaud N. Daniels & Jason Brickhill, *The Counter-Majoritarian Difficulty and the South African Constitutional Court*, 25 PENN. ST. INT'L L. REV. 371, 378 (2006); Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 529 (1999); Patrick Heller, *Degrees of Democracy: Some Comparative Lessons from India*, 52 WORLD POL. 484, 492 (2000); Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review Vs. Democracy in Comparative Perspective*, 34 U. RICH. L. REV. 415, 421 (2000).

17. JESSICA KORN, THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO 14 (1996).

18. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629 (1952) (Douglas, J., concurring) (quoting Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

19. ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 15 (1998).

20. HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS IN THE ADMINISTRATIVE STATE 4–5 (2006).

to whom citizens entrust the responsibilities of government.[21] A constitutional separation of powers furthers each of those virtues. When public institutions possess itemized responsibilities, individuals can better hold those institutions accountable for the actions they take and the ones they do not. This leads us to the connection between the rule of law and predictability in the law:

> In its origin, the rule of law derives from the claim by all political rulers, good or bad, liberal or authoritarian, to a monopoly or near monopoly of the use of force. This imposes on them all, irrespective of their class, not just the moral duty, but the practical necessity to police stability by imposing norms of conduct not only reflected in a criminal code, but extending to the settlement of all civil disputes between individuals who might otherwise be tempted to take the law into their own hands. This means the establishment of ordered government operating under a set of intelligible rules leading to predictable results.[22]

We can therefore conceive of the constitutional allocation of powers as a checklist against which to judge the performance of each of the branches. Not only may we assess whether task X was discharged by branch A as required by the constitutional text, but we may also evaluate how well that branch performed its task. We may, moreover, discern whether branch A has mistakenly performed a task that was otherwise assigned to branch B or C, in which case we could likewise hold branch A accountable for the misdeed of overstepping its constitutional boundaries. In a constitutional culture of separated powers, arbitrary exercises of power become less likely.[23] The separation of powers therefore restrains official power by imposing rules for its exercise, both as to whom may exercise it and how.[24]

The real value of a regime anchored in the rule of law is the liberty that follows from it. Personal liberty is derivative of the rule of law and only risks compromise to public institutions in the absence of constitutionally bounded directives. The separation of powers is essential in this respect because it fosters the rule of law, which itself ensures liberty.[25] How? As constitutional theorist Trevor Allan explains, the rule of law "assumes a division of governmental powers or functions that inhibits the exercise of arbitrary state power,"[26] and in turn "[t]he division of power ensures that

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21. *See generally*, Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137 (1993) (describing the purposes and implications of the separation of powers applied to constitutional interpretation).

22. LORD HAILSHAM, ON THE CONSTITUTION 8 (1992).

23. Richard Bellamy, *The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy*, 44 POL. STUD. 436, 438 (1996).

24. ROGER MASTERMAN, THE SEPARATION OF POWERS IN THE CONTEMPORARY CONSTITUTION 13 (2011).

25. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 14 (Liberty Fund, Inc. 2d ed. 1998) (1967).

26. T.R.S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW 31 (2001).

public officials cannot create new rules and enforce them at the same time, making people subject to their will as it evolves from case to case."[27] Imagine the abuses of power that would ensue where one person or body was given the power to write, interpret, and enforce its own laws: "there would be no force, other than good will, to counteract the temptation to use the powers of government to provide exemptions from the operation of the law and establish special privileges and immunities for the ruling class or governing faction."[28] But dividing power makes possible the popular control and accountability of the government.[29]

A related democratic value that flows from separating powers is interbranch comity.[30] To understand this point, we may draw an analogy to the Full Faith and Credit Clause,[31] which requires each state to recognize the constitutional actions and judgments of another. When the State of Delaware grants a charter to a new corporation, the Commonwealth of Massachusetts must recognize that corporation's constitutional rights and legal privileges within its own borders.[32] Similarly, interbranch comity invites the Legislature, for example, to cede to the Executive's choice on a matter that falls within its uncontested jurisdiction. We would likewise expect the Judiciary to defer to the Legislature or the Executive in matters best left to their own judgment. Indeed, interbranch comity is the very basis for the political question doctrine, pursuant to which federal courts commonly decline to decide a constitutional dispute because the duty of resolution rests with "a coordinate political department."[33]

What interbranch comity really illustrates is mutual respect and institutional equality. When a state takes an action that it anticipates will be recognized in its sister states, the expectation is anchored in the mutual respect that states grant to each other. It flows from the reciprocal deference that one state shows another by virtue of their joint venture as members in the constitutional compact. The same institutional posture attends to the relationship among separated branches of government. The Legislature, Executive, and Judiciary are free to conduct their own affairs in their respective zones of exclusive authority without disruption from other branches.[34] True, each branch retains the power to check the excesses of the others, but those constitutional tugs-of-war occur at the outer limits of constitutional delegations of power. When the branches act squarely within their bounded authority, they have plenary power.

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27. *Id.* at 48.

28. JAMES MCCLELLAN, LIBERTY, ORDER, AND JUSTICE: AN INTRODUCTION TO THE CONSTITUTIONAL PRINCIPLES OF AMERICAN GOVERNMENT 328 (Liberty Fund, Inc. 3d ed. 2000) (1989).

29. PAUL STARR, FREEDOM'S POWER: THE TRUE FORCE OF LIBERALISM 58–59 (2007).

30. ROBERT A. KATZMANN, COURTS AND CONGRESS 1 (1997).

31. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

32. *See id.*

33. Baker v. Carr, 369 U.S. 186, 217 (1962).

34. *See* Robert A. Katzmann, *The Underlying Concerns*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 7, 14 (Robert A. Katzmann ed., 1988).

They exercise their own peculiar functions, not completely independently of the others,[35] but with autonomy and a presumption of constitutional correctness. In this sense, the separated branches enjoy reciprocal equality in the exercise of their constitutional authority. No institution possesses primacy over the others; there is instead a "balanced strength" that characterizes the collective structure of the three branches.[36] It is a "harmonious balance" in which the "the interests of each of the tripartite elements [are] addressed and protected."[37] The Judiciary is preeminent in its sphere, just as the Legislature and the Executive are preeminent in their own. Only by respecting the constitutionally bounded spaces reserved for each branch may the branches carry on their delegated tasks and in turn give their constituents the good government the Constitution is designed to foster.

But neither personal liberty nor institutional respect and equality is possible in the absence of departmental independence within a larger framework of departmental interdependence. That is the third democratic value the separation of powers helps constitutional states achieve. The U.S. Constitution's separation of powers protects the independence of each branch in specific ways. For instance, the Executive is shielded from legislative interference insofar as legislators cannot concurrently hold an executive appointment.[38] Additional protections for the Executive include the President's election by electors, not by Congress;[39] the President's plenary power over diplomacy and the recognition of diplomatic engagements;[40] and the President's power of removal without Senate ratification.[41] Likewise, Congress cannot pass a bill of attainder in large part because that would invade the province of the Judiciary.[42] Other judicial protections include the prohibition preventing Congress from altering the Supreme Court's original jurisdiction,[43] or, more generally, from abolishing the Supreme Court[44] or the position of Chief Justice.[45] As for the Congress, its independence is served well by a number of protections: the President may not dissolve the Congress;[46] each chamber may judge the selection and qualifications for membership;[47] its members cannot be arrested while Congress is in session;[48] and no one

35. CHARLES WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 247–48 (1930).

36. *See* CHARLES O. JONES, SEPARATE BUT EQUAL BRANCHES: CONGRESS AND THE PRESIDENCY 10 (2d. ed. 1999).

37. MICHAEL FOLEY, THE POLITICS OF THE BRITISH CONSTITUTION 14 (1999).

38. U.S. CONST. art. I, § 6.

39. *Id.* art. II, § 1.

40. *Id.* art. II, § 3.

41. *Id.* art. II, § 2.

42. *See id.* art. I, § 9.

43. *Id.* art. III, § 2.

44. *Id.* art. III, § 1.

45. *Id.* art. I, § 3.

46. *Id.* art. I, § 4.

47. *Id.* art. I, § 5.

48. *Id.* art. I, § 6.

but its own members may gainsay its internal operating rules.[49] Nor may executive or judicial officers interfere with congressional speeches and debates.[50] A further illustration of the independence that one branch enjoys from the other is the constitutional prohibition against diminution of presidential[51] and judicial salaries.[52] All of these and other examples demonstrate the Constitution's attentiveness to departmental independence in a regime of separated powers.

Return for a moment to our discussion of interbranch comity. In a regime of separated powers, the branches of government enjoy a reciprocal respect and equality of status insofar as they may fulfill their functions secure in the knowledge that one branch will recognize the legality of actions taken in the heart of the other's constitutional jurisdictions. What happens when there is a conflict about which branch is responsible for which function? The theory of separated powers points to the checks and balances in the separated system as the answer. Each branch operates independently of the other, possessed of the power of oversight and limited control to challenge the disputed institutional prerogatives of a coordinate branch.[53] Power checks power and institutional prerogative collides with institutional prerogative, all in the service of preventing the accumulation of power in the hands of a single branch. The separation of powers fortifies the independence of the branches by conferring upon each a toolkit of obstructive devices to slow the quickening pace of concentrating power in another.[54]

Separation of powers theory therefore requires the independence of the branches.[55] Equipped with independent judgment, each branch may carry out its duties under the constitutional text but may, moreover, take action to curb other branches' institutional overextensions that threaten to destabilize the balance of power among the three coequal branches. Self-policing and mutual oversight is a corollary of separated powers: "An institution cannot check unless it has some measure of independence; it cannot retain independence without the power to check."[56] In this way, the separation of powers divides responsibilities even as it blurs them; the constitutional allocation of power creates many different fora

49. *Id.* art. I, § 5.
50. *Id.* art. I, § 6.
51. *Id.* art. II, § 1.
52. *Id.* art. III, § 1.
53. Barbara B. Knight, *Introduction* to SEPARATION OF POWERS IN THE AMERICAN POLITICAL SYSTEM 1, 14–15 (Barbara B. Knight ed., 1989).
54. Harvey C. Mansfield, *Separation of Powers in the American Constitution*, *in* SEPARATION OF POWERS AND GOOD GOVERNMENT 3, 10 (Bradford P. Wilson & Peter W. Schramm eds., 1994).
55. *See* J.W.F. ALLISON, THE ENGLISH HISTORICAL CONSTITUTION: CONTINUITY, CHANGE AND EUROPEAN EFFECTS 76–77 (2007).
56. LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 6 (4th ed. 1998).

within which branches actually "share and compete"[57] for authority when the contested function falls nowhere within the categorical purview of any branch. Although one branch may achieve ascendancy over another, it is typically only a temporary imbalance in the constitutional hierarchy because the design of the Constitution is predisposed to returning the branches to an institutional equilibrium.[58] In the event of an interbranch tussle about constitutional correctness, the constitutional separation of powers can therefore serve as a referent for a dispute pitting one branch versus another.[59]

B. SEPARATION AT THE FOUNDING

Quite apart from the constitutional theory of separated powers, the constitutional politics of separated powers likewise point to the same democratic values of liberty, equality, and independence. No wonder, then, that the framers of the U.S. Constitution saw great virtue in the separation of powers. For them, separated powers would form the foundation of the American constitutional order and would create the basic framework that would spur the development and subsequent entrenchment of the first principles of democratic government, namely democratic legitimacy, legitimate authority, and the rule of law. The separation of powers was the roadmap that would lead to their desired destination; it was the means toward an end: "[Separated powers] are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided."[60] The framers therefore chose to separate powers not for the sake of separation itself, but rather to make possible the democratic values that they correctly deemed necessary for good government.[61]

For the framers, good government sprang from three democratic values: institutional equality, departmental independence, and personal liberty. They understood the separation of powers as vital to achieving these three values. First, by dividing public authority equally among three departments, the separation of powers would prevent the concentration of power and consequently frustrate the rise of tyranny. Second, the separation of powers grants to each branch a sphere of independent

57. Jeb Barnes, *Adversarial Legalism, the Rise of Judicial Policymaking, and the Separation-of-Powers Doctrine*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 35, 48 (Mark C. Miller & Jeb Barnes eds., 2004).

58. JEAN REITH SCHROEDEL, CONGRESS, THE PRESIDENT, AND POLICYMAKING: A HISTORICAL ANALYSIS 5 (1994).

59. John M. Rogers, *Anticipating Hong Kong's Constitution from a U.S. Legal Perspective*, 30 VAND. J. TRANSNAT'L L. 449, 451 (1997).

60. THE FEDERALIST NO. 9, *supra* note 11, at 51 (Alexander Hamilton).

61. Even the anti-federalist opponents of the Constitution supported this proposition, perhaps even more adamantly than the Federalists. *See, e.g.*, *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents* (Dec. 18, 1787), *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 237, 240 (Ralph Ketcham ed., 1986); Brutus, *Essay XVI* (Apr. 10, 1788), *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra*, at 331, 335.

jurisdiction over which they hold dominion and enjoy a rebuttable presumption of constitutional correctness; this point derives from regarding each branch as institutionally equal. Third, the separation of powers is a guarantor of liberty insofar as its assignment of discrete functions to the three branches serves to circumscribe the authority each can legitimately exercise. Those, then, were what the framers perceived as the three virtues of the separation of powers. In a regime of separated powers, liberty would follow from each of the separate branches operating as coequal entities authorized to discharge their delegated functions independently.

The Constitution therefore separates powers in the service of three overarching purposes, the first of which is to prevent the concentration of power in the hands of one branch of government. Let us call this the democratic value of institutional equality and balance. In this respect, the separation of powers is concerned with establishing three coequal departments, each one invested with a collection of privileges and prerogatives no greater in the aggregate than the ones possessed by the others. The framers' goal was to "form some balance"[62] among the branches and, furthermore, to signal that each merited reciprocated respect.[63] The result was to create a constitutional structure wherein public authority is dispersed over mutually reinforcing and mutually limiting organs of the national government, all toward the worthy end of thwarting the tyranny that arises when one branch dominates over the others. So explained Madison when he commented that "[t]he several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers,"[64] gesturing to the democratic significance of separated powers. Even Centinel, a leading voice among Anti-Federalists, believed deeply in the promise of equal branches.[65] Equality among branches is a laudable objective in and of itself. But equality does not follow merely from stating that the branches are equal; each of the three branches of government can be truly equal only if they operate autonomously and independently of the others.

Consider next in greater detail the democratic value of departmental independence. In establishing the rules that would govern American constitutional politics, the framers were particularly attentive to the dangers of majoritarianism that would derive from an emboldened legislature. Of the three branches, the Legislature was the one most likely to "extend[ ] the sphere of its activity, and draw[ ] all power into its impetuous vortex."[66] The tendency of republican government, observed the framers, was the "aggrandizement of the legislative, at the expense of the other

62. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 340 (Max Farrand ed., 2d ed. 1937) (statement of Mr. Davie).

63. *See* Robert A. Burt, THE CONSTITUTION IN CONFLICT 72 (1992).

64. THE FEDERALIST NO. 49, *supra* note 11, at 339 (James Madison).

65. *See* Centinel, *Number I* (Oct. 5, 1787), *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 61, at 227, 230–31.

66. THE FEDERALIST NO. 48, *supra* note 11, at 333 (James Madison).

departments,"[67] by virtue of the Legislature's method of election and its large size relative to the Executive and Judicial branches. With its dominant position in the distribution of constitutional powers, the Legislature could weaken the autonomy of the Executive and Judiciary, in so doing exacting considerable damage to the democratic foundations of the nation. What good was the separation of powers if it could not endow each of the separated powers with independence, inquired the framers.[68] To separate powers without achieving their independence would produce a separation "merely nominal and incapable of producing the ends for which it was established."[69]

The separation of powers served the framers' interest in ensuring the independence of each of the three branches.[70] The founding generation understood independence to mean at least three things. First, it required that no branch possess the power to obstruct the work of a sister branch in an area over which it enjoyed plenary power. Let us call this the jurisdictional principle. As the framers wrote, the powers delegated to one branch "ought not to be directly and completely administered by either of the other departments,"[71] adding for emphasis that "neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers."[72] At the Constitutional Convention, Madison was just as resolute in his view that "[i]f it be a fundamental principle of free Government that the Legislative, Executive and Judiciary powers should be *separately* exercised, it is equally so that they be *independently* exercised."[73]

Second, what follows from jurisdictional primacy is the idea of expert specialization. The separation of powers affords each branch of government its own sphere of jurisdiction based on the tasks it is best equipped to perform. It is at once a matter of institutional efficiency and competence. The Legislature passes laws and distributes public dollars, the Executive executes those laws and spending instructions, and the Judiciary stands in judgment of the constitutionality of the actions and inactions of the Legislature and Executive.[74] From this general framework flows the recognition that one branch may be best positioned to interact directly

67. THE FEDERALIST NO. 49, *supra* note 11, at 341 (James Madison); *see also* Gouverneur Morris, *The Judiciary, the Veto, and Separation of Powers* (July 21, 1787), *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 61, at 120, 122 (concurring with the other framers "in thinking [that] the public liberty [is] in greater danger from Legislative usurpations than from any other source").

