



## **THE CONSTITUTIONAL STRUCTURE OF DISESTABLISHMENT**

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[W]e have no government armed with power capable of contending with human passions unbridled by morality or religion. . . . Our Constitution is made only for a moral and religious people. It is wholly inadequate to the government of any other.

—John Adams<sup>1</sup>

The only tyrant I accept in this world is the still, small voice within.

—Mohandas Gandhi<sup>2</sup>

### **Introduction**

When President John Adams observed that our Constitution is ill equipped to govern the unbridled passions of an immoral people, he identified one of the fundamental problems

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<sup>1</sup> Letter from John Adams to the Massachusetts Militia (Oct. 11, 1798), *reprinted in* 9 WORKS OF JOHN ADAMS 229 (Charles F. Adams ed., AMS Press 1971).

<sup>2</sup> MOHANDAS K. GANDHI, THE WORDS OF GANDHI 10 (Richard Attenborough ed., 2001) (internal quotations omitted).

confronting any democratic state: popular government depends upon popular virtue. That is, our democratic institutions rely on the service and participation of an informed citizenry committed to at least some shared vision of our national ideals and public goals. And yet, as a democracy, prominent among those national ideals is the belief that we are free to imagine and pursue personal conceptions of virtue without the coercive influence of a paternalistic state. So, while democracy depends upon a moral citizenry, the democratic state cannot coerce the public virtue necessary to its survival. Indeed, once coerced by a state, a virtuous act is no longer virtuous—it is simple obedience—and the state has robbed the citizen of the profound human experience of choosing virtue for its own sake. Thus, the problem of public virtue produces one of the central paradoxes of democratic government.

It is this paradox that Adams, among others, recognized at the constitutional founding, and it remains at the core of virtually every modern Establishment Clause controversy. Over the last two centuries, many gifted jurists and scholars have explored various aspects of the same basic problem. Unfortunately, some commentators seem to suggest that any approach other than their own amounts to brazen activism.<sup>3</sup> This paper is yet another effort to revisit the paradox of public virtue, but it attempts to avoid the kind of divisive intellectual partisanship that characterizes some commentary and proceeds instead within the inclusive constitutional philosophy of practice and tradition that Professor Phillip Bobbitt has identified in two excellent books on the subject of judicial review.<sup>4</sup>

Bobbitt's books are among the most insightful contributions to constitutional theory in the last quarter century.<sup>5</sup> By reframing

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<sup>3</sup> See, e.g., *McCreary County v. ACLU*, 545 U.S. 844 (2005) (Scalia, J., dissenting) (advocating a purely historical or "originalist" approach to the problem grounded in an examination of the founding generation's official acts and proclamations).

<sup>4</sup>See generally PHILLIP BOBBITT, *CONSTITUTIONAL FATE* (1982) [hereinafter *FATE*]; PHILLIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991) [hereinafter *INTERPRETATION*] (advancing a practice-based, "modal" theory of constitutional law).

<sup>5</sup> I am lonely, but not alone, in holding Bobbitt's work in such high regard. See, e.g., Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 *TEX. L. REV.* 1837, 1837

traditional foundational questions in terms of constitutional practice, Bobbitt's approach to the Constitution recalls Wittgenstein's later approach to words and meaning.<sup>6</sup> Starting from the premise that "[l]aw is something we do, not something we have as a consequence of what we do,"<sup>7</sup> Bobbitt has argued that a proposition about constitutional meaning is legitimate only when grounded in one or more accepted modalities of constitutional argument. He has described six such modalities:

[1] the *historical* (relying on the intentions of the framers and ratifiers of the Constitution); [2] *textual* (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man on the street"); [3] *structural* (inferring rules from the relationships that the Constitution mandates from the structures it sets up); [4] *doctrinal* (applying rules generated by precedent); [5] *ethical* (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and [6] *prudential* (seeking to balance the costs and benefits of a particular rule).<sup>8</sup>

Bobbitt's insight invites us to step back and examine how we use the Constitution in the practice of law, and to thus abandon the Sisyphean struggle to define the conditions that make a constitutional proposition true or false.<sup>9</sup> This shift enables us to

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(1994) ("Constitutional Interpretation is the best book on constitutional law in years.").

<sup>6</sup> See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 3-7, 20-26 (G.E.M. Anscombe trans., Basil Blackwell & Mott 2d ed. 2000) (1953) (presenting a theory of meaning based on practice and usage as well as traditional reference).

<sup>7</sup> INTERPRETATION, *supra* note 4, at 24.

<sup>8</sup> *Id.* at 12-13 (emphasis added).

<sup>9</sup> *Id.* at xiv. Take, for example, the following proposition: "The Constitution forbids any display of the Ten Commandments in the buildings of state government." There are many ways we might try to demonstrate or deny this proposition's truth, including: reference to some set of "neutral-principles"; a search of James Madison's personal correspondence; or an effort to divine the understanding of some "interpretive community." Bobbitt's insight allows us to stop debating which of these external referents establishes the proper conditions by which to justify or disprove the proposition and to instead focus on the ways that we *use* the Constitution, which makes all of these methods legitimate. See *id.*

escape the contradictions and regressions that may persist when we view constitutional meaning as discoverable externally in either an objective (positivist) or subjective (realist) form.<sup>10</sup>

Bobbitt initially struggled, however, to present a principled account of constitutional decision making in close and difficult cases—such as those involving the Establishment paradox—where different modalities may produce divergent outcomes.<sup>11</sup> These cases may tempt us to rank the modalities, or to designate one modality as superior to all others, but Bobbitt recognized that such solutions are simply a retreat to the old search for external justification.<sup>12</sup> Instead, he concluded that we must accept that competing modalities may produce contradictory, yet equally legitimate, constitutional meanings.<sup>13</sup> Indeed, this competition is necessary: it creates the conceptual structure, the dialectical space, within which the judicial conscience operates to reach constitutional conclusions.<sup>14</sup> Ultimately, Bobbitt was comforted to find individual conscience at the core of constitutional interpretation, and this paper suggests that a similar faith in the power of the “still, small voice within” lies at the heart of the entire republican democratic experiment.

To that end, the discussion that follows is devoted entirely to one of the most interesting and underutilized modalities Bobbitt describes—structural argument—in the hope that it might offer a fresh perspective on the problem of public virtue and the Establishment Clause. This paper attempts to reveal the constitutional structures the framers erected to confront the

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<sup>10</sup> See Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 288 (1993) (book review) (making the same point with a comparison of “realist” and “anti-realist” perspectives)

<sup>11</sup> INTERPRETATION, *supra* note 4, at 9.

<sup>12</sup> *Id.* at 159-60.

<sup>13</sup> *Id.* at 161-62.

<sup>14</sup> *Id.* at 163-64. Some readers will no doubt object that Bobbitt’s judicial “conscience” is simply another external source of constitutional meaning. For Bobbitt, however, “conscience” is an integral part of the act of *decision*, which is itself a part of the practice—not the justification—of constitutional law. Such an act of decision does not define the only legitimate constitutional meaning, rather it becomes a part of the way we develop and use the Constitution in our democracy. *Id.*

paradox of public virtue, and to recast two modern church-state controversies in light of those structures. The first section describes and summarizes the structural approach to constitutional interpretation; the second section undertakes a structural analysis of the Establishment Clause; and the final section applies the structural model of disestablishment to two modern constitutional problems.

### **The Structural Method in Constitutional Law**

In his Edward Douglass White Lectures, delivered at the Louisiana State University Law School in the spring of 1968, Professor Charles L. Black, Jr. offered his thoughts on the value of examining certain constitutional questions in terms of the structures and relationships the document establishes among the various sources of government.<sup>15</sup> Black later published these lectures under the title *Structure and Relationship in Constitutional Law*.<sup>16</sup> It is primarily to this work that Bobbitt referred in outlining the structural mode of constitutional argument,<sup>17</sup> and Black's ideas, as summarized below, are the basic inspiration for this paper.

Black began with the observation that the doctrinal tradition of specific "textual interpretation" so dominates American legal culture that a much-litigated statute or constitutional provision often becomes "little more than a sort of heading for the cases decided under it."<sup>18</sup> Black then suggested that his lectures would move beyond this "method of purported explication or exegesis of [a] particular textual passage" to reinvigorate the oft-neglected "method of inference from the structures and relationships created by the constitution in all its parts or in some principal part."<sup>19</sup> He concluded with an able demonstration of structural analysis at work in several constitutional decisions, and it is worth recounting a few of those examples here.

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<sup>15</sup> CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 48-49 (Ox Bow Press 1985) (1969).

<sup>16</sup> *Id.*

<sup>17</sup> FATE, *supra* note 4, at 76.