68. THE FEDERALIST NO. 71, *supra* note 11, at 483 (Alexander Hamilton).

69. *Id.*

70. 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 87 (Max Farrand ed., 2d ed. 1937) (statement of Mr. Madison); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 86 (Max Farrand ed., 2d ed. 1937) (statement of Mr. Dickenson).

71. THE FEDERALIST NO. 48, *supra* note 11, at 332 (James Madison).

72. *Id.*

73. James Madison, *Election and Term of Office of the National Executive* (July 17, 19, 1787), *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 61, at 114, 119 (emphasis in original).

74. THE FEDERALIST NO. 78, *supra* note 11, at 522–23 (James Madison).

with foreign counterparts and another to give the product of those interactions the force of law.[75] That is precisely what we see in the dualism of the Constitution's treaty-making power, pursuant to which the Senate must ratify any treaty the President negotiates with another nation.[76]

Third, independence demands an outer perimeter of autonomy into which other branches should have only limited entry. This is the principle of self-governance. It commands concurrently "that each department should have a will of its own; and consequently should be so constituted, that the members of each should have as little agency as possible in the appointment of the members of the others,"[77] and that they "should be as little dependent as possible on those of the others, for the emoluments annexed to their offices."[78] This autonomy therefore entails the power to regulate its own membership and the security of compensation unconditioned on other branches' approval of the way it discharges its constitutional functions.

Turn now to personal liberty, which may be understood as the main reason for separating powers. No one has captured with greater clarity than Montesquieu the threat to liberty that the fusion of powers risks imposing upon civil society: "When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically."[79] The framers seized upon this justifiable concern to defend their choice of separated powers as their prescription for liberty,[80] calling the separation of powers an "essential precaution in favor of liberty."[81] Echoing Montesquieu's political acuity, the framers held to the view that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."[82] And so, as the Dean of American founding history has observed, "[t]he separation of this governmental power, rather than simply the participation of the people in a part of the government, became the best defense of liberty."[83]

How does the separation of powers make liberty possible? The framers saw an important interconnection between separating powers and preserving liberty. If we were angels, they remarked, there would be no

75. THE FEDERALIST NO. 75, *supra* note 11, at 504 (Alexander Hamilton).

76. U.S. CONST. art. II, § 2, cl. 2.

77. THE FEDERALIST NO. 51, *supra* note 11, at 348 (James Madison).

78. *Id.*; *see also* THE FEDERALIST NO. 79, *supra* note 11, at 531 (Alexander Hamilton) ("Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support.").

79. MONTESQUIEU, *supra* note 12, at 157.

80. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 62, at 108 (statement of Mr. Pinckney).

81. THE FEDERALIST NO. 47, *supra* note 11, at 323 (James Madison).

82. *Id.* at 324.

83. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 608 (2d ed. 1998).

need to create the structures of government to govern our interactions.[84] But given that we are not angels, we must establish a government and, once it is established, find ways to control it.[85] For the framers, the solution was to create an arrangement of intersecting authority and overruling powers so as to encourage one department of government to restrain the other, even as its own exercise of power would be constrained by another department. "This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public,"[86] wrote Madison, moreover observing that "where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other."[87] Endowing each branch with self-defense mechanisms against the others would frustrate the concentration of power, and in turn forestall tyranny. The separation of powers therefore helped negate "[t]he propensity of the legislative department to intrude upon the rights and to absorb the powers of the other departments,"[88] just as well as it warned us that one branch "ought not to be left at the mercy of the other, but ought to possess a constitutional and effectual power of self defence."[89]

From the founding of America until today, separation of powers theory has grown into a democratic imperative. Scholars commonly regard separated powers as either a fundamental[90] or necessary[91] feature of liberal democracy. And with good reason, because any of the three pitfalls of fused powers—concentrated power, institutional subservience, and the deprivation of liberty—constitutes the very antithesis of good government. The thought of official power converging into the hands of a single individual or branch of government offends our sensibilities about constitutional prudence and legitimate authority just as deeply as the possibility of relegating one branch to the command of another or the threat of divesting citizens of the freedom that comes only with controlling the exercise of official power. The founding theory of separated powers has therefore served American constitutional government quite well.

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84. THE FEDERALIST NO. 51, *supra* note 11, at 349 (James Madison).

85. *Id.*

86. *Id.*

87. *Id.*

88. THE FEDERALIST NO. 73, *supra* note 11, at 494 (Alexander Hamilton).

89. *Id.* at 495.

90. Charles McDaniel, *Islam and the Global Society: A Religious Approach to Modernity*, 2003 BYU L. REV. 507, 540 (2003); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 927 n.135 (1999); Manuel Medina-Ortega, Comment, *A Constitution for an Enlarged Europe*, 32 GA. J. INT'L & COMP. L. 393, 400 (2004).

91. Susan S. Gibson, *International Economic Sanctions: The Importance of Government Structures*, 13 EMORY INT'L L. REV. 161, 213 (1999); Emanuel Gross, *The Struggle of a Democracy Against the Terror of Suicide Bombers: Ideological and Legal Aspects*, 22 WIS. INT'L L.J. 597, 655 (2004); Sammy Smooha, *The Implications of the Transition to Peace for Israeli Society*, 555 ANNALS AM. ACAD. POL. & SOC. SCI. 26, 33–34 (1998).

C. SEPARATION ON THE COURT

The Supreme Court of the United States has interpreted the separation of powers in much the same way constitutional theory would counsel and the founders understood it.[92] For the Court, what has mattered most has been to respect the institutional prerogatives of each branch, including its own.[93] The Court has dutifully policed the borders separating one branch from another, taking great care to afford the broadest possible deference to the Legislature or the Executive when it acts directly within its province. Let us not mistake the Court's deference for weakness, however. When it has been so moved, the Court has taken an aggressive posture toward the other branches in the interest of defending the integrity of the constitutional boundaries meant to frustrate any one branch from arrogating or acquiring by acquiescence vast powers that would reduce separation to a nullity.[94] The Court has therefore accepted the founding wisdom that the separation of powers serves the interest of liberty where the branches enjoy independence within a larger framework of equality, mutual respect, and interdependence.

Like the founding framers, the Justices of the Supreme Court have recognized that the Constitution does not prescribe a complete separation among the branches. The Court has defined as "archaic" the thought that separated power demands "three airtight departments of government."[95] It is simply not possible to enforce a strict separation of powers because the founding design of independent branches within a larger framework of interdependence creates a carefully calibrated system of shared, not isolated, powers.[96] This dovetails quite nicely with the founders' observation that, in order for liberty to take root, "[a]mbition must be made to counteract ambition"[97] in a structure of separated powers. So the framers weaved joint checks and balances into their separated system of government, the salutary outcome being a "partial intermixture of powers [that] even in some cases not only proper, but necessary to the mutual defence of the several members of the government, against each other."[98] The separation of powers is therefore something of a misnomer because the powers are shared among branches and indeed often overlap.[99] Some noteworthy examples of shared powers include the power to legislate

92. *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 702–04 (1997); *see also* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1148–49 (2000).

93. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 454–55 (2000) (Scalia, J., dissenting).

94. *See Clinton*, 524 U.S. at 438–39; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–88 (1952).

95. Nixon v. Adm'n of Gen. Servs., 433 U.S. 425, 443 (1977) (internal quotes omitted).

96. *See* RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 33 (1960).

97. THE FEDERALIST NO. 51, *supra* note 11, at 349 (James Madison).

98. THE FEDERALIST NO. 66, *supra* note 11, at 445 (Alexander Hamilton).

99. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1808-10 (1996).

(Congress and the President both have a role in the legislative process)[100] and the power to hear cases (the Judiciary adjudicates disputes and the Congress is endowed with the impeachment power).[101]

Despite the intermixture of governmental powers, each branch enjoys institutional independence in the performance of its constitutional functions, according to the Supreme Court. One branch must accept the judgment of another where that decision is constitutionally assigned to it. For example, "[it] would[ ] be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit."[102] Similarly, "[t]here would be a similar damage to the basic concept of these co-equal branches of Government if when the Executive Branch has adequate authority granted by Congress to protect 'national security' it can choose instead to invoke the contempt power of a court to enjoin the threatened conduct."[103] In the same way that the Judiciary serves the interest of institutional independence by declining to invoke its power of contempt to circumvent the decision or nondecision of Congress, the Court interprets the Speech and Debate Clause's protection for congressional personnel "in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government."[104]

Congress is of course not the only branch whose independence matters. Each branch's independence must be protected. The Court has said as much, both with respect to the Executive and itself.[105] As for its own independence, the Court has been uncompromising when it comes to protecting its turf. Neither Congress nor the Executive may annul a final judgment of the Judiciary; that is "an assumption of Judicial power, and therefore forbidden."[106] The subject of independence is also relevant for the Presidency, particularly in the area of executive immunity. To allow the Presidency to carry out its constitutional functions without undue obstruction or a paralyzing fear of reprisal, the Court has concluded that the President is entitled to absolute immunity from damages liability predicated on acts taken in an official capacity.[107] The Court's concern here is not to free the Presidency to do whatever it pleases under the cover of

100. U.S. CONST. art. I, § 1 (conferring upon Congress the legislative power); U.S. CONST. art. I, § 7, cl. 2 (granting the power of veto upon the President).

101. U.S. CONST. art. III, § 2, cl. 1 (vesting upon the judiciary the power to hear "cases" and "controversies"); U.S. CONST. art. I, § 2, cl. 5 (giving to the House of Representatives the power to impeach); U.S. CONST. art. I, § 3, cl. 6 (assigning to the Senate the power to convict persons impeached by the House of Representatives).

102. N.Y. Times Co. v. United States, 403 U.S. 713, 742 (1971) (Marshall, J., concurring).

103. *Id.*

104. United States v. Brewster, 408 U.S. 501, 508 (1972).

105. United States v. Will, 449 U.S. 200, 217–18 (1980); Buckley v. Valeo, 424 U.S. 1, 135–36 (1976) (per curiam).

106. Plaut v. Spendthrift Farm, 514 U.S. 211, 224 (1995) (internal quotation marks omitted).

107. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

full immunity. It is instead the interest of preserving the independence of the office so that it may properly conduct the affairs of the Executive Branch: "In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages."[108] Moreover, "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve."[109] Both the Court and Chief Justice Burger, writing in a concurrence, agreed that presidential immunity derives from the constitutional doctrine of separation of powers.[110]

Institutional independence is possible only where the branches regard each other as coequal branches worthy of mutual respect. As the Court wrote in a case pitting the Legislature versus the Judiciary as to which one could properly give meaning to the Constitution, "[o]ur national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches."[111] In that case, Congress interpreted a constitutional provision in a way that risked limiting the range of subsequent judicial interpretations of that provision.[112] The Court could not let that congressional action stand because it was an improper legislative incursion into the judicial sphere. To interpret the Constitution is a judicial task, wrote the Court, and other branches must respect the Court's interpretations: "When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is."[113]

For the Court, mutual respect entails deference to the Constitution itself and the responsibilities it delegates to each branch. Where the Constitution vests one branch with power X, another branch cannot claim the right to exercise that power. Not only would that run counter to the constitutional allocation of functions, but it would more generally upset the balance of powers that gives the Constitution its dynamic stability. Let us take, for example, the power to make laws. The Constitution of course vests the lawmaking power in the Congress.[114] Though the President has an important role in the legislative process—the power of veto[115]—the President is not a lawmaker in the same sense as Congress. This is therefore why the Court has routinely stepped in to protect Congress's legislative province when it risked abuse or erosion at the hands of the Executive. A prominent case helps demonstrate this observation with

108. *Id.* at 753.
109. *Id.*
110. *Id.* at 753–54; *Id.* at 758 (Burger, C.J., concurring).
111. City of Boerne v. Flores, 521 U.S. 507, 535-36 (1997).
112. *Id.* at 534–35.
113. *Id.* at 536.
114. U.S. CONST. art. I, § 1.
115. U.S. CONST. art. I, § 7, cl. 2.

convincing clarity. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Court prevented the President from seizing the nation's steel-producing mills because the President's order authorizing the seizure was itself a seizure of the congressional lawmaking power.[116] Though extraordinary circumstances may cause us to wish the President could make laws unencumbered by the vagaries of the legislative process, "[t]he Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."[117] What impelled the Court's judgment was the view that the separation of powers requires unfailing respect for the Constitution as well as mutual respect among the three branches, each of which must be given wide latitude to do its work within its own realm.

Together, the institutional independence and mutual respect advanced by the separation of powers create the conditions for personal liberty. That is, after all, the paramount aspiration of separating powers: "The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."[118] For the Court, the separation of powers is a condition precedent for liberty: "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."[119] The Court has referred to the separation of powers as the device that makes possible "freedom's first principles," specifying that "[c]hief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[120] The Court has made clear that it "has repeatedly emphasized that the Constitution diffuses power the better to secure liberty."[121] The Court has cast itself in the leading role of fighting the rights retrenchment that attends the concentration of power. Recognizing that "[t]he Framers of our Government knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers,"[122] the Court has neutralized risks that, in its view, "threaten the goal of dispersion of power, and hence the goal of individual liberty, that separation of powers serves."[123]

So from constitutional theory, to the Constitution's founding, and to the practice of constitutional politics, there is a prevailing understanding about the purpose of separating powers. The United States Constitution does not separate powers just to separate them. It separates powers to achieve democratic values that are deemed important, perhaps even in-

116. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952).

117. *Id.* at 589.

118. Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991).

119. Clinton v. New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

120. Boumediene v. Bush, 553 U.S. 723, 797 (2008).

121. United States v. Munoz-Flores, 495 U.S. 385, 394 (1990) (internal quotation marks omitted).

122. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 468 (Kennedy, J., concurring)

123. Bowsher v. Synar, 478 U.S. 714, 775 (1986) (White, J., dissenting) (quoting AmeronInc. v. U.S. Army Corps of Engineers, 787 F.2d 875, 895 (Becker, J., concurring)) (internal quotation marks omitted).

dispensable, to constitutional and liberal democracy. Those values are mutually reinforcing: personal liberty, institutional equality, and departmental independence. Where a branch of government discharges its constitutionally delegated functions independently, the coordinate branches function as coequal entities, each one afforded a reciprocated measure of respect. Both as a matter of theory and application, the result is salutary when the three branches act independently as equals within a larger framework of interdependence and interlocking mechanisms of oversight: those subject to the power of the state are better assured of liberty. For the Court, the meaning and purpose of the separation of powers is therefore quite clear.

III. SEPARATING GOD FROM MAN

But the Supreme Court has struggled mightily to bring a similar measure of clarity to the Establishment Clause. Scholars have been critical of what they regard as the Court's muddled establishment case law.[124] And perhaps with good reason, because even Supreme Court Justices acknowledge that the Court's establishment genealogy leaves something to be desired.[125] Let us be careful, though, about assigning blame to the Court for the incoherence of the Establishment Clause. For the text of the Establishment Clause admits of no undisputed and indisputable answers to our establishment questions.[126] Nor does the Clause's constitutional history suggest clarity in its founding design or meaning.[127] Against this backdrop, the quest for constitutional clarity on the Estab-

124. *See, e.g.*, LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 163 (1986); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 247 (1988); Edmond Cahn, *The "Establishment of Religion" Puzzle*, 36 N.Y.U. L. REV. 1274, 1274–75 (1961); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CALIF. L. REV. 5, 6 (1987); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 75 (1990); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 233–34 (1989); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 839 (1984); Philip B. Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV. 1, 10–11 (1984); Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 956 (1989).

125. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring); Rosenberger v. Rector, 515 U.S. 819, 861 (1995) (Thomas, J., concurring); Cnty. of Allegheny v. ACLU, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part); Edwards v. Aguillard, 482 U.S. 578, 636–40 (1987); (Scalia, J., dissenting); Aguilar v. Felton, 473 U.S. 402, 426–30 (1985) (O'Connor, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 108–13 (1985) (Rehnquist, J., dissenting); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980); Roemer v. Bd. of Pub. Works, 426 U.S. 736, 768–69 (1976) (White, J., concurring).

126. Leslie Gielow Jacobs, *Even More Honest Than Ever Before: Abandoning Pretense and Recreating Legitimacy in Constitutional Interpretation*, 1995 U. ILL. L. REV. 363, 380 (1995).

127. *See, e.g.*, Sch. Dist. v. Schempp, 374 U.S. 203, 237–38 (1963); Frank Guliuzza III, *The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church–State Test Case*, 42 DRAKE L. REV. 343, 372 (1993).

lishment Clause may be both a hopeless exercise and an illusory expectation.

Still, the indeterminacy of the Establishment Clause's text and history has not discouraged the Court from striving to bring clarity to it. Indeed that is precisely what the modern Court has endeavored to do. The Supreme Court has developed and subsequently relied on a number of constitutional tests—the neutrality principle, the *Lemon* test, the coercion test, and the endorsement test—to navigate the uneven terrain of the Establishment Clause.[128] Constitutional tests, of course, present risks when deploying their criteria in a restrictive, rather than representative, fashion because "[c]onstitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics."[129] Moreover, more than one test is a recipe for trouble, especially if the choice of which test to apply turns on the predilections of the Court's changing majority. At bottom, though, that each Establishment Clause test has been followed by a new or modified test reflects the Court's pattern of devising, applying, and subsequently consigning the prior test. For a field of law crying desperately for consistency, the variability of the Court's establishment standard poses a serious challenge to ultimately achieving it.

A. The Core Establishment Principle

Nonetheless, one thing has remained unchanged as the Court has wound its way through a series of Establishment Clause tests: the core principle driving the Court's interpretation and application of each test has been the separation of powers. Though the finer points of each Establishment Clause test have differed, what rests at the base of each of them is a common commitment to achieving the democratic values inherent in the separation of powers: liberty, equality, and independence. The Court has not undertaken its analysis in these precise terms; it has instead held fast to the taxonomy that governs each particular Establishment Clause test. But as I will demonstrate below, as the Court has developed, refined, and elaborated its respective tests, its establishment jurisprudence has been above all most concerned with preserving liberty, ensuring equality, and respecting the independence of God and man. This is a valuable discovery because it reveals a critical continuity between the separation of powers and the separation of Church and State.

It is worth mentioning, though, that the separation analogy does not quite fit perfectly. Although the values we hope to achieve by separating powers reflect the same ones the Court endeavors to vindicate under the Establishment Clause, there are limits to the analogy. None of them are fatal to the project of applying separation theory to the relationship be-

128. *See Allegheny*, 492 U.S. at 590–93; *id.* at 659 (Kennedy, J., concurring in part and dissenting in part).

129. Tilton v. Richardson, 403 U.S. 672, 678 (1971) (upholding congressional grant program to church-affiliated colleges and universities for construction of buildings and facilities for secular educational purposes).

tween Church and State; on the contrary, they point to important differences that can only serve to strengthen the analytical framework of separated powers that courts can apply to the Establishment Clause. Two of the disanalogies merit some attention. The first concerns the institutional actors. When we speak of institutional equality or independence under the separation of governmental powers, we are referring to the institutional equality or independence of the branches of government. But in the context of Church and State, we are concerned not only with the equality and independence of Church and State as separate entities but also with the equality and independence of different religious faiths under the larger umbrella of Church.

The second disanalogy concerns the instrumental and intrinsic values of separated powers. We separate governmental powers not for the sake of separated powers themselves, but instead in order to achieve the intrinsic value of personal liberty. We in turn promote personal liberty from governmental intrusion by cultivating the two instrumental values of institutional equality and departmental independence—because only where governmental departments are coequal and independent may we make liberty possible. Otherwise, in a regime of concentrated powers where the imbalance favors one branch, the risk is great and perhaps insurmountable that liberty will be compromised because there will be no check on the disproportionately powerful branch. In the context of the separation of Church and State, we seek the same instrumental and intrinsic values, but there is a third step in the sequence, in contrast to the two that exist in separating governmental powers. Recall the sequence in the separation of governmental powers: we foster institutional equality and departmental independence in the service of personal liberty. Those are the two steps in the entrenchment of the intrinsic value of liberty. The sequence is one step longer in the relationship between Church and State. We begin by cultivating institutional equality and departmental independence between religion and government, which in turn fosters religious liberty for religious faiths and their adherents, which in turn promotes the personal liberty that is constitutive of republican government and liberal democracy. The point of departure and port of call are therefore the same, only separated by one step along the way.

Begin with the Court's first major Establishment Clause decision of the modern era. In its first case to incorporate the Clause against the states, the Court upheld a New Jersey statute authorizing reimbursements to parents for public bus fare expenditures to send their children to both public and parochial schools.[130] A taxpayer had claimed the law compelled residents to pay taxes that would be used to support religious educational institutions in violation of the Establishment Clause, but the Court disagreed.[131] The Republic had been founded specifically to repudiate the old world practice of requiring financial and spiritual adherence

130. Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947).
131. *Id.*

to religious institutions from nonadherents and nonbelievers.[132] Any hint, intimated the Court, that a similar constraint would compel citizens to support religion against their will would run contrary to the Constitution in two ways. First, it would undermine the nation's constitutional traditions.[133] And second, it would most certainly be unconstitutional as a violation of religious liberty.[134]

But beyond the actual holding itself, the Court's reasoning is instructive insofar as it shows quite clearly how the theme of separated powers steers the majority decision. "The First Amendment," explained the Court, "has erected a wall between church and state. That wall must be kept high and impregnable."[135] The purpose of separating these two institutions is not clear from that statement alone. One could understand the objective of erecting a wall between two worlds as protecting one of the two worlds from the other. But that would be an incompletely theorized conception of the Establishment Clause. The Clause more accurately reflects the intent to protect both worlds from themselves. In order to protect God from man, and man from God, we must impose limits on how the two may intersect. To this end, we can imagine, for example, that it would be a good idea to proscribe a national church or state religion. We might also deem it appropriate to forbid the state from compelling citizens to attend religious services. Those are just two illustrations of actions the Court would forbid in the interest of shielding religion from the intrusive reach of the state and guarding the state from the compromising influence of religion. The *Everson* Court thought carefully about this.[136] So much so that it wrote a passage that one could read as a quasi-legislative order detailing how to respect the integrity of the border separating religion and the state.[137]

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, open or secretly, participate in the affairs of any religious organizations or groups and vice versa.[138]

132. *Id.* at 9–11.
133. *Id.* at 11–12.
134. *Id.* at 13.
135. *Id.* at 18.
136. *Id.* at 15–16.
137. *Id.*
138. *Id.*

This is the Court's religious neutrality principle. The mental image of a wall separating Church from State calls to mind the very same image that we picture when we think of the separation of powers among the Legislative, Executive, and Judicial Branches of government. Each is given its own dominion, both to protect the sanctity of its own world and also to grant to each a measure of independence. That is the message that follows from the Court's recitation of what the state may or may not do in tandem with religion.[139] The result is to protect the democratic value of liberty. Just as we separate powers in order to serve the interest of personal liberty, we likewise separate Church from State to afford the widest possible latitude to individuals for their own liberty of belief, disbelief, or nonbelief. We would therefore expect the Court to state, as it did, that early Americans were right when they "reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."[140] Here we perceive that the Court's motivation in this establishment case echoed a parallel interest in its separation of powers cases: to preserve personal liberty.

As if to leave no doubt about its overriding purpose, the Court emphasized the motif of religion and the state occupying two separate worlds that must remain just that.[141] The Court invoked an earlier case that made clear that God and man constitute independent realms whose effectiveness and flourishing requires one to operate apart from the other: "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 invasions of the civil authority."[142] These twin proscriptions against "religious interference" into the sphere of the "temporal institutions" and vice-versa are a matter, first and foremost, of liberty and independence. Each must stand alone, away from the other if either is to enjoy independence and if citizens are to be free. But second, and just as importantly, the proscription alludes to a third tenet of separation theory: equality. Each empire must respect the other, acknowledge the primacy the other enjoys in its own world, and accept that claims in one world may be authoritative in one but wholly meaningless in another. It is in this sense that each world is equal: mutually respectful, authoritative in its province, and only advisory beyond its borders.

The first major Establishment Clause test—the *Lemon* test—came over two decades later. In *Lemon v. Kurtzman*, the Court ruled two statutes unconstitutional.[143] Under the first law, the state reimbursed parochial schools for the cost of teacher salaries and teaching resources in

139. *See id.*
140. *Id.* at 11.
141. *Id.* at 15.
142. *Id.*
143. Lemon v. Kurtzman, 403 U.S. 602, 606 (1971).

secular subjects; the second law authorized direct supplemental payments by the state to parochial school teachers. Each of the statutes fell under the weight of the three-part *Lemon* test that the Court created by merging the various standards used in prior establishment cases: "Every analysis in this area," declared the Court, "must begin with consideration of the cumulative criteria developed by the Court over many years."[144] Alongside introducing the *Lemon* test, this case is notable for the very same reason that *Everson* merits our attention: the Court, though it focused its judgment narrowly on the particular dangers of permitting close ties between religion and government, conveyed its special solicitude for the larger stakes hanging in the balance of the separation of powers: independence, equality, and liberty.

Consider the three elements of the *Lemon* test. In order to meet the exigencies of the Establishment Clause, the state must fulfill three conditions: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster an excessive government entanglement with religion."[145] This test requires the Court to engage in a fact-specific inquiry into how an impugned governmental action either restricts or obliges action by a religious organization. The first element—whether the governmental action is motivated by a secular purpose—is a deferential investigation that calls the Court to discern governmental intent.[146] If the single or dominant purpose is in some way religious or antireligious, the government fails the test, and its action is deemed unconstitutional. But if there is some proof that the purpose is secular—for instance, if the law states in its legislative history or directly in its text that it is intended to enhance the quality of secular education in all schools, as was the case in *Lemon*[147]—the Court will regard the legislative record favorably. The second factor is the effect of the governmental action. Where the effect is to help or hinder religion, the governmental action must fail the constitutional examination.[148] Finally, the *Lemon* test's third element is concerned with the interrelation between religion and government. If the governmental action results in joining together Church and State in any way but among the most innocuous, the action is unconstitutional. For example, in *Lemon*, the laws raised a serious hazard of the latter directing the conduct of the former: "We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education."[149] This posed an intolerable risk of entangling religion and government, which the Court described as a "con-

144. *Id.* at 612.
145. *Id.* at 612–13 (internal citation omitted).
146. *See id.* at 613; *see also* Lynch v. Donnelly, 465 U.S. 668, 690–91 (1984).
147. *Lemon*, 403 U.S. at 613.
148. *See Lynch*, 465 U.S. at 691–92.
149. *Lemon*, 403 U.S. at 617.

flict of functions."[150]

But what lies beneath the *Lemon* test are our three familiar themes of independence, equality, and liberty. Although the Court begins to unfold its reasoning in *Lemon* by acknowledging that "[t]he language of the Religion Clauses of the First Amendment is at best opaque,"[151] it shortly becomes apparent that the Court has a very orderly vision of what the text should in fact mean. Citing an earlier case, the majority writes that the Establishment Clause was intended to guard against three evils: governmental sponsorship of religion, publicly financed support for religion, and official involvement in religion.[152] For the Court, religion and government are two autonomous authorities whose domains must remain sovereign. This peculiar choice of words—"sovereign"—illuminates how the Court regards the two higher powers.[153] Teachers in parochial schools are employed by a sovereign entity, "a religious organization, subject to the direction and discipline of religious authorities."[154] For its part, the state is its own sovereign entity, itself answerable to a different collection of authorities and authoritative values.

In order to give due respect to the two sovereigns, the Court sees its role as taking care to keep the two worlds separate and apart, each enjoying determinative authority and independence in its own sphere, dividing powers as equally as possible between them.[155] Separating powers between God and man is worth doing, according to the Court, for many reasons. First, and perhaps foremost, is to underwrite personal liberty by protecting religion from the corrosive influence of the government: "The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive powers of government."[156] The second and equally powerful justification is to keep the two orbits operating independently, responding to different external and internal stimuli, and serving different, perhaps even complementary, social interests: "The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief."[157] Therefore, for the Court, its mission is to shield one entity from the other's undue interference. Only in this way may Church and State flourish as constructive influences in civil society and as sites of civic engagement where individuals may manifest their convictions and engage with each other as social entrepreneurs.[158]

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150. *Id.*
151. *Id.* at 612.
152. *Id.*
153. *See id.* at 625.
154. *Id.* at 618.
155. *Id.*
156. *Id.* at 623.
157. *Id.*
158. On the broader implications of this point on First Amendment doctrine, see Richard W. Garnett, *Do Churches Matter: Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 282–84, 292–93 (2008); Paul Horwitz, *Churches as First*

The *Lemon* test has birthed a number of successor tests, largely because scholars and jurists have been dissatisfied with its internal coherence and external applicability.[159] Notwithstanding whether *Lemon* was (or still is)[160] in fact problematic, the Court has more recently marshaled the test's various offspring to resolve establishment disputes. While the taxonomy accompanying each test has differed, the fundamental principles underlying each inquiry have remained unchanged.[161] Independence, equality, and liberty—these are the values that drive the Court's inquiry under the endorsement and coercion tests that have emerged since the decline of the *Lemon* test. This speaks to the considerable consistency that governs the Court's approach to mediating the boundary separating Church from State.

Both the endorsement and coercion tests speak to the same interests as the *Lemon* test. The endorsement test sprang from a concurring opinion upholding the constitutionality of a municipality's decision to include a nativity scene in its local Christmas display.[162] In *Lynch v. Donnelly*, the majority applied the original *Lemon* test to reach its judgment,[163] finding that the municipality had not strayed beyond what the Establishment Clause requires.[164] In a concurrence, Justice Sandra Day O'Connor opted to "write separately to suggest a clarification of our Establishment Clause doctrine."[165] That clarification spawned the endorsement test,

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Amendment Institutions: Of Sovereignty and Spheres, 44 HARV. C.R.-C.L. L. REV. 79, 107, 114–15 (2009).

159. *See, e.g.*, Stuart W. Bowen, Jr., *Is* Lemon *a Lemon? Crosscurrents in Contemporary Establishment Clause Jurisprudence*, 22 ST. MARY'S L.J. 129 (1990); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847 (1984); Thomas C. Marks, Jr. & Michael Bertolini, Lemon *Is a Lemon: Toward a Rational Interpretation of the Establishment Clause*, 12 BYU J. PUB. L. 1 (1997); Raul M. Rodriguez, *God Is Dead: Killed by Fifty Years of Establishment Clause Jurisprudence*, 23 ST. MARY'S L.J. 1155 (1992); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987); Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997 (1986).

160. The *Lemon* test may admittedly have been followed by new tests used to assess the validity of state action under the Establishment Clause, but it has not been superseded. Indeed, it has been invoked even after the development of newer establishment tests. *See, e.g.*, McCreary Cnty. v. ACLU, 545 U.S. 844, 859 (2005); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 397 (1993) (Scalia, J., concurring).

161. The same is true of the Court's updated version of the *Lemon* test, which was announced in 1997. The *Lemon* test no longer consists of three parts; the Court modified it to require two principal inquiries. The first probes the purpose of the governmental action, an inquiry that remains unchanged from the original test. The second inquiry evaluates the effect of the governmental action. This new second inquiry effectively merges the second and third inquiries from the original test into it a new subsidiary three-part analysis, which sets forth three criteria for determining whether the governmental action has the effect of advancing religion: (1) whether it results in governmental indoctrination; (2) whether it defines individuals or groups by reference to religion; and (3) whether it creates an excessive entanglement. *See* Agostini v. Felton, 521 U.S. 203, 234 (1997).

162. Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

163. *Id.* at 681–85.

164. *Id.* at 687.