<sup>18</sup> BLACK, *supra* note 15, at 6.

Certainly the most famous opinion to employ the structural method is *McCulloch v. Maryland*, in which the Supreme Court confronted the question of whether the Maryland legislature could levy a tax on the Baltimore branch of the national bank.<sup>20</sup> Writing for the Court, Chief Justice John Marshall addressed himself to two constitutional questions: (1) whether Congress could charter a national bank; and (2) if so, whether Maryland could lawfully tax the federal institution.<sup>21</sup> As Black observed, our learned preference for specific textual interpretation runs so deep that most readers probably recall Marshall's resolution of the first question as grounded solidly in the so-called "necessary and proper" clause, but a careful reading reveals that the opinion discusses that clause principally to counter Maryland's contention that it acts to *limit* Congressional power.<sup>22</sup> Black notes that Marshall

never really commits himself to the proposition that the necessary and proper clause enlarges governmental power, but only to the propositions, first, that it does not restrict it, and, secondly, that it *may* have been inserted to remove doubt on questions of power which the rest of Article I, Section 8, without the necessary and proper clause, had not, in Marshall's view, really left doubtful.<sup>23</sup>

In any case, it is in Marshall's response to the second question that the structural method takes center stage.

Many undoubtedly remember this section of *McCulloch* for Marshall's famous declaration that "the power to tax involves the power to destroy."<sup>24</sup> Professor Bobbitt has observed that this absolutist position is quite unsatisfying from the traditional doctrinal-textual perspective, even prompting a sharp riposte from the great doctrinalist Justice Oliver Wendell Holmes: "Not while

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<sup>19</sup> *Id.* at 7.

<sup>20</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 318 (1819).

<sup>21</sup> *Id.* at 401, 425.

<sup>22</sup> BLACK, *supra* note 15, at 13-14.

<sup>23</sup> *Id.*; accord *McCulloch*, 17 U.S. at 411-420.

<sup>24</sup> *McCulloch*, 17 U.S. at 431.

this Court sits.”<sup>25</sup> Holmes would have preferred some doctrinal method—an interpretive “balancing” test—to help identify the point at which a tax becomes destructive, but Marshall instead approached the problem from a structural perspective and focused on the relationship between the state and federal governments.<sup>26</sup> Because the states ceded some sovereignty to the Union—and are in fact represented in Congress—Marshall reasoned that the federal government has constitutional authority to impose taxes upon them.<sup>27</sup> By contrast, however, the federal government has no representation in the state legislatures and has never ceded sovereignty over its institutions to the states. Thus, the states lack authority to levy *any* tax on valid manifestations of the national body. In Marshall’s words: “The right never existed, and the question whether it has been surrendered, cannot arise.”<sup>28</sup>

Black conceded that Marshall relied, at least in part, on the text of the Supremacy Clause, but he observed that some textual interpretation is necessary in any structural argument. The principal difference, Black suggested, between textual and structural analysis is that the former method purports to interpret or define a particular clause or passage of text, while the latter proceeds “on the basis of reasoning from the total structure which the text has created.”<sup>29</sup> We might find such structure made explicit in particular constitutional language, or we may infer certain structures and relationships from the implicit theoretical commitments that gave life to the Constitution and made republican democracy possible. Both approaches are evident in *McCulloch*.

To further illustrate the potential power of the structural method, Black went on to challenge the ubiquitous use, and abuse,

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<sup>25</sup> FATE, *supra* note 4, at 78.

<sup>26</sup> *Id.*

<sup>27</sup> *McCulloch*, 17 U.S. at 429-30.

<sup>28</sup> *Id.* at 430.

<sup>29</sup> BLACK, *supra* note 15, at 15.

of the Fourteenth Amendment as guardian of individual rights.<sup>30</sup> He observed waggishly:

There are fifty-two words which we come close to using for everything. . . . [V]irtually the whole work of shielding the individual from the incidence of state power, in the name of the national standards of freedom, equality, and justice, has been done by the [Fourteenth Amendment's] due process and equal protection clauses.<sup>31</sup>

He then set about defending from state encroachment several of the individual freedoms enshrined in the Bill of Rights—without resort to the Civil War amendments.<sup>32</sup>