165. *Id.*

which emerged from her restatement of the purpose and effect elements of the *Lemon* test.

What the *Lemon* test really meant to do, concluded Justice O'Connor, was to neutralize the risk that government would give its approval or disapproval to, or be seen as giving its approval or disapproval to, religion. Her analysis rearticulated the purpose and effect elements of the *Lemon* test in terms of endorsement: "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[166] The result was the endorsement test, which requires that "a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community."[167] Deploying this refinement to the *Lemon* test, Justice O'Connor concluded that the nativity scene's presence in the Christmas display did not violate the endorsement test because it was merely a government acknowledgement of religion.[168] In her view, when the state acknowledges the importance of religion to some of its members, it severs "the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging recognition of what is worthy of appreciation in society."[169] Therefore the display did not go too far because "[i]t cannot fairly be understood to convey a message of government endorsement of religion,"[170] according to Justice O'Connor.

We can perceive how the endorsement test mirrors the *Everson* and *Lemon* courts' shared attentiveness to the democratic values of separated powers. The values of independence, liberty, and equality become apparent when we read Justice O'Connor's reasons for urging the state to refrain from endorsing or disapproving religion: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[171] Recognizing that Justice O'Connor's anxiety stems from the fear that government would side with all religion, a particular religion, or against religion, governmental endorsement or infringement of religion exacts deleterious consequences for independence and liberty. When the state endorses or disapproves religion, that action undermines its own independence as well as the independence of the religion. It moreover compromises the liberty of the in-

166. *Id.* at 690.
167. *Id.* at 692.
168. *Id.* at 692–93.
169. *Id.* at 693.
170. *Id.*
171. *Id.* at 688.

dividuals who perceive the state as placing a value in their own status as either believers or nonbelievers. Equality, too, is implicated in the endorsement test insofar as a governmental endorsement or disapproval of one religion over another disrupts the balance that should govern among religions and also among religion, nonreligion, and irreligion. The state cannot claim to be, nor can it be perceived to be, a fair umpire when it either elevates one religion above others or demotes one below the rest, or also when it suggests to individuals and the community that one of religion, nonreligion, or irreligion enjoys most favored standing. That is, in the final analysis, what Justice O'Connor believes was the real peril—the way third parties will react to official action either championing or resisting religion, or a particular religion.[172]

The coercion test is no different on this score. First articulated in a dissenting opinion by Justice Anthony Kennedy in response to what he deemed "[p]ersuasive criticism of *Lemon*,"[173] the test states that "government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact establishes a state religion or religious faith, or tends to do so."[174] Justice Kennedy created this test to determine whether a municipality could lawfully display a crèche and a menorah on public property during the holiday season.[175] He concluded that both displays were permissible under the Establishment Clause because neither display had the effect of coercing observers to follow the tenets or participate in the celebration of a particular religion, nor did they serve to distance citizens from their government in a way that would call into question the neutrality of the state. Justice Kennedy took great care to outline why, in his view, neither the crèche nor the menorah had the effect of coercing belief or action:

> There is no suggestion here that the government's power to coerce has been used to further the interests of Christianity or Judaism in any way. No one was compelled to observe or participate in any religious ceremony or activity. Neither the city nor the county contributed significant amounts of tax money to serve the cause of one religious faith. The crèche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech. There is no realistic risk that the crèche and the menorah represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion.[176]

172. *Id.* at 690.

173. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part).

174. *Id.* at 659 (internal citations omitted).

175. *Id.* at 663.

176. *Id.* at 664.

Both displays were, for Justice Kennedy, no more than a harmless "act of recognition or accommodation" by the government that was both "passive and symbolic" and from which "any intangible benefit to religion [was] unlikely to present a realistic risk of establishment."[177] Justice Kennedy saw no threat to these displays because "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal."[178] That these religious displays could possibly exert a coercive influence was therefore not lost on Justice Kennedy.

In much the same way that we worry in the school context about what Justice Kennedy described as the "subtle coercive pressure" that teachers' religious practices may inflict on elementary and secondary school students,[179] we may likewise worry about the effect that a state's expression of a particular religious preference would have on its residents. Would a citizen feel compelled to adhere to that religion? Would a state preference known to the public make it less comfortable for persons to manifest their competing faith beliefs freely and openly? Those are the worries that motivated Justice Kennedy's coercion test. It is one thing, wrote Justice Kennedy, for the state to participate in public speech.[180] That is acceptable in a way that government subscription to religion is not. After all, "[s]peech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own,"[181] wrote Justice Kennedy. But when it comes to religion, "the government is not a prime participant, for the framers deemed religious establishment antithetical to the freedom of all."[182] The reason the Constitution protects speech and religion by permitting government participation in the former and forbidding it in the latter is precisely that "[t]he First Amendment protects speech and religion by quite different mechanisms."[183] That reason, for Justice Kennedy, comes down to the coercive power of the state: "The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."[184] The consequence would be disastrous for freedom of thought, belief, and religion: "A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."[185]

Coercion is really about choice. To coerce someone is to narrow the choices before her. When the state coerces an individual, it divests her of

177. *Id.* at 662.
178. *Id.*
179. Lee v. Weisman, 505 U.S. 577, 592 (1992).
180. *Id.* at 591.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 591–92.
185. *Id.* at 592.

the full range of choices that she would otherwise enjoy absent that coercive power. The coercion test therefore strikes at the heart of the nefarious effect of limiting or forcing the choices individuals make as members of their community. If individuals see the state taking a side in the choice between religion and irreligion, or the choice among religions, their own choice could no longer properly be described as free. It would be a constrained choice, perhaps even a compelled one, but certainly not one entirely free of influences commonly regarded as improper in a liberal democracy.[186] In this sense, the coercion test is concerned with the liberty interest that is so central in separation of powers analysis.

Liberty, wrote Montesquieu, the fountainhead of separation of powers theory, demands the power to choose freely and securely.[187] The freedom of choice derives from and indeed reinforces the first principle of civil society and legitimate authority: self-government, both in the sense of membership in a larger community governed according to the consent of the community but also in the more personal sense of governing one's own personal province. That, for Montesquieu, was the meaning of liberty.[188] It produces a "tranquility of spirit" within individuals[189]—the very tranquility that, according to Justice Kennedy, is upset by the coercive influence of the state when it encroaches upon the religious choices of individuals.[190] Hence, the coercion test at its core seeks to protect the democratic value of liberty. The coercion test also engages the equality and independence interests of the separation of powers. As to the former, the coercion test is attentive to equality among religions and as among religion, irreligion, and nonreligion. And as to the latter, the coercion test keeps the state and religion independent, both as a matter of reality and perception.

Peering into the Supreme Court's establishment tests leaves us with an interesting observation: though the tests use different vocabulary and apply different standards, what they share in common is their objectives. Their narrow objective is of course to give the Court a framework to decide Establishment Clause disputes. The neutrality principle, the *Lemon* test, the endorsement test, and the coercion test—each of them endeavors to do that, some perhaps with more success than others. But more broadly, what each test is really concerned with is how best to serve the democratic values of the separation of powers: liberty, equality, and independence. Whether the standard is the *Everson* benchmark of keeping an impregnable wall separating religion from government; the *Lemon* criteria of a secular purpose, a primary effect that neither advances nor in-

186. *See* Kent Greenawalt, *Grounds for Political Judgment: The Status of Personal Experience and the Autonomy and Generality of Principles of Restraint*, 30 SAN DIEGO L. REV. 647, 672–73 (1993) (describing the nonestablishment norm as one of several "practical principle[s] good for all liberal democracies").

187. MONTESQUIEU, *supra* note 12, at 157–59.

188. *Id.* at 159.

189. *Id.* at 155.

190. *Lee*, 505 U.S. at 591–92.

hibits religion and sufficient distance between religion and government; the endorsement test's requirement of no official sanction or disapproval; or even the coercion's insistence on free choice, the overriding ambition of each inquiry is to preserve liberty, ensure equality, and respect the independence of God and man.

B. Our Two Masters

Church and State are the two institutional forms through which persons see their aspirations and anxieties most vividly reflected. We design the organs of our government both to achieve the social objectives to which we aspire and to thwart the dangers we associate with human frailties that even democratic governance tends to exacerbate. We likewise associate with, and often define ourselves according to, religion and religious organizations. We do so for many reasons, including the search for community, redemption, and the solace and security that comes from accountability for our thought and action. Inasmuch as one or the other may exert comprehensive and controlling authority upon our conscience and conduct, religion and government serve as our two masters. Sometimes competing and sometimes complementary, the interactions between Church and State commonly breed divisive tensions that test their colliding claims to our continuing fidelity.

The impulse to divide religion and government is commonly thought to spring from the fear that religion will exert a nefarious influence over the state.[191] But as Stephen Carter writes, this view is "nonsense—pardonable nonsense, but nonsense all the same."[192] The origins of the separation of Church and State in the United States derive not from the objective to protect the state from religion but rather to protect religion from the state. "[I]n other words," writes Martin Steven, "by keeping the State away from churches, religion would be protected within the political system."[193] Indeed, the famous metaphor of the wall, which is typically attributed to Thomas Jefferson,[194] has not only been mischaracterized as intended to safeguard the province of government from the realm of religion,[195] but it was actually developed nearly two centuries earlier by

191. *See, e.g.*, C. Truett Baker, Church–State Cooperation Without Domination 181 (2010); Philip Hamburger, Separation of Church and State 5 (2002); William Lee Miller, The First Liberty: America's Foundation in Religious Freedom 158 (1986).

192. Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 Ariz. L. Rev. 293, 297 (2002).

193. Martin Steven, Christianity and Party Politics: Keeping the Faith 149 (2011).

194. *See* Robert L. Tsai, *Democracy's Handmaid*, 86 B.U. L. Rev. 1, 37 (2006).

195. *See* Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. Rev. 455, 481 n.137 (1991) ("When the imagination of Roger Williams built the wall of separation, it was not because he was fearful that without such a barrier the arm of the church would extend its reach. It was, rather, the dread of the worldly corruptions which might consume the churches if sturdy fences against the wilderness were not maintained." (quoting Mark DeWolfe Howe, The Garden and the Wilderness 6 (1965))).

Roger Williams.[196] For Williams, what mattered most was the sacrality of religion, which he called "the garden," and the imperative to shield it from the impurities of government:

> [T]he faithful labors of many witnesses of Jesus Christ, extant to the world, abundantly prove that the church of the Jews under the Old Testament in the type, and the church of the Christians under the New Testament in the antitype, were both separate from the world, and that when they opened the gap in the hedge or wall of separation between the Garden of the church and the wilderness of the world, God broke down the wall itself, removed the candlestick, and made his garden a wilderness, as at this day. And therefore if he will ever please to restore his garden and Paradise again, it must of necessity be walled in peculiarly to himself from the world, and all that shall be saved out of the world are to be transplanted out of the wilderness of [the] world and added to his church or garden.[197]

Religion, then, according to Williams, may remain pure only where it is removed from the purview of government.[198] For its part, government appears to have a dual burden: first, to stay away from religion in the interest of ensuring its continuing vitality and purity and, second, to remove any barriers that may stand in the way of persons who wish to manifest their religion and express their religious beliefs. These twin negative and positive duties serve the ultimate end of keeping Church and State separate while concurrently affording religious institutions the respect they have come to command in the American tradition.

The Court appears, at least on some occasions, to accept Williams' theory of religious sacrality.[199] For the Court, religion is sacred and it must be protected from the reach of the state. Yet the Court would insist that the reverse—that the state is special and must not be merged with religion—is also true: "Government need not resign itself to ineffectual diffidence because of exaggerated fears of contagion of or by religion, so long as neither intrudes unduly into the affairs of the other."[200] Religion and government occupy different spheres of authority, "different jurisdictions" according to Edward Eberle, who developed this idea with reference to Williams: "Williams' approach was to identify the essential

196. Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1565–66 (1989).

197. Roger Williams, *Mr. Cotton's Letter Lately Printed, Examined, and Answered*, *in* ON RELIGIOUS LIBERTY: SELECTIONS FROM THE WORKS OF ROGER WILLIAMS 46, 70 (James Calvin Davis ed., 2008).

198. *See id.*

199. There are some instances in which this is not true, namely school vouchers and cases involving the Ten Commandments. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 644, 649 (2002) (holding that constitutional voucher program must have valid secular purpose); McCreary Cnty. v. ACLU, 545 U.S. 844, 850–51 (2005) (invalidating Ten Commandments display).

200. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 10 (1989) (invalidating special state tax benefit for religious publications); *see also* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 793 (1973) (stating that "[s]pecial tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court").

attributes of each government and religion as a way of distinguishing one from the other.[201] By so distinguishing the two, they could remain separate from one another. Thus, the affairs or disputes of one would not effect the other."[202] And what are the respective functions of religion and government? "The main role of government, in Williams' view, was to preserve law and order, and promote social peace. The main role of religion was to facilitate communication with God so that one could find a path to salvation. For Williams, these goals were not incompatible."[203] By keeping to their respective spheres of authority, thought Williams, Church and State could exert determinative influence over their adherents on the matters that properly fell within their jurisdiction. Hence, the separation of Church from State.

Although the conventional narrative purports that liberal democracy demands the strict separation of Church from State,[204] social and political reality tell a different story. We know very well from centuries of constitutional government that religion and government cannot be kept entirely separate. There must necessarily be some intermingling of the two, if not to allow religion and religious organizations to operate with the protection of the state, then at least to require the state to create sufficient space for citizens to manifest the sacrality of our religious convictions. The Supreme Court has recognized as much. Just as the Court has reached the conclusion that a strict application of the separation of powers is not possible in the context of allocating constitutional responsibility among the legislative, executive, and judicial branches of the national government, it is equally unworkable to expect the Court to enforce a strict separation of constitutional authority between the two higher powers of Church and State.

If anything can be gleaned with certainty from the Court's Establishment jurisprudence, it is that there is no plainly discernible border separating the realm of religion from the province of government. Some may wish to establish clear markers between Church and State but efforts to this end have more often than not proven fruitless. In *Agostini v. Felton*, the Court acknowledged that "[i]nteraction between church and state is inevitable, and we have always tolerated some level of involvement between the two."[205] More than a series of fleeting overlaps, however, it is a fact of human interaction that religion and government will intersect at

201. Edward J. Eberle, *Roger Williams' Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425, 457 (1999).

202. *Id.*

203. *Id.*

204. *See, e.g.*, L. ALI KHAN, A THEORY OF UNIVERSAL DEMOCRACY: BEYOND THE END OF HISTORY 15 (2003); MILAN ZAFIROVSKI, LIBERAL MODERNITY AND ITS ADVERSARIES 434 (2007); Stephen L. Carter, *Can Religion Tolerate Democracy? (And Vice Versa?)*, *in* DEMOCRATIC VISTAS: REFLECTIONS ON THE LIFE OF AMERICAN DEMOCRACY 67, 70 (Jedediah Purdy ed., 2004); Anthony J. Langlois, *Liberalism, the Ethics of Citizenship and Religious Belief*, *in* POLITICS AND RELIGION IN THE NEW CENTURY: PHILOSOPHICAL REFLECTIONS 92, 99 (Philip Andrew Quadrio & Carrol Besseling eds., 2009).

205. Agostini v. Felton, 521 U.S. 203, 233 (1997) (internal citation omitted).

important public and private junctions given that "the complexities of modern life inevitably produce some contact" between Church and State.[206] It belies the course of contemporary government to believe anything but that "[a] system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church."[207] Although it is true that the Court has strived to maintain neutrality between religion and nonreligion, and among religions, "a hermetic separation of [religion and government] is an impossibility it has never required."[208] Therefore the view that anything but a mingling of religion and government will govern our interactions with ourselves, our communities, and our state is theoretically and practically unsustainable. As the Court has written recently in this vein, "[t]he Constitution does not oblige government to avoid any public acknowledgement of religion's role in society."[209]

The Court has long conceded the inevitable intermixture of Church and State. As early as the era of the Establishment Clause's incorporation against the states, the Court spoke to the core of the reason why strictly separating Church from State is undesirable. According to the Court, were it to press the enforcement of an impermeable boundary between religion and government, such a policy would render them alien to each other, locking them into a path-dependent, antagonistic relationship. The following passage describes from the Court's perspective the far-reaching costs of insisting on the strict separation of higher powers:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God in our courtroom oaths"—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment.[210]

Yet the Court allows these and other seemingly violative religious practices to unfold in the public square. One possible justification for casting aside an exacting standard of separation between religion and government is the pursuit of neutrality and the guarantee of equal access as

206. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 676 (1970).
207. Roemer v. Bd. of Pub. Works, 426 U.S. 736, 745 (1976).
208. *Id.* at 746.
209. Salazar v. Buono, 130 S. Ct. 1803, 1818 (2010).
210. Zorach v. Clauson, 343 U.S. 306, 312–13 (1952).

between the secular and sectarian. This argument has surfaced in the context of religious organizations petitioning for permission to use public spaces.