Black first considered whether the First Amendment's free speech protection might extend to the state governments had the Fourteenth Amendment never come into being.<sup>33</sup> He began by examining *Gitlow v. New York*, the 1925 decision in which the Court concluded that the freedom of speech is among those liberties contemplated in the Fourteenth Amendment's due process clause.<sup>34</sup> The problem with *Gitlow*, from Black's perspective, is that, while the decision does protect the freedom of speech from state infringement, it does so only inasmuch as a state acts to curtail speech "without due process of law."<sup>35</sup> Thus, the textual reliance on the Fourteenth Amendment limits the First Amendment's application to "cases of 'arbitrary and unreasonable exercise of the police power of the state.'" In fact, the Court upheld both the New York law in question and Benjamin Gitlow's conviction.<sup>36</sup> Even

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<sup>30</sup> *Id.* at 33.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 33-66. Black, of course, concedes that the Court held early on—in *Barron v. Baltimore*, 32 U.S. 243 (1833)—that the Bill of Rights does not apply to the state governments. He goes on, however, to reexamine that proposition along structural lines. *Id.* at 35.

<sup>33</sup> *Id.* at 35-49.

<sup>34</sup> *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>35</sup> BLACK, *supra* note 15, at 36-37 (quotations omitted).

<sup>36</sup> *Id.* at 37 (quoting *Gitlow*, 268 U.S. at 670). Black acknowledges that this standard has evolved to become more protective of individual rights, but only at the doctrinal

more troublesome for Black, the *Gitlow* rationale appeared to work in reverse in several later cases, so that the Court hinted at something like due process analysis when examining a federal statute—where the Fourteenth Amendment should have had no bearing at all.<sup>37</sup>

For these reasons, Black urged the Court to rethink its approach to free speech along structural lines, and he suggested that “the nature of the federal government, and of the states’ relation to it, compels the inference of some federal constitutional protection for free speech.”<sup>38</sup> In support of this conclusion, Black pointed to our First Amendment right to petition the government for redress of grievances.<sup>39</sup> Certainly, he argued, no state could pass a law aimed at preventing its citizens from signing or submitting such a petition, nor could a state regulate such petitions based on their content.<sup>40</sup> But it is not the text of the First Amendment that so limits the states. Indeed, the Amendment, by its plain language, does not even address the situation.<sup>41</sup> Rather, Black suggested that such a state law was unconstitutional because it “would constitute interference with a transaction which is part of the working of the federal government.”<sup>42</sup> Thus, Black recognized that we are in fact citizens of two governments—state and federal—and, given federal supremacy, the states cannot infringe upon Congress’s inherent relationship with its constituency, even without resort to the First Amendment.<sup>43</sup>

Black then pushed further to inquire whether the states might lawfully interfere in the stages of speech and assembly

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cost of creating a distinct species of due process analysis applicable in speech cases. *See id.* at 46 (discussing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)); *id.* at 49.

<sup>37</sup> *Id.* at 39. (arguing that the Court’s citation and discussion of *Gitlow* in *Dennis v. United States*, 341 U.S. 494, 505-06 (1951), suggests the “dilution of the clear and present danger test [to something] like a muddled and disguised form of ‘due process’ reasoning”).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 40.

<sup>40</sup> *Id.*

<sup>41</sup> U.S. CONST. amend. I.

<sup>42</sup> BLACK, *supra* note 15, at 40.

<sup>43</sup> *Id.* at 40-41.

leading to the creation of such a petition.<sup>44</sup> Because the meetings and discussions from which a petition emerges are as much a part of the function of national government as is the petition itself, he concluded that such dialogue and “its fruits in opinion” must likewise remain free from state infringement.<sup>45</sup> Presumably, we must define the speech that bears such fruit expansively enough to include the myriad forms of expression—political, journalistic, scientific, scholarly, artistic, and so on—that actually shape and inform public opinion in policy matters. Thus, the structural protection of free speech is potentially quite broad indeed, and it undoubtedly provides greater protection than a rigid textual jurisprudence forced to pass “through the narrow verbal funnel of due process of law.”<sup>46</sup>

In his final lecture, Black examined several other enumerated constitutional rights through the structural lens, including a cursory examination of our right to free religious exercise. Again wary of the “incorporation” doctrine binding this protection—as it regards the state governments—to due process analysis, Black suggested that we could just as easily infer religious freedom from the structural relationship between America’s democratic institutions and its “citizens.”<sup>47</sup> Although Black did not elaborate on that relationship, he did argue that citizenship must confer the right to “live under a scheme of ordered liberty”<sup>48</sup>—which, for Americans anyway, must ensure the freedom of conscience. More significantly, he presented the seed of an idea that the rest of this paper will explore in some detail: that individual moral freedom and a citizen’s right to engage in the practice of virtue are among the essential structural commitments upon which our republican democracy depends.<sup>49</sup> A number of inferences and

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<sup>44</sup> *Id.* at 41.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 46.