Government programs adopting neutrality toward religion and granting equal access to religious organizations commonly find no difficulty satisfying the Establishment Clause. The reason relates to the Court's historical resistance toward, and its recognition of the impracticability of, erecting a truly impenetrable wall between the secular and sacred. The profound bonds between the two indeed belie the wall metaphor that has endured for so long. It should come as little surprise that the Court would invalidate a policy allowing all but religious after-school clubs from holding meetings and conducting activities on public school property.[211] This policy constituted a view contrary to the very aspiration of the Establishment Clause, the intent of which is surely not to favor religion over nonreligion, but certainly to permit the sectarian to stand alongside the secular when the dispute concerns equal use and access.

The same principle militates in favor of granting accommodations for religious practices. One case in particular demonstrates this point: *Cutter v. Wilkinson*.[212] The case involved a suit filed by adherents of four unconventional religious traditions who argued collectively that prison officials had failed to make appropriate accommodations to permit them to observe the tenets of their respective faiths.[213] The Court ruled in favor of the petitioners in large part because they were under the institutional control of the state, "unable freely to attend to their [own] religious needs,"[214] and were "therefore dependent on the government's permission and accommodation for exercise of their religion."[215] Although the Court confirmed the state's duty to accommodate religious practices where possible, the state was not required "to elevate accommodation of religious observances over [a public] institution's need to maintain order and safety."[216] But there is a lot of space between accommodating religion and exalting it to the detriment of the public good. The Court was not encouraging the latter but it was certainly encouraging public institutions to act in as tolerant and affirming a manner as possible to create enough space for persons to practice their religious faith.

C. The Nonestablishment Norm

The challenge of liberal democracy is to foster a constitutional culture that invites religious adherence, belief, and expression while not going so

211. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); *see also* Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 822–23 (1995) (holding that a public university must make available a financial subsidy to student religious organization on the same basis as it does to other student organizations).

212. Cutter v. Wilkinson, 544 U.S. 709 (2005).

213. *Id.* at 712.

214. *Id.* at 721.

215. *Id.*

216. *Id.* at 722.

far as to require it. The nonestablishment norm strives to do just that. Whether it actually achieves it, however, is another question altogether. Nonetheless, one of the strongest justifications of the nonestablishment norm is to ensure equality among religion, nonreligion, and irreligion, and also among religions themselves. Where the state favors one religion over others, equality becomes unattainable because the reality of social ordering forecloses the possibility of the nonfavored or disfavored religions acceding to the same benefits accorded to the chosen religion. What is more, the self-perception of their own inequality may exert conscious or subconscious constraints on what nonfavored or disfavored religions allow themselves to do and the ways in which they manifest their religious beliefs.

As the Court noted in *Larson v. Valente*, the Establishment and Free Exercise Clauses are mutually reinforcing only when religions are treated equally by a neutral state: "Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs."[217] But, added the Court, "such equality would be impossible in an atmosphere of official denominational preference."[218] We therefore hold to the nonestablishment norm partly for the very same principle we separate governmental powers horizontally: to establish coequal branches, none endowed with greater constitutional legitimacy than the other, allowing all three to interact sometimes cooperatively and sometimes competitively in the larger interest of liberty.

Perception is crucial to the nonestablishment norm. Both the self-perception of religion or religions that may be treated differently from others, as referenced above, and the third-party perception of the relationship between religion and government are important to sustaining the even-handedness for which we strive under nonestablishment. As to the latter, the legitimacy of both Church and State is called into question when they are seen as operating in tandem or even too closely together. This line of thought helps explain the Court's decision in *Larkin v. Grendel's Den*, a case challenging the power of a church, under a Massachusetts statute, to object to liquor license applications submitted by businesses within a 500-foot radius of the church.[219] The Court invalidated the law for a number of reasons, but one principal reason was the Court's anxiety about how the fusion of sectarian and secular powers would be perceived by citizens.[220] According to the Court, the Constitution cannot allow religion to be seen as trumping government or as deriving a benefit unavailable to other institutions: "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a

217. Larson v. Valente, 456 U.S. 228, 245 (1982) (rejecting a statute exempting from bureaucratic requirements only those religious organizations meeting a certain threshold of member contributions).

218. *Id.*

219. Larkin v. Grendel's Den, Inc. 459 U.S. 116, 117 (1982).

220. *Id.* at 126.

significant symbolic benefit to religion in the minds of some by reason of the power conferred."[221] There were therefore two items breeding unease in the majority's collective mind: first, the perception of fairness and equality, and second, the notion of institutional competence, specifically that legislative authority can be discharged in the secular world only by government, not by religion. When the two merge, that union compromises both government and religion. Undermining the authority of each separate sphere is precisely what happens to the organs of the national government—the Legislature, the Executive, and the Judiciary—when the norm of separated powers gives way to a fusion of powers.

IV. THE FORMS AND FRONTIERS OF SEPARATING HIGHER POWERS

Proving that the Supreme Court's establishment case law reflects the structure and interests of separation of powers analysis does little to bring constitutional clarity to the Establishment Clause. It is a useful point of departure, but without more it only complicates our inquiry. The discovery of an intellectual and jurisprudential continuity between the separation of Church and State and the separation of powers leaves unanswered serious questions about the relative rank of religion and government in the hierarchy of constitutional authority. Why? Because the separation of powers folds within itself two types of separation, and we must be clear about which of the two we wish to engage when applying separation of powers analysis to the separation of Church and State. The standing of religion relative to government varies according to which of the two forms of separated powers we determine should govern the relationship between the two higher powers.

A. WHICH SEPARATION?

The separation of powers manifests itself in two ways: vertically and horizontally. When we refer to the separation of powers, we think most commonly of the horizontal division of powers among the Legislative, Executive, and Judicial Branches of the same level of government. Both the national government and its state counterparts separate powers in this way: nationally, the Congress operates alongside the Judiciary and the Presidency. At the state level, a bicameral or unicameral legislature shares official power with the state judiciary and the governor. In con-

221. *Id.* at 125-26; *see also* Aguilar v. Felton, 473 U.S. 402, 409–10 (1985) (raising doubts about the propriety of the state becoming "enmeshed with a given denomination in matters of religious significance" because "the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular," and also because "the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters"); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 390 (1985) (expressing concern about "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices").

trast, the vertical separation of powers divides power between two or more levels of government; we call this federalism. Under this structure of constitutional government, the national government enjoys certain powers and the state governments enjoy others. To illustrate, consider a state composed of two levels of government: a national government and subnational states. A constitution could adopt several design strategies to allocate powers between these two levels of government. For example, a constitution could entrench two lists of specific powers that belong to two levels of government, one for each.[222] Alternatively, it could entrench three lists, one cataloguing the exclusive powers of each of the two levels of government and a third list identifying areas of shared powers.[223] Still another option is to grant specific powers to the states and leave all others in the hands of the national authority.[224] The United States Constitution does something different: it enumerates the powers of the national government and confers all residual powers upon the states.[225]

Federalism is just as much a separation of powers as the traditional separation of legislative, executive, and judicial powers. It is one of the principal means by which democracies diffuse power.[226] One of the first significant studies devoted to the subject of vertically separated powers drew similarities between federalism and the horizontal separation of powers, noting that we rely on both to make constructive contributions to good governance and public administration.[227] The diffusion of power in American federalism, like its horizontal equivalent, is correctly thought to serve the interest of liberty. Both serve the same ends of promoting liberty and frustrating the rise of tyranny.[228] As Laurence Tribe has written in his leading tome on constitutional law, "along both dimensions, that of federalism as well as that of separation of powers, it is *institutional interdependence* rather than *functional independence* that best summarizes the American idea of protecting liberty by fragmenting power."[229] Madison also made plain the connection between federalism and liberty:

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222. *See, e.g.*, Constitution Act, 1867, 30 & 31 Vict., c. 3, § 91 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.) (listing powers of the Canadian federal Parliament); *id.* § 92 (listing powers of the Canadian provincial legislatures).

223. *See, e.g.*, INDIA CONST. art. 246 (Seventh Schedule).

224. The South African Constitution's distribution of powers adheres to this model insofar as it expressly grants specific powers to the subnational level of government but authorizes the national government to override the actions of a subnational government if it is in the national interest. *See* S. AFR. CONST. ch. IV, § 44 (1996).

225. U.S. CONST. arts. I, II, III (vesting enumerated powers in the three branches of the national government); U.S. CONST. amend. X (reserving to the States and the people all powers not delegated to the national government).

226. Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT'L L. 39, 55 (2001).

227. Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 22–24 (2003).

228. Janice C. Griffith, *Judicial Funding and Taxation Mandates: Will* Missouri v. Jenkins *Survive Under the New Federalism Restraints?*, 61 OHIO ST. L.J. 483, 603–04 (2000).

229. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 17 (1978) (emphasis in original).

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will contruol each other; at the same time that each will be controuled by itself.[230]

Liberty becomes the product of federalism for a number of reasons. First, its diffusion of power guards against the concentration of power and the tyranny that may follow from it.[231] Second, it invites multiple points of entry for citizens hoping to improve political outcomes,[232] and as a result the right to vote becomes only one of several ways of holding accountable public officials.[233] Third, it grants the several states an important deliberative voice in the national legislative process.[234] Relatedly, the constraints of the national lawmaking procedures themselves protect the liberty-promoting federal structure of the Constitution.[235]

Yet whether federalism advances liberty turns on whether citizens perceive both levels of government as legitimate and independent entities.[236] For absent the reality and perception of institutional independence, the separation of powers cannot fulfill its democracy-enhancing aspirations. Perhaps, then, we can understand the theory of dual federalism as an effort to vindicate the independence of both levels of government. Dual federalism operates as a kind of "constitutional preemption,"[237] where "the state and federal governments each possess[ ] distinct 'spheres' of regulatory authority in which their respective authority [is] exclusive, so that any intrusion by one level of government into the other's sphere [is] unconstitutional."[238] This involves three subsidiary principles, each necessary, but on its own insufficient, to give an adequately theorized account of dual federalism: first, the national and state governments possess exclusive and distinguishable powers; second, the national and state governments are both authoritative in their respective areas of jurisdiction; and third, the Judiciary patrols the border separating national from state

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230. THE FEDERALIST NO. 51, *supra* note 11, at 351 (James Madison).

231. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 272 (2005).

232. Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1279 (2004).

233. James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 966 (1997).

234. Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1655 (2002).

235. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1372 (2001).

236. Laura E. Little, *Envy and Jealousy: A Study of Separation of Powers and Judicial Review*, 52 HASTINGS L.J. 47, 104 (2000).

237. John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 243 (1997).

238. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 88 n.61 (2001) (internal citations omitted).

jurisdiction.[239] The states and the national government are "separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres."[240] Dual federalism is therefore a vigorous defense of independence.[241]

But dual federalism creates a model of dueling sovereignties. The strict division of labor between the center and the periphery gives rise to the creation and entrenchment of government empires that each level of government marshals its resources to protect and indeed expand.[242] The result is "the idea of competing, antagonistic governmental entities each vying for a larger share of the regulatory pie at the expense of the other."[243] This moves federalism beyond simply fostering independence between the national and state governments to more ominously managing a turbulent antagonism between the two sovereigns.[244] It generates a "spirit of rivalry,"[245] which is perhaps not what we want of our public authorities. We may instead prefer a model of cooperative federalism, which similarly regards the national and state governments as autonomous entities, each enjoying some measure of immunity from the other,[246] but which sees the federalist form as encouraging complementary, not competing, interactions.[247] Although cooperative federalism conceives of the two levels of government as independent,[248] it nonetheless also situates the national and state governments along a constitutional hierarchy. In this respect, "cooperative federalism . . . is a concept of partnership between the national and state governments that acknowledges the fact of national supremacy and the reality that the terms of the partnership are almost entirely fixed by the strength and power of the central government."[249] The result of cooperative federalism, in contrast

239. Robert A. Schapiro, *Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World*, 57 EMORY L.J. 115, 118 (2007).

240. Ableman v. Booth, 62 U.S. (21 How.) 506, 516 (1858).

241. *See, e.g.*, K.C. WHEARE, FEDERAL GOVERNMENT 15 (1947); Alison Grey Anderson, *The Meaning of Federalism: Interpreting the Securities Exchange Act of 1934*, 70 VA. L. REV. 813, 837 (1984); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 16 (1950); Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 184 (2005).

242. For a discussion of empire-building in the context of federal relations, see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 938–50 (2005).

243. Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1887 (1995).

244. Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 864 (1985).

245. Harry N. Scheiber, *State Law and "Industrial Policy" in American Development, 1790–1987*, 75 CALIF. L. REV. 415, 420 (1987).

246. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 816 (1998).

247. Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 175–77 (2006).

248. Richard B. Stewart, *Federalism: Allocating Responsibility Between the Federal and State Courts*, 19 GA. L. REV. 917, 957–58 (1985); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 664–65 (2001).

249. 1 CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION: POWERS OF GOVERNMENT 270 (9th ed. 2009).

to the defensive posture of dual federalism, is an environment of "polite conversations and collaborative discussions"[250] about how to make intergovernmental relations work constructively. Nevertheless, dual and cooperative federalism share the belief that the national and state governments are independent branches in the vertical separation of powers, both possessing constitutionally entrenched rights and responsibilities.

Are Church and State dueling or cooperative sovereigns? We would expect some guidance from the Supreme Court in its capacity as the umpire of the constitutional boundaries separating horizontal, vertical, and higher powers. The Court has indeed answered the question whether religion and government stand as equals in the hierarchy of American constitutional law. But the problem is that the Court has answered the question in more than one way. These divergent answers are the origin and the continuing fount of the incoherence that has ensnared the Establishment Clause. Since the founding of the new republic, the Supreme Court has vacillated among three approaches to the Establishment Clause and given three different, incompatible, and indeed contradictory answers to the relative ranking of religion and government. Most commonly, the Court has invoked the horizontal separation of powers to cast Church and State as institutional equals, with either Church or State designated as *primus inter pares*, or first among equals. On other occasions, the Court has applied the theory of vertically separated powers to elevate State above Church. Less frequently, the Court has appealed to the vertical separation of powers to elevate Church over State.

B. Church and State

What generally informs the Court's rendering of the Church–State boundary is the horizontal separation of powers. Under this theory of separated powers, Church and State are coequal entities in the project of governing, each entitled to sovereign deference in the discharge of their respective institutional missions. There are two dimensions—a negative prohibition and a positive requirement—to this form of separation between the two higher powers. First, the horizontal separation of powers entails a negative prohibition that limits how one higher power may interrelate with the other. Specifically, just as government may not interfere in the autonomous sphere of religion, neither may religion tread into the domain of government. Second, the theory of horizontally separated powers recognizes that Church and State possess competencies both divergent and intersecting. There are tasks that only government can execute capably and other tasks that only religion can perform reliably, and we therefore grant to each higher power the respect and independence that its expertise commands. As a corollary, there also exist tasks that both religion and government can carry out competently. Where that is

250. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256, 1271 (2009).

the case, the horizontal separation of powers imposes a positive duty upon government to recognize that religion is just as well-equipped as the government to accomplish that particular task.

In the first Supreme Court case to set Church and State as institutional equals, the Court ruled that a religious institution could deliver medical care just as effectively as a public one. The case was *Bradfield v. Roberts*,[251] and it concerned a suit against the Treasurer of the United States, the former arguing that a congressional appropriation to Providence Hospital, which was operated by a body organized under the Roman Catholic Church, violated the Establishment Clause.[252] Congress had earlier granted a corporate charter to the hospital and was now disbursing $30,000 to it for new construction.[253] The plaintiff objected that this congressional appropriation would run afoul of the constitutional provision prohibiting Congress from passing "a law respecting a religious establishment."[254] The Court was quick to correct the plaintiff about the correct wording of the Establishment Clause, which did not prohibit laws "respecting a religious establishment" but more accurately laws "respecting an establishment of religion," an important difference, according to the Court.[255] The Establishment Clause does not bar laws respecting churches or other religious institutions; it only bars laws creating an establishment of religion, a distinction that was either lost on or distorted by the plaintiff. Furthermore, wrote the Court, it was appropriate that the hospital had been duly incorporated without reference to the religion of the incorporators because it is not the role of the state to inquire into the religious beliefs of incorporators:

> Nothing is said about religion or about the religious faith of the incorporators of this institution in the act of incorporation . . . .
>
> . . . .
>
> . . . Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into.[256]

The reason it was inappropriate to inquire into the religious beliefs of the operators of Providence Hospital concerns the precise function of the institution. Though it may have been operated by a Roman Catholic group, the hospital was performing a secular role: giving medical care. And since there was neither allegation that Providence Hospital confined its services to adherents of the Roman Catholic faith nor any concern that

251. Bradfield v. Roberts, 175 U.S. 291 (1899).
252. *Id.* at 291–93.
253. *Id.* at 295–96.
254. *Id.* at 293.
255. *Id.* at 297.
256. *Id.* at 297–98.

it had violated the terms of its secular charter,[257] the plaintiff could not prove that the congressional appropriation to Providence Hospital constituted an impermissible establishment of religion. It therefore did not matter that the hospital was run by religious personnel: "It is simply the case of a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists." Indeed, that the Roman Catholic Church runs the hospital was "wholly immaterial,"[258] concluded the Court.

Perhaps the best depiction of the theory of the horizontal separation of higher powers comes not from the court of constitutional law but rather from the arena of constitutional politics. In 2001, newly-installed President George W. Bush issued an executive order creating the White House Office of Faith-Based and Community Initiatives.[259] The purpose of the Office was to enlist the help of religious and community organizations in meeting the needs of underprivileged and underserved communities.[260] Just as government agencies have the capacity to deliver social services related to decreasing crime, fighting and treating drug addiction, supporting families, building communities, and reducing poverty, so do religious organizations. "Government cannot be replaced by such organizations," acknowledged the executive order, "but it can and should welcome them as partners."[261] The executive order continued, echoing the themes of independence and equality that we associate with the horizontal separation of powers: religious organizations "should have the fullest opportunity permitted by law to compete on a level playing field"[262] with public secular institutions.

Later in 2002, President Bush issued a complementary executive order on faith-based initiatives.[263] This one directed federal agencies to ensure that religious organizations "are able to compete on an equal footing for Federal financial assistance used to support social service programs."[264] Recognizing that religious institutions could face discrimination in the process of applying for federal funding, the executive order commanded that all applicants should be protected from discrimination on the basis of religion or religious belief.[265] As the prior order had done in creating the Office in the first place, the executive order again paid special attention to the themes underpinning the horizontal separation of powers: equality and independence. In instructing federal agencies to treat religious orga-

257. *Id.* at 298.
258. *Id.*
259. Exec. Order No. 13,199, 3 C.F.R. 752 (2001), *reprinted in* 3 U.S.C. § 21 at 597 (2006).
260. *Id.*
261. *Id.* § 1.
262. *Id.*
263. Exec. Order No. 13,279, 3 C.F.R. 258 (2002), *reprinted in* 3 U.S.C. § 601 at 754–56 (2006).
264. *Id.* § 2(b).
265. *Id.* § 2(c).

nizations equitably, the executive order further charged that religious organizations should be eligible to apply for and receive federal funding to deliver social services "without impairing their independence, autonomy, expression, or religious character."[266] To further stress the independence and equality of religion as an equal partner in the project of delivering social services, the executive order stressed that religious organizations could continue to operate as they normally do within their fully private sphere of autonomy:

> Among other things, faith-based organizations that receive Federal financial assistance may use their facilities to provide social services supported with Federal financial assistance, without removing or altering religious art, icons, scriptures, or other symbols from these facilities. In addition, a faith-based organization that applies for or participates in a social service program supported with Federal financial assistance may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other chartering or governing documents.[267]

Though President Barack Obama has since renamed the Office as the White House Office of Faith-Based and Neighborhood Partnerships,[268] the Office continues to seek ways to involve religious organizations in the work of delivering social services to America's communities. What is most important for our purposes, though, is to recognize the parallel between the horizontal separation of powers and the relationship between Church and State exhibited in the mission of the Office. By assigning public functions to religious organizations, the Office recognizes that religion and government are coequal entities. It moreover exemplifies the positive requirement that attends to the horizontal separation of powers: Church and State possess intersecting competencies, and it is consequently the duty of government to yield to religion some of its claim to social management and development where religion is competent to discharge an otherwise public task. And in the course of executing the public task, religion must not suppress its religiosity. Quite the contrary, the pillars of equality and independence protect the individuality and indigenous character of religion. Religion may therefore perform its important social services proudly as a religious institution; regarding government and religion as equal sovereigns rejects the inhibition coercing a religious organization receiving government funding to operate under the cover of a nonreligious calling.

The Supreme Court has often relied on similar reasoning to authorize religious organizations to discharge public functions. Education is perhaps the most conspicuous context in which we may perceive the Court's

266. *Id.* § 2(f).
267. *Id.*
268. Exec. Order No. 13,498, 3 C.F.R. 219 (2009), *reprinted in* 3 U.S.C. at 64 (Supp. 111 2010).

permissive posture toward religion as a deliverer of important social services. One case is particularly instructive. In *Zorach v. Clauson*, New York City parents whose children attended public schools challenged the constitutionality of a "released time" program under which public school students could be excused from school property at the request of their parents to attend religious instruction or to participate in devotional exercises during part of the school day.[269] The Court upheld the program, finding it wholly in conformity with the standard set by the Establishment Clause because the program "involve[d] neither religious instruction in public school classrooms nor the expenditure of public funds."[270] More interesting than the result, though, was the Court's reasoning. The Court called upon the themes of independence and mutual respect that represent the basis of separation of powers theory in discussing the separation of Church and State: "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."[271] The Court continued, refining the point to highlight the special place of religion in American life:

> To hold that [the state] may not [respect religion] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.[272]

According to the *Zorach* Court, the fabric of the American legal tradition therefore requires the state to respect religion as an authoritative, constructive, and legitimacy-conferring institution entitled to regard equal to that afforded to the state in the delivery of social services.

Acknowledging that religious organizations perform a valuable social benefit when they help relieve the pressures of oversubscription on the public school system, the Court has moreover praised religious organizations for discharging a valuable social service when they erect institutions to instruct children. In *Hunt v. McNair*, the Court upheld state revenue bonds to raise funds for a religious college wanting to take advantage of a state law available to all schools—religious and otherwise—for projects like campus construction.[273] The Court cited the text of the South Caro-

269. Zorach v. Clauson, 343 U.S. 306, 308–09 (1952).
270. *Id.* at 309.
271. *Id.* at 313–14.
272. *Id.* at 314; *see also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) ("[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.").
273. Hunt v. McNair, 413 U.S. 734, 735–36 (1973).

lina law with approval to make the point that religious organizations render a useful public service in delivering important social services: the law was "all to the public benefit and good" because "the purpose of [the law is] to provide a measure of assistance and an alternative method to enable [secular and religious] institutions for higher education in the State to provide the facilities and structures which are sorely needed . . . ."[274] This was also the case in *Board of Education v. Allen*, a controversial case in which New York had passed a law authorizing textbook loans to all middle and high school students, including students attending parochial schools.[275] In holding that the program complied with the requirements of the Establishment Clause, the Court noted that religious organizations were capable of competently performing the secular task of educating children: "[T]he continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students."[276] The Court further noted that "parochial schools are performing, in addition to their sectarian function, the task of secular education."[277] Constitutionally permissible tax benefits have also been issued to parochial schools under a statute authorizing deductions to both public and private schools for expenses arising out of educational expenditures.[278] This has also been the case where the state gave vocational rehabilitation assistance to a blind student receiving religious instruction to become a pastor, missionary, or youth director.[279]

Even when the Court has invalidated school-related programs for breaching the boundary separating Church from State, it has done so in the interest of protecting the independence of each realm.[280] In *Illinois ex rel. McCollum v. Board of Education*, for instance, where the Court ruled unconstitutional a program permitting religious groups to instruct students in public school buildings "through the use of the State's compulsory public school machinery,"[281] the Court was most interested in protecting the autonomous rule of both Church and State: "The First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[282] Similarly, when the Court disallowed a New York state statute authorizing reimbursements to parochial schools

274. *Id.* at 742 (quoting S.C. CODE ANN. § 22–41 (Supp. 1971)).
275. Bd. of Educ. v. Allen, 392 U.S. 236, 238 (1968).
276. *Id.* at 247–48.
277. *Id.* at 248.
278. Mueller v. Allen, 463 U.S. 388 (1983).
279. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 481 (1986).
280. Indeed, the choice to selectively exclude religious organizations from the universe of successful government grant recipients may actually reinforce the autonomy principle that anchors the right to free religious exercise. *See* Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1271–72 (2008).
281. Ill. *ex. rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).
282. *Id.*

for the cost of recordkeeping and testing programs required under state law, the reasoning was the familiar point of institutional independence.[283] To require periodic audits of religious schools—the kind of audits that demand meticulous and probing inquiries into the practices of religious institutions—is to breach the buffer that protects religion from government.[284] In order to satisfy both the constraints of the Establishment Clause and the requirements of the New York state statute, government cannot be allowed to gainsay the teachings of religious institutions, and those religious institutions cannot use public moneys to test religious materials. Yet, under the statute, "[i]n order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials."[285] As for the state, it "would have to undertake a search for religious meaning in every classroom examination offered in support of a claim."[286] That would prove problematic in two respects. First, it would cast the Court "in the role of arbiter of [an] essentially religious dispute,"[287] a state of affairs that is inconsistent with religious and governmental independence. Second, the very prospect of a judicial dispute "about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment,"[288] which is repugnant to the interest of institutional independence that courts seek to vindicate when applying the Establishment Clause.

Likewise, when the Court prohibited New York from instituting a daily prayer in its public schools,[289] it took an effusively praiseworthy posture toward religion. Referencing the history of the Establishment Clause—which, according to the Court, had been designed "out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to"[290]—the Court gestured toward the role of the State in protecting religion from the intrusive reach of government, precisely so that Church may be allowed to play its central role in American life. "The [Clause] thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[291] For the Court, what follows from the religion-regarding purpose of the Establishment Clause is that "it is neither sacrilegious nor antireligious" to order government to stay away from "the business of writing or sanctioning official

283. New York v. Cathedral Acad., 434 U.S. 125, 126 (1977).
284. *Id.* at 132.
285. *Id.* at 132–33.
286. *Id.* at 133.
287. *Id.*
288. *Id.*
289. Engel v. Vitale, 370 U.S. 421, 424 (1962).
290. *Id.* at 435.
291. *Id.* at 431–32.

prayers."[292] Quite the contrary, it is to afford religion its due respect and deference. The same is true of *Levitt v. Committee for Public Education and Religious Liberty*, where the Court did not allow public reimbursements to parochial schools for state-mandated testing and recordkeeping.[293] The Court's concern was not that parochial school teachers would act in bad faith to circumvent the limitations of the Establishment Clause but rather that the mere existence of the risk that Church and State could become fused, instead of separate, powers was enough to induce the Court to enforce the wall that divides the independent realm of religion from that of government.[294]

Only by recognizing the independence and independent social value of religion may the Court adopt such a view of the Establishment Clause. Without seeing religion as independent from government and as an independently legitimating institution, it is not possible to justify the state of affairs that governs Church–State relations, which is a regime anchored in "an affirmative policy that considers [religious organizations] as beneficial and stabilizing influences in community life"[295] and which regards these groups as "useful, desirable, and in the public interest."[296] Such affirmative policies include tax exemptions like the one at issue in *Walz v. Tax Commission of N.Y.*, where the dispute concerned whether religious organizations could be excepted from property taxes in light of their charitable status.[297] The Court approved the exemption on the theory that granting religion this socially useful independence from government "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other."[298] Once again, therefore, we can perceive the Court's interest in protecting the independence of both religion and government.

To position Church and State as institutional equals requires a robust protection for free religious exercise. For without strong armor around the freedom of religion, religion cannot operate freely and independently of external pressures that would otherwise inhibit its practice and observance. The Court has recognized this vital interconnection between the Establishment Clause and the Free Exercise Clause, many times articulat-

292. *Id.* at 435; *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000) (prohibiting public school district's policy permitting student-led and -initiated prayer at football games); Lee v. Weisman, 505 U.S. 577, 584–86 (1992) (disallowing clergy from offering prayers in official public school ceremony); Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (invalidating an Alabama statute authorizing a moment of silence in public schools for meditation or prayer).

293. Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 482 (1973).

294. *Id.* at 480; *see also* Wolman v. Walter, 433 U.S. 229, 255 (1977) (holding unlawful an Ohio law granting direct aid to sectarian schools); Meek v. Pittenger, 421 U.S. 349, 366 (1975) (invalidating a Pennsylvania program providing direct aid to parochial schools); Sloan v. Lemon, 413 U.S. 825, 835 (1973) (ruling unconstitutional a Pennsylvania law directly reimbursing parents for children's parochial school tuition).

295. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 673 (1970).

296. *Id.*

297. *Id.* at 666–67.

298. *Id.* at 676.

ing a forceful defense of free religious exercise in terms that resound in the separation of powers themes of equality and independence.[299] In *Cantwell v. Connecticut*, the Court spoke to the reason that the Constitution bars Congress and the states from making laws establishing a religion or impinging upon the right to free religious exercise: "On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship," wrote the Court, adding that "[o]n the other hand, it safeguards the free exercise of the chosen form of religion."[300] In settling the dispute in the case—whether a group of Jehovah's Witnesses could constitutionally be prosecuted under a statute that forbade individuals from soliciting without a license on behalf of religious causes from persons who are not adherents of that religious cause—the *Cantwell* Court concluded that the statute offended our sense of religious dignity and personhood, both of which are expressed when we manifest our religious beliefs: "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."[301] Therefore, continued the Court, it would be improper to require a license from the state to share one's religious beliefs with another:

> [T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."[302]

What matters, then, is to guard zealously the independence of thought and action when they derive from religion.

We have seen this most clearly in the Court's doctrine of the "preferred position" of the freedom of religion. Although it is true that a state cannot impose a tax for the privilege of exercising a right guaranteed under the Constitution, the rights enshrined in the First Amendment are especially worthy of security against infringement: "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon."[303] The reason, according to the Court, is that "freedom of press, freedom of speech, freedom of religion are in a preferred position."[304] For example, where either a publicly- or company-owned town seeks to curb the religious expression rights of citizens, the town faces a high burden to justify the restriction: "When we balance the Constitutional rights of owners of

299. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993); *Walz*, 397 U.S. at 672; Sch. Dist. v. Schempp, 374 U.S. 203, 221–23 (1963).
300. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
301. *Id.* at 310.
302. *Id.* at 307.
303. Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943).
304. *Id.* at 115.

property against those of people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."[305] Not only must the infringing body find a way to defend its violation of a constitutional right, but it must find a way to validate its breach of a *preferred* constitutional right that sits at the base of the meaning of democratic self-government: "As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances' and appraise . . . the reasons . . . in support of the regulation of (those) rights."[306] Under the horizontal separation of higher powers, Church therefore enjoys both exemptions and immunities that lay bare its coequal and independent standing alongside State.