<sup>47</sup> *Id.* at 61-62 (citing Mark De Wolfe Howe, *Religion and the Free Society: The Constitutional Question*, in *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 780 (Edward L. Barrett, Jr. et al. eds., 1963)).

<sup>48</sup> *Id.* at 62 (quotations omitted).

<sup>49</sup> *See id.*

advantages flow from this particular structural perspective, all of which the next section will explore in more detail.

Before turning to that task, however, it is important to summarize the structural method that Black described and to comment on the advantages this approach may have over more popular methods—at least in particular kinds of cases. Briefly stated, to reason structurally is to take a broad, holistic approach to constitutional questions—to consider not just a particular textual provision, but to account also for the theoretical commitments and relationships that make that text meaningful. The structural approach relies on both the text and the intellectual and political history of our constitutional founding, but it does not evaluate the Constitution solely in terms of a particular historical practice or temporal linguistic definition. Rather, the structural method examines the relationships between constitutional institutions and actors, and draws principled inferences from the theoretical commitments those relationships imply.<sup>50</sup> While Black's examples primarily concern the relationship between state and federal governments, the structural commitments and relationships among community and local organizations and institutions, and among individual citizens—the sovereign and atomistic building blocks of republican democracy—are important as well. Black's approach simply asks us to think carefully about the constitutional relationships between these entities.

As Black's examples demonstrate, the structural method has particular value and power in those cases where the constitutional text is (perhaps deliberately) vague, and a doctrinal balancing approach is simply unsatisfying. In such cases, an approach that seeks the basic elements and commitments of our constitutional structure may reveal a simple and straightforward resolution. Of course, lawyers and judges will no doubt differ over which structural inferences are proper, but, in Black's words, "at least they would be differing on exactly the right thing, and that is no small gain in law."<sup>51</sup> While some cases do call for specific textual

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<sup>50</sup> BLACK, *supra* note 15, at 6-7.

<sup>51</sup> *Id.* at 48-49.

interpretation or multi-pronged doctrinal tests, others require us to understand and enforce elemental constitutional principles—and in such cases the balancing approach may simply perpetuate a tortured Ptolemaic conception of a constitutional puzzle in need of a studied Copernican insight.

It is for these reasons that the structural method has the potential to clarify and enrich our understanding of the Establishment Clause and the liberty of conscience. The current doctrinal balancing approach to the issue—which includes the much-maligned *Lemon* test<sup>52</sup>—is so malleable that it will bend to almost any result,<sup>53</sup> and purely historical approaches can devolve into descriptions of sectarian battles and ideological prejudices that miss the constitutional forest for the political trees.<sup>54</sup> At the same time, modern secularist perspectives too easily discount (1) the profound importance of religion, particularly Protestant Christianity, in the development of American democratic political philosophy; and (2) the perceived ascendance of “legal secularism,” which has fueled popular fears that the ship of state is dangerously adrift on relativist seas.<sup>55</sup> By refocusing our inquiry on the most fundamental of democratic freedoms, the right to engage in the individual practices and processes of virtue, the structural method can help reveal the proper relationship between political and social institutions in a nation without an established church.

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<sup>52</sup> The three-part *Lemon* test asks whether state aid to religion: 1) has a secular purpose; 2) has the primary effect of advancing or inhibiting religion; and 3) fosters an excessive entanglement between church and state. *Lemon v. Kurtzman*, 403 U.S. 602, 606-07 (1971).

<sup>53</sup> See *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary County v. ACLU*, 545 U.S. 844 (2005).

<sup>54</sup> See generally, PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002) (contending that prejudice and political ambition drove the separation of church and state); NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005) (explaining that latent “nonsectarianism” is the result of a historical commitment to a generic Protestant worldview).

<sup>55</sup> See, e.g., RONALD B. FLOWERS, *THAT GODLESS COURT? SUPREME COURT DECISIONS ON CHURCH-STATE RELATIONSHIPS* 126-129 (1994) (describing the Christian right's disillusionment with modern disestablishment); FELDMAN, *supra* note 54, at 5-16 (describing similar sentiments reflected in the 2004 presidential elections).

### **The Structure of Disestablishment**

Among its other unavoidable shortcomings, this paper is confined to a particular and limited focus on the Establishment Clause. Although the Free Exercise Clause must ultimately inform any discussion of disestablishment, this paper is an effort to treat the two clauses separately, even if that is only the first step in the more complex task of understanding the complete structure of American religious freedom. This paper, then, does not confront many of the difficult issues that free exercise presents, e.g., those problems that arise from the relationship between belief, expression, and conduct, and the state's necessary role in regulating that conduct. While these issues are profoundly important, the necessary first step in understanding religious freedom is to focus on the state's role in shaping thoughts and beliefs. It is to these issues that the Establishment Clause speaks.

It is important to say a few words at the outset about the propriety of taking a structural approach to the interpretation of a fundamental constitutional right, as it appears that this paper is among the first to make such an attempt. As noted above, Charles Black devoted much of his discussion of the structural method to issues of federalism, which he certainly ranked among the most important architectures of American constitutionalism.<sup>56</sup> In more recent years, scholars have often treated separation of powers issues as structural questions<sup>57</sup> to such a degree that some readers may associate structuralism with the interaction of our government's three branches. These examples of structuralism examine the constitutional relationship between different branches or bodies of state authority. This paper argues that the structural approach is equally valid when analyzing the interplay of other constitutional actors: here, political and social institutions.

The unifying thread in the structural method seems to be an examination of the relationship between different sovereigns. With this in mind, it is clear that the structural method is appropriate

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<sup>56</sup> See BLACK, *supra* note 15, at 6-7.

<sup>57</sup> See, e.g., Robert J. Delahunty, *Structuralism and the War Powers Act: The Army, Navy and Militia Clauses*, 19 GA. ST. U. L. REV. 1021 (2003).

when analyzing the relationship between political institutions and the people—the ultimate constitutional sovereign—or between the state and various churches, which, thanks to the religion clauses, enjoy a peculiar kind of sovereignty in our democratic system. The argument that follows, then, examines the separate but symbiotic constitutional relationship that the Establishment Clause creates between church and state, and attempts to illuminate the founders' structural solution to the paradox of public virtue.

### Liberty of Conscience

Liberty of conscience—the right to form personal ideas and convictions about the practices of worship and the virtuous life—is among the most fundamental of American freedoms.<sup>58</sup> Our constitutional democracy is committed to the idea that individual citizens can and will fulfill personal moral duties, and to the idea that we can only truly participate in the highest of human endeavors, virtuous living, when we are totally free to reject that calling and abandon virtue altogether. A virtuous choice is only so if freely made; otherwise it is simply obedience.<sup>59</sup> While the historical evidence supports this view of the framers' philosophy,<sup>60</sup> this paper contends that our collective commitment to the freedom of conscience would be apparent from our constitutional structure even if no historical record existed. What is more, this basic constitutional commitment helps reveal the larger structure of American disestablishment, which can, in turn, inform our approach to contemporary church-state controversies.

Surely the very idea of republican democracy presupposes an Enlightened optimism about our innate ability to apprehend

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<sup>58</sup> U.S. CONST. amend. I.

<sup>59</sup> Ian Bartrum, *Paradise Lost: Good News Club, Charitable Choice, and the State of Religious Freedom*, 27 VT. L. REV. 177, 182 (2001).

<sup>60</sup> See, e.g., James Madison, *Virginia Declaration of Rights*, reprinted in 5 THE FOUNDERS' CONSTITUTION 70 (Philip B. Kurland & Ralph Lerner, eds. 1987) (1776) (stating "that religion, or the duty we owe to our creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence"); see generally, Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 351-52, 424 (2002) (placing the liberty of conscience at the heart of disestablishment thought).

virtue without the intrusion of a paternalistic state.<sup>61</sup> After all, only citizens who are free to form individual moral and ethical perspectives can contribute meaningfully to a participatory government. Indeed, it would seem that democracy is founded upon the idea that human progress is best realized through individual moral and intellectual growth, and that genuine flourishing can only occur when individual citizens are free—indeed, when they are obliged to imagine and pursue their own conceptions of human virtue.<sup>62</sup> The fundamental democratic insight is to reject the coercive, paternalistic model of authoritarian government, which stunts progress through conformity, in favor of a more Darwinian conception of ethical and intellectual evolution: the development of individual perspectives produces growth and diversity, which in turn promotes stability, freedom, and human progress.<sup>63</sup> Even if our commitment to the freedom of conscience is not self-evident, it remains structurally evident from: (1) the decision to adopt a written constitution; and (2) the circumspect nature of the specific constitution adopted.