The wide berth granted to religion as an institution worthy of deference under the theory of horizontally separated powers is similarly evident elsewhere in the Court's jurisprudence. Consider the controversy over legislative prayer. When a member of the Nebraska legislature challenged the constitutionality of opening each legislative session with a state-funded chaplain's prayer, the Court rejected the plaintiff's claim, holding the legislative prayer constitutional.[307] For a public body to invite within its chamber the performance of a religious ritual appears upon first glance and deeper reflection to pose the very kind of fusion between Church and State that the Establishment Clause is intended to thwart. The Court's judgment to the contrary is accordingly quite surprising, mostly because the decision turns on the historical standing of the religious ritual of legislative prayer dating back to the First Congress.[308] That the First Congress voted both to approve the First Amendment for ratification by the states and that in the same week it also voted to appoint a paid chaplain for each chamber suggested to the Court that Congress certainly did not intend the Establishment Clause to forbid the actions it had itself just taken.[309] The Court therefore concluded that "[t]his unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged."[310] But the Court acknowledged that there is more to this than simply historical practice. Beginning "legislative sessions with prayer has become part of the fabric of our society,"[311] wrote the Court, adding that for a public body to invoke religious guidance was not to establish a religion, but more accurately to acknowledge that America is a country of religious people whose civil

305. Marsh v. Alabama, 326 U.S. 501, 509 (1946).
306. *Id.* (quoting Schneider v. New Jersey, 308 U.S. 147, 161 (1939)); *see also* Lovell v. City of Griffin, 303 U.S. 444, 450–51 (1938) (invalidating ordinance restricting distribution or sale of religious materials without first obtaining written permission from municipality).
307. Marsh v. Chambers, 463 U.S. 783, 784–86 (1983).
308. *Id.* at 791–92.
309. *Id.* at 790.
310. *Id.* at 791.
311. *Id.* at 792.

institutions are founded on strong religious beliefs.[312]

We have seen this deferential posture toward religion arise time and again in the Court's Establishment Clause jurisprudence. The Court has even adopted a term for the constitutional indulgence granted to religion on the strength of its historical significance in the American tradition: ceremonial deism, a phrase adopted from the work of Eugene Rostow.[313] The concept of ceremonial deism refers to "brief official acknowledgements of religion . . . [ranging] from the national motto, to the words 'under God' in the Pledge of Allegiance, to the cities of Corpus Christi and St. Louis, to the phrase 'in the Year of our Lord,' or the abbreviation A.D. on public documents."[314] In the Court's case law, these official acknowledgements have generally been interpreted as constitutionally sound because they are not commonly viewed, according to the Court, as either indicating or implying governmental sanction of the religious beliefs they espouse or represent.[315] It is hard, however, to distinguish ceremonial deism from what the Court has otherwise ruled unconstitutional: "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[316] Yet in refusing to invalidate instances of ceremonial deism apart from legislative prayer—including a recitation,[317] an emblem,[318] a Sunday closing law,[319] and a government program[320]—it appears that the Court is permitting government itself to advance religion, or at the very least making it possible for government to advance religion. The reason the Court has constructed the concept of ceremonial deism can only be because the Court hopes to recognize the centrality of religion in the lives of Americans while also sustaining a strong perception, though perhaps not necessarily the reality, of Church standing separate from State.

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312. *Id.*

313. Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

314. B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning over Time*, 59 DUKE L.J. 705, 711 (2010).

315. County of Allegheny v. ACLU, 492 U.S. 573, 595 n.46 (1989).

316. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987) (emphasis in original).

317. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 7–8 (2004) (dismissing challenge to daily recitation of Pledge of Allegiance for lack of standing).

318. Van Orden v. Perry, 545 U.S. 677, 681, 691–92 (2005) (approving display on public property of Ten Commandments and other symbols of faith and statehood). *But see* McCreary Cnty. v. ACLU, 545 U.S. 844, 850–51, 868–70 (2005) (invalidating display of Ten Commandments where purpose could not be classified as secular or even as benignly religious); Stone v. Graham, 449 U.S. 39, 42–45 (1980) (per curiam) (disallowing state statute requiring posting copy of Ten Commandments in each public schoolroom).

319. McGowan v. Maryland, 366 U.S. 420, 422, 452 (1961) (finding that Sabbath laws did not violate the Establishment Clause).

320. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 595–96 (2007) (finding petitioners lacked standing to challenge expenditures in connection with the White House Office of Faith-Based and Community Initiatives).

C. CHURCH UNDER STATE

While the Court has most often adopted a theory of horizontally separated powers to resolve establishment disputes, it has also on occasion applied the vertical separation of powers. The vertical separation of powers creates a hierarchy of constitutional authority pursuant to which either God or man is hoisted above the other and the superior may exert preemptive control over its subordinate. Much like the vertically separated powers in American federalism contemplate the national government trumping its state equivalents in the event of a constitutional, legal, or regulatory conflict, the vertical separation of Church and State envisages Church or State overriding the other when the commands of the former conflict with those of the latter. The vertical separation of powers between Church and State produces two possibilities: Church under State and Church over State. The first of these two alternatives is more common in American constitutional law, and perhaps with reason. After all, the liberal democratic interests of neutrality, fairness, and equality require religious practices to conform to the rule of law. Therefore, pursuant to the separation of higher powers conception of Church under State, government is situated above religion in the hierarchy of constitutional authority and may exert comprehensive and preemptive control over it. To draw an analogy from the vertical separation of powers, Church under State implies an organizational structure where government is endowed with the equivalent of a Supremacy Clause that compels religion to conform its conduct to it.[321]

Nowhere is the hierarchy situating government over religion more evident than the Court's earliest polygamy case.[322] In *Reynolds v. United States*, a Utah resident pled not guilty to the charge of having more than one wife in contravention of a congressional law prohibiting polygamy.[323] The threshold issue in the case was not polygamy, but rather a number of questions of criminal procedure, including whether a grand jury impaneled under the laws of Utah and consisting of fewer than the federally prescribed number of panelists could properly issue an indictment under a federal statute.[324] Yet in concluding that the indictment was proper, the Court also addressed the matter of religious belief, specifically whether the sincere belief that polygamy is a religious duty can constitute a valid defense to breaking a law prohibiting it.[325] The answer in the United States, the Court announced, must be no. The reason was clear to the Court:

> [A]s a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall

321. *Cf.* U.S. CONST. art. VI, cl. 2 (designating the Constitution and federal laws as "supreme").
322. Reynolds v. United States, 98 U.S. 145 (1878).
323. *Id.* at 146.
324. *Id.* at 153–54.
325. *Id.* at 154–62.

> not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[326]

To allow polygamous relations would be to elevate religion over government and therefore render the United States an ungovernable nation, reasoned the Court. The statute was constitutional because it "prescrib[ed] a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control."[327] What is more, permitting polygamous relations would introduce an uneasy distinction in the laws of religious freedom because the inequitable result would be to acquit those engaging in polygamous practices for religious reasons and to convict those engaging in the same conduct for reasons unrelated to religion.[328] It was therefore necessary, from the Court's perspective, to subordinate Church to State in this particular instance in the larger interest of administrative fairness, uniform application, and social order in the civil laws of the country.

The Court reached the same conclusion the following year in *Davis v. Beacon*, once again elevating government over religion.[329] A man whose Mormon religion required the practice of polygamy was convicted for violating the criminal laws of Idaho, which barred Mormons from registering to vote because of their conduct and advocacy of polygamy.[330] The question before the Court was whether Idaho could lawfully make it a crime to divest the right to vote from persons convicted of crimes, namely polygamy; the Court answered in the affirmative.[331] The tension in the case set in opposition the right to free religious belief, the fear of establishing a faith whose tenets foreclosed sufficient room for other faiths, and the interest of uniformity in the application of the criminal laws of the nation. For the Court, the tension could be resolved in one way alone: by subordinating the free exercise of religion to the nation's criminal laws. "However free the exercise of religion may be," wrote the Court, "it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."[332]

Surely we can understand why the Court would take this view. Imagine, as the Court itself asked in the course of reaching its judgment, a person "'believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under

326. *Id.* at 166–67.
327. *Id.* at 166.
328. *Id.*
329. *See* Davis v. Beason, 133 U.S. 333, 342–43 (1890).
330. *Id.* at 337, 346–47.
331. *Id.* at 337, 348.
332. *Id.* at 342–43.

which he lived could not interfere to prevent a sacrifice?'"[333] The answer to the Court's rhetorical question is obvious, at least according to the Court. There can be no exemption from the criminal laws of generally applicability, especially where the religious practices for which the exemption is requested visit such deleterious consequences on other persons and in public spaces. How can a society, even the most liberal of democracies, accommodate the religious practices of its members where those practices are repugnant to the criminal laws that apply broadly and equally to everyone? The Court raised that very question before quickly dispensing with it, describing it as a matter that no civil society can take seriously:

> Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.[334]

But relegating religion to the equivalent of state in the federal structure of government need not necessarily mean that religion is not worth protecting. On this point, the Court made an important distinction between action and belief.[335] Under the Constitution, the latter is given the fiercest protection and afforded something approximating immunity from prosecution. But the former is squarely within the reach of the state, and rightfully so, says the Court: "It was never intended or supposed that the [First] Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society."[336] However, "[w]ith man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted,"[337] though the Court did add an important qualification, stipulating that this freedom of thought applies only "provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with."[338] Therefore, according to the Court, although the proper organization and management of civil society may require that Church be situated under State, this does not diminish the place of religion in the lives of the people and the nation.[339] This is a powerful illustration of the Court situating religion prior to government, Church over State, and God above man.

Consigning religion to secondary status below government has sober consequences for the free exercise of religion. When Church cedes to the

333. *Id.* at 344 (quoting *Reynolds*, 98 U.S. at 166).
334. *Id.* at 343.
335. *Id.* at 344.
336. *Id.* at 342.
337. *Id.*
338. *Id.*
339. *See id.*

commands of State, the universe of actions that may be lawfully taken in the name of religion must necessarily shrink. This is a reasonable result from divesting religion of its special quality and from requiring religion to conform its practices to those that constrain and compel what nonreligious organizations may or may not do. Indeed, the focal point of this typology of Church–State relations—Church under State—is the distinction between thought and action. The Court will defend the position that no official action can lawfully restrict the scope and content of religious belief, for it forms the core of the freedom of religion. However, the same range of constitutional protection does not apply—nor can it apply in a civil context where Church sits under State—to the way religious beliefs are manifested as actions. For unlike religious beliefs, which are private and have little effect on third parties, religiously motivated actions are not only visible to or felt by others but moreover exact public reverberations across the community.

The Court has recognized as much. Whether religiously driven actions have stemmed from religious rituals or whether they have derived from applications for religious exemptions, the Court has often invoked concerns about public safety and welfare, and alternatively the concept of equal treatment, to subject religious organizations to the same standards that govern secular organizations. For instance, one relevant case concerned a city ordinance requiring a license and the payment of fees in order to lawfully engage in selling books and pamphlets door-to-door.[340] When two persons were arrested for traveling house-to-house without a license, sharing their religious beliefs with others, playing recordings of religious lectures, and distributing religious materials in return for a contribution of twenty-five cents per book, they argued that the ordinance violated their right to free religious exercise.[341] The Court disagreed, declaring that religious organizations must follow the same rules as secular ones when they engage in commercial activity. "When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing,"[342] concluded the Court, making sure to emphasize that "[i]t is prohibition and unjustifiable abridgement which [are] interdicted, not taxation."[343] The Court also insisted that although the Constitution cannot command belief, it can always regulate conduct:[344]

340. Jones v. City of Opelika, 316 U.S. 584, 586 (1942), *vacated*, 319 U.S. 103 (1943) (per curiam).

341. *Id.* at 588–89.

342. *Id.* at 597.

343. *Id.*

344. *Id.* at 594. But the Court has held that "[a] state may not impose a [tax] for the [privilege of exercising] a right granted by the [C]onstitution." *See* Murdock v. Pennsylvania, 319 U.S. 105, 112–13 (1943) ("It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.").

> Courts, no more than Constitutions, can intrude into the consciences of men or compel them to believe contrary to their faith or think contrary to their convictions, but courts are competent to adjudge the acts men do under color of a constitutional right, such as that of freedom of speech or of the press or the free exercise of religion and to determine whether the claimed right is limited by other recognized powers, equally precious to mankind. So the mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows.[345]

Yet the distinction between religious belief and action is not always as clear as we might hope. For instance, imagine a state statute granting citizens the right to observe the Sabbath on their chosen day of the week, therefore authorizing them to absent themselves from work or other commitments when applicable. The action of observing the Sabbath, and therefore excusing oneself from an employment commitment, is prompted by the religious belief in the sanctity of the Sabbath. Would upholding that statute grant an immunity to religious action or to religious thought? That was the clash in *Estate of Thornton v. Calder*, in which Connecticut had passed such a statute.[346] The Court appears to have taken the view that religious action, not religious belief, was the issue, and therefore held that the law ran afoul of the Establishment Clause.[347] Here is how the Court explained it: "Under the Religion Clauses, government must guard against activity that impinges on religious freedom, and must take pains not to compel people to act in the name of any religion."[348] With this as the Court's point of departure, one could have predicted the outcome because the dispute was characterized as one involving action and not thought.

Consider another example: Is the religiously driven choice to refuse to fulfill a state constitution's compulsory military service as a condition for bar admission an illustration of religious belief or a manifestation of religiously compelled behavior? The Supreme Court, in *In re Summers*, adopted the former view, upholding the Illinois Supreme Court's decision to deny a conscientious objector's petition for admission to practice law.[349] The conscientious objector had long espoused nonviolence, declining to serve in either the military or police forces, contrary to the Illinois Constitution's requirement that all men his age serve in the militia during times of war.[350] When the time came to apply for admission to the Bar, he was not admitted on the theory that his refusal to comply with the terms of the Illinois Constitution compromised irreparably his capacity both to serve as an officer charged with the administration of justice and

345. *Jones*, 316 U.S. at 593–94.
346. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 704–06 (1985).
347. *Id.* at 710–11.
348. *Id.* at 708.
349. *In re* Summers, 325 U.S. 561, 562, 573 (1945).
350. *Id.* at 571.

to take an oath to support the Constitution.[351] On appeal to the Supreme Court, the conscientious objector lost again. The Court first observed that:

> Under our Constitutional system, men could not be excluded from the practice of law, or indeed from following any other calling, simply because they belong to any of our religious groups, whether Protestant, Catholic, Quaker or Jewish, assuming it conceivable that any state of the Union would draw such a religious line."[352]

But the majority then concluded that no such discriminatory purpose had triggered the decision of the Illinois Supreme Court to deny him admission.[353] Here again, we have an instance of the Court elevating State above Church, almost to the point of divesting religion of its distinctive quality. For when a person's religious beliefs—in this case the religiously inspired belief in nonviolence—prompts the state to erect a barrier to his entry into a profession, religion becomes an affiliation no different from cultural and social affiliations generally deemed distasteful.

D. Church over State

The Court has most often conceived of Church and State as institutional equals, and less often as subordinate–superior. But it has also, though only seldom, hoisted Church over State. In contrast to the conception of Church *under* State, the conception of Church *over* State elevates religion over government. On this view, religion may shape and compel government action or inaction in the service of religious liberty and freedom. This may manifest itself in religious accommodations or in outright religious exemptions. But the key element of Church over State is that religion may override government when the two come into conflict, with religion standing above government in the hierarchy of constitutional authority.

Examples of the Court placing Church over State exist, but they represent the least common of the triumvirate of Church–State relationships: Church *and* State, Church *under* State, and Church *over* State. The theory behind the Court's disinclination to give religion precedence over government derives from the moral design of liberal democracy. As Charles Taylor reasons, "a liberal society should not be founded on any particular notion of the good life" because "[t]hose who see their views denied official favor would not be treated with equal respect in relation to their compatriots espousing the established view."[354] To identify one religion as more worthy of reverence than another, or to send the official signal that religion itself is regarded more favorably than nonreligion, would therefore violate a fundamental precept of liberal democracy.

Robert Audi takes the position that three principles must underpin all

351. *Id.* at 569–70.
352. *Id.* at 571.
353. *Id.*
354. Charles Taylor, Philosophical Arguments 186 (1995).

liberal democracies: liberty, equality, and neutrality.[355] As to the first, the state must tolerate the practice of any religion. The second precludes the state from preferring one religion over another; but it is the third principle, neutrality, which warns against positioning Church over State insofar as it requires the state to neither favor nor disfavor religion and the religious.[356] The secularity of the state is thought to be the signature feature of a liberal democracy, along with the constitutive requirements of constitutional democracy. In a constitutional state anchored in the principles of liberal democracy, the rule of law constrains the exercise of power, individuals may seek redress for violations of their rights, and the state must be secular and refrain from endorsing one religion over another.[357]

Yet the Court has at times upset the rules that give liberal democracy its rationality, giving unusual deference to religion and, along the way, further exacerbating the incoherence in which the Establishment Clause is mired. In a nineteenth century case, the Court applied the vertical separation of powers between Church and State in a way that placed Church above State. The dispute involved whether a church in the United States seeking to hire a religious minister from a foreign country could be exempted from a congressional law that prohibited any person or group from "prepay[ing] the transportation, or in any way assist[ing] or encourag[ing] the importation or migration, of . . . any foreigner . . . into the United States . . . to perform labor or service of any kind in the United States, its territories, or the District of Columbia."[358] The Court ruled that the church could indeed hire the foreign minister, and in doing so effectively gave the church an exemption from a rule of general application.[359]

What is most relevant for our purposes is not the Court's ruling itself but more specifically the Court's reasoning. For that is where we perceive why the Court chose to elevate Church above State. To begin with, for the Court in this case, religion stands prior in importance to the state. Without it, the community cannot function properly nor can it survive precisely because religion is necessary to the United States. Here is the Court's overture to readers, as it lays out one of the many facts that lead it to its ultimate conclusion:

> If we examine the constitutions of the various states, we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four states contains language which, either directly or by clear implication, recognizes a profound reverence for religion, and an assumption that its influence in all human affairs is

355. ROBERT AUDI & NICHOLAS WOLTERSTOFF, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE 1, 3–4 (1997).

356. *Id.* at 4.