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<sup>61</sup> See, e.g., JEAN-JACQUES ROUSSEAU, *A DISCOURSE ON THE ORIGIN OF INEQUALITY*, reprinted in 38 GREAT BOOKS OF THE WESTERN WORLD 343-45 (G.D.H. Cole trans., Encyclopedia Britannica, Inc. 1952) (1755) (arguing that people in their natural state are motivated by the instinct for self-preservation, but also by the enduring virtue of compassion for others); see generally JOHN LOCKE, *AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT*, reprinted in 35 GREAT BOOKS OF THE WESTERN WORLD 118 (Alexander Campbell Fraser ed., Encyclopedia Britannica, Inc. 1952) (1690) (“To understand political power aright, and derive it from its original, we must consider what estate all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their persons and possessions as they think fit. . .”).

<sup>62</sup> See 3 CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 22 (Anne Cohler, Basia Miller & Harold Stone, trans., Cambridge Univ. Press 1995) (1748) (“There need not be much integrity for a monarchical or despotic government to maintain or sustain itself. The force of laws in the one and the prince’s ever-raised arm in the other can rule or contain the whole. But in a popular state there must be an additional spring, which is VIRTUE.”) (emphasis in original).

<sup>63</sup> See, e.g., JOHN TRENCHARD & THOMAS GORDON, *2 CATO’S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS* 257-266 (Ronald Hamowy & Leonard Levy eds., 1971); JOHN TRENCHARD & THOMAS GORDON, *3 CATO’S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS* 41-54 (Ronald Hamowy & Leonard Levy eds., 1971) (arguing that tyranny stunts human progress while freedom of thought leads to growth and improvement); see also *THE FEDERALIST NO. 51* (James Madison) (arguing that direct competition between a “multiplicity of interests” and a “multiplicity of sects” offers the best protection for civil and religious freedom).

### The Significance of a Written Constitution

First, it is structurally significant that the framers chose to establish our democratic system within a written constitution. The specific constitutional text is, of course, important; but it is also important to recognize the political innovation that made a written constitution possible: the theory that the state's sovereignty may be limited.<sup>64</sup> The classical conception of sovereignty, as defined by Hobbes, describes complete, unlimited, and undefined authority:

This is the generation of that great LEVIATHAN, or rather, to speak more reverently, of that mortal god to which we owe, under the immortal God, our peace and defence. For by this authority, given him by every particular man in the Commonwealth, he hath the use of so much power and strength conferred on him that, by terror thereof, he is enabled to form the wills of them all. . . . And he that carryth this person is called SOVEREIGN, and said to have *sovereign power*; and every one besides, his SUBJECT.<sup>65</sup>

In contrast, the very purpose of a written constitution is to limit and define state power. Thus, the adoption of a written constitution commits us to the position that the state is no longer sovereign in the classical sense.<sup>66</sup> In Professor Bobbitt's words, "[a] state irrevocably bound would no longer *be* sovereign once it agreed to be restrained by a written instrument."<sup>67</sup> The very decision to adopt a written constitution, then, is evidence of a profound shift in thinking about the scope of state power and authority.

That shift reserves sovereignty firmly to the people. Again, in Bobbitt's words, "The American innovation was not the writing *per se*, but rather the political theory whereby the state was objectified and made a mere instrument of the sovereign will that

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<sup>64</sup> INTERPRETATION, *supra* note 4, at 3.

<sup>65</sup> THOMAS HOBBS, LEVIATHAN, *reprinted in* 23 GREAT BOOKS OF THE WESTERN WORLD 100 (Nelle Fuller ed., Encyclopedia Britannica, Inc. 1952) (1651).

<sup>66</sup> INTERPRETATION, *supra* note 4, at 4.

<sup>67</sup> *Id.*

lay in the People.”<sup>68</sup> That is, the people retain ultimate and absolute authority, which they have exercised—through their representatives—to create a government of expressly limited powers.<sup>69</sup> As James Wilson explained to the Pennsylvania Ratifying