357. *See* Ali Khan, *A Theory of Universal Democracy*, 16 WIS. INT'L L.J. 61, 64 (1997).

358. Holy Trinity Church v. United States, 143 U.S. 457, 457–58 (1892).

359. *Id.* at 458, 472.

essential to the well-being of the community.[360]

As it began to elaborate its judgment, the Court took readers through a religious history of the United States. Beginning with Christopher Columbus's discovery of the continent,[361] tracing the development of colonies and the religious orientation they had given themselves,[362] through the announcement of the Declaration of Independence,[363] followed by the religious calling in state constitutions,[364] the United States Constitution,[365] and in a previous judgment of the Supreme Court,[366] the Court concluded that, in its view, one thread ran through the entirety of the American experience: religion. There was "no dissonance," wrote the Court, in the historical facts of the United States: "There is a universal language pervading them all, having one meaning. They affirm and reaffirm that this is a religious nation."[367] But the Court went a step even further than that, calling America a Christian nation. Summarizing its observation that America is a religious nation in words as clear as could be, the Court declared that "[t]hese, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation."[368] America is not only a religious nation, it is a Christian one, according to *Holy Trinity Church.*

Two decades later, the Court once again elevated Church over State, this time in a dispute concerning the appropriation of public funds for Catholic-denomination instruction for Native Americans.[369] The case arose against the backdrop of contested congressional appropriations to pay a treaty debt owed by the United States to the Sioux Indian population in connection with lands acquired in 1868.[370] In exchange for the land and territorial rights, the United States promised to provide a schoolhouse and a teacher for every thirty elementary school students for a period of twenty years.[371] Further exchanges of land and territorial rights were made in 1877, and in 1889, Congress extended its treaty obligations for another twenty-year period, pledging to make an annual appropriation to fulfill the terms of its financial support for the Sioux Indians. When Congress forbade, in its Indian appropriation acts for the years 1895–1898, the use of public money for sectarian education, uncertainty enveloped the status of the Bureau of Catholic Indian Missions's contract with the Secretary of the Interior to provide sectarian education

360. *Id.* at 468.
361. *Id.* at 465–66.
362. *Id.* at 466–67.
363. *Id.* at 467.
364. *Id.* at 468–70.
365. *Id.* at 470.
366. *Id.* at 471.
367. *Id.* at 470.
368. *Id.* at 471.
369. Quick Bear v. Leupp, 210 U.S. 50, 52–53 (1908).
370. *Id.* at 80–81.
371. *Id.* at 80.

to children of the Sioux Indians.[372]

May Congress appropriate public dollars to pay for Catholic denominational instruction? In this case, the answer was yes. But there were three important qualifications: first, the appropriation was made for the benefit of Sioux Indian children; second, the funds were owed on a debt; and third, the Sioux Indians had specifically requested Catholic denominational instruction. According to the Court, "we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof."[373] On the Court's reasoning, although the United States is bound by the Establishment Clause's prohibition against establishing a religion—in this case, against awarding funding to schools exclusively for their denominational character—that barrier collapses when the United States spends public dollars on behalf of a third party in the context of a prior obligation, namely a treaty.

The Court's judgment carries with it two important implications for the neutrality of the United States on matters of religion. The first implication concerns the meaning of neutrality. If the Secretary of the Interior can lawfully enter into a contract with a religious institution to provide elementary education to Sioux Indian children, does there remain a principled basis upon which to distinguish the Secretary of Education's choice to contract with a religious institution to provide elementary education to any population? The answer is very likely no, because otherwise the concept of state neutrality would be transformed from its current rendering of strict neutrality into something more closely resembling benevolent neutrality. Under strict neutrality, religious institutions must fulfill secular criteria and champion a nonreligious purpose in order to permissibly benefit from governmental action or inaction.[374] In contrast, benevolent neutrality holds that government action or inaction may permissibly benefit religion provided all religions are benefited in an equal and equitable fashion with no resulting preference given to one religion over another.[375] The Secretary's choice to fund Catholic denominational instruction would not only violate the rule of strict neutrality, but it would necessarily precipitate the funding of other religious instruction if government wanted to remain neutral, at least in the benevolent sense.

We can also perceive an important implication for the relative standing of Church and State. One could plausibly interpret this case as situating Church and State as institutional equals. Much like the matter of provid-

372. *Id.* at 54, 77.

373. *Id.* at 81–82.

374. *See* Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961).

375. *See* DEREK DAVIS, ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH/STATE RELATIONS 48–49 (1991).

ing medical care in *Bradfield v. Roberts*,[376] where the Court sanctioned congressional disbursements to a hospital operated under the auspices of the Roman Catholic Church, providing educational instruction is likewise a secular activity. Both government and religion can perform the task of instructing children. Granted, the content of the instruction can of course change the complexion of the instruction from secular to sectarian, but the act of classroom teaching itself is a neutral exercise.

Nevertheless, *Quick Bear* is best interpreted as an instance of Church over State. The Court compelled the United States to answer first to its commitment to fund Catholic denominational instruction to the Sioux Indians and only second to the Constitution, which would proscribe public funding for Catholic denominational instruction where, as in the case, that instruction was chosen specifically for its Catholic character.[377] By requiring the Secretary to act in a way that undermined the American commitment to the nonestablishment norm, the Court signaled that religion belongs in a category separate and apart from other nonpublic institutions.[378] This ruling illustrates the Court's view that religion may sometimes demand special dispensations that compromise or even displace fundamental American constitutional commitments to neutrality in the interest of larger objectives, in this case the fulfillment of an outstanding national obligation.

E. Church or State?

The battery of tests through which the Court has run the Establishment Clause should have by now resulted in some measure of clarity on the border separating Church from State. But today the border appears as blurry as ever before. With the Court ruling in ways that sometimes locate Church and State as institutional equals, other times in ways that relegate Church under State, or still other times in ways that elevate Church over State, the deep incoherence of the Establishment Clause only risks getting deeper. Therein lies the source of the great confusion that has enveloped the Court's establishment case law: the Court has failed to consistently deploy either a doctrinal anchor or an organizing framework to reliably resolve disputes pitting religion versus government.

We have observed for ourselves why scholars so vigorously decry the Court's Establishment Clause case law. When the Court rules that a state cannot reimburse,[379] or give a tax deduction,[380] to parents for their children's attendance at religious schools, yet a state can permit parents to deduct from their income expenditures incurred for their children's textbook and transportation expenses to religious schools,[381] it is right to

376. Bradfield v. Roberts, 175 U.S. 291 (1899).
377. *Quick Bear*, 210 U.S. at 81–82.
378. *See* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principles*, 27 Ariz. St. L.J. 1085, 1089 (1995).
379. Sloan v. Lemon, 413 U.S. 825, 834 (1973).
380. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 790 (1973).
381. Mueller v. Allen, 463 U.S. 388, 390–92 (1983).

question the basis for the Court's distinctions. It is also reasonable to ask why the Court has both approved[382] and disapproved[383] programs for public school students to receive religious instruction from private teachers. Observers should likewise wonder how it is possible for the Court both to permit[384] and forbid[385] the use of federal moneys to fund remedial classes taught by public school teachers and social workers in parochial schools.

The apparent inconsistencies do not end there. It is unlawful, according to the Court, to grant a sales tax exemption to religious periodicals,[386] but it is not to afford a property tax exemption to religious properties.[387] It is also sometimes unlawful for a state to give educational materials to religious schools[388] but it is sometimes constitutionally permissible for a state to do the same thing.[389] A state may also, consistent with the Constitution, require public schools to loan educational materials to religious schools;[390] but sometimes a state cannot do that because doing so would be unconstitutional.[391] These are only some of the many divergences one can perceive in the Court's Establishment Clause jurisprudence. And we may trace their origin to the Court's three competing approaches to religion and government: Church and State as institutional equals, Church under State, and Church over State.

Each of the three competing theoretical approaches can claim normative virtue in its ordering of the secular and the sacred, and each could plausibly stand on its own as the operational blueprint for applying the separation of powers to the separation of Church and State. But when they are deployed concurrently, these three incongruent theories of Church and State visit devastating consequences on the prospect of elaborating a coherent line of establishment case law. Constitutional clarity suffers, perhaps irremediably, as do judicial predictability and confidence in the administration of the law. If we wish to bring clarity to the Establishment Clause, the solution is two-fold. First, we must recognize that establishment case law reflects the analytical structure of the separation of powers. This Article begins the important work of demonstrating the jurisprudential continuity between the separation of Church and State and the separation of powers. Second, the Court, armed with the realization that separation theory informs its establishment case law, must help us reach clarity and consensus about whether God and man occupy com-

382. Zorach v. Clauson, 343 U.S. 306, 307 (1952).
383. Illinois *ex. rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 205–06 (1948).
384. Agostini v. Felton, 521 U.S. 203, 208–09 (1997).
385. Aguilar v. Felton, 473 U.S. 402, 404–05 (1985), *overruled by* Agostini, 521 U.S. at 208–09.
386. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 25 (1989) (plurality opinion).
387. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 666–67 (1970).
388. Wolman v. Walter, 433 U.S. 229 (1977).
389. Mitchell v. Helms, 530 U.S. 793, 801, 808 (2000).
390. Bd. of Educ. v. Allen, 392 U.S. 236, 238 (1968).
391. Meek v. Pittenger, 421 U.S. 349, 353 (1975), *overruled by Mitchell*, 530 U.S. at 808.

peting or complementary spheres of influence. The question remains, though, how precisely should the Court pursue this worthy objective?

The Court need not, nor should it, take upon itself the task of articulating the grand organizing logic of American constitutional government as it relates to religion and the public space. That may not be well received in some corners where the Court is already seen as overstepping its constitutional limits.[392] The Court can instead achieve the same result by choosing, in the course of adjudicating a future establishment case and in keeping with its function as the ultimate arbiter of constitutional meaning, to map onto the separation of Church and State either a vertical or horizontal theory of separated powers. The key is then to remain consistent in applying that theory to disputes arising under the Establishment Clause. In the course of issuing judgments that adhere reliably to a theory of either vertically or horizontally separated powers, the Court would make clear whether Church and State are institutional equals under American constitutional law, or whether the Church and State relationship is superior–subordinate, subordinate–superior, or some other variation on one of those forms.

From a doctrinal perspective, it is less important which of the three approaches the Court adopts than that it adopts a single Establishment Clause doctrine and remains committed to it going forward. The result will be positive for the Court's jurisprudence, for it will set the Court on the course to finally bringing constitutional clarity to the Establishment Clause. Only good can follow from constitutional clarity: predictability in the Supreme Court's interpretation of the Establishment Clause and, just as importantly, predictability in the many more cases that begin and end in the lower federal courts at the trial and appellate level. A coherent interpretation of the Establishment Clause will moreover have positive consequences in the design and administration of public policy. Knowing how the Court interprets the Establishment Clause—and specifically how it understands the relationship between religion and government—will help guide political actors in crafting programs that are more likely to find favor if challenged in a lawsuit.

But from a sociopolitical perspective, the choice of Church or State matters immensely. Would American liberal democracy tolerate a regime where Church stood over State? The answer is presumably, and rightly, no. After all, if the basis of the new American republic was to free the colonies and their citizens from the grip of imperial overlords who had imposed religious mandates upon them, then it is hard to conceive of such a state affairs once again governing this land. That said, there are liberal democratic ways in which one could envision constructing a hierarchical relationship between religion and government in which

392. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONAILSM AND JUDICIAL REVIEW 227–28, 246–48 (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 194 (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1358 (2006).

Church rises above State. Indeed, as long as an establishmentarian nation guarantees in theory and preserves in practice the full range of religious freedom for nonadherents, the concept of Church over State could conform to the standards of liberal democracy. Several liberal democratic Western states have adopted this model, most notably including the United Kingdom. Alternatively, perhaps the choice of Church under State is just as problematic. There may be instances where government should see religion as its equal, albeit an equal that operates in a separate sphere, in order to grant religion and its adherents the respect and independence they merit. All told, the choice of Church or State—Church and State, Church under State, Church over State—is not an easy one to make. But it is a necessary choice that faces both the Supreme Court and its critics in their search for constitutional clarity.

V. CONCLUSION

Perhaps the quest for constitutional clarity in establishment case law is an elusive expedition. Can the Supreme Court really ever achieve the jurisprudential coherence that scholars have called for? And even if the Court could in fact finally develop a reliable, predictable, and consistent framework to resolve establishment disputes, would that necessarily be a desirable outcome? These two questions point to separate, though admittedly interconnected, inquiries into what is at stake in the future of the Establishment Clause. For now, it appears that the Court's establishment case law is doomed to disrepair, given the decades of inconsistent interpretation of the proper boundary separating Church from State. It is quite literally impossible to discern a single principle or theory that makes sense of the entire corpus of the Court's judgments under the Establishment Clause.

As I have sought to demonstrate, the reason for the Court's inconsistent application of the Establishment Clause over the course of two centuries is evident in the Court's establishment rulings themselves. And that reason is chiefly that the Court has vacillated among different conceptions of the relationship between religion and government. In some instances, the Court has cast Church and State as institutional equals. In others, it has elevated Church above State. And on still other occasions, the Court has relegated Church below State. In the face of such variability in the Court's decision rules, no constitutional principle stands a chance of enjoying the consistent application that derives only from equally consistent interpretation.

Nevertheless, choosing how to order religion and government may not be a choice worth making. Whatever the direction in which the Court might elect to nudge establishment jurisprudence, there is bound to be dissatisfaction and perhaps even anger from the losing constituencies. The public and political reaction would be particularly acute were the Court to concretize one of the three archetypes of constitutional hierarchy between Church and State. Perhaps that explains why the Court has

recently taken a page from Alexander Bickel's passive virtues,[393] invoking the constitutional barrier of standing to avoid deciding constitutional controversies arising under the Establishment Clause.[394] We cannot yet know for certain; the sample size is much too small to conclude that the Court's turn to standing represents a new institutional approach to governing the enduring tensions and collaborations between religion and government.

That said, this Article provides the Court with a roadmap for finally bringing coherence to the Establishment Clause. The answer is to apply separation of powers theory to the separation of Church and State. With the analysis undertaken above, the Court is now in a position to perceive that it has unknowingly deployed its several Establishment Clause tests to the same end: to police the border separating Church and State in an effort to vindicate the very same democratic values we seek to achieve by separating governmental powers—personal liberty, institutional equality, and departmental independence. But recognizing the pattern does not solve the problem, for the Court must subsequently determine whether the horizontal or vertical separation of powers serves best to govern the interrelationships between religion and government. If constitutional clarity is an objective the Court believes worthy of achieving, then the separation of powers may double as a useful analytical framework upon which the Court may rely to make real the prospect of coherence in its Establishment Clause case law. For only with a consistent application of either vertically or horizontally separated powers may we at last find peace in the constitutional law of religion and government. But achieving peace in the constitutional politics of religion and government may well be another matter altogether.

393. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111–98 (2d ed. 1986) (1962).

394. *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1440 (2011) (dismissing, for lack a standing, challenge to tax credit program); Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 592–93 (2007) (concluding that petitioners lack standing to challenge expenditures in relation to the White House Office of Faith-Based and Community Initiatives); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 4–5 (2004) (rejecting, for lack of standing, a challenge to the daily recitation of the Pledge of Allegiance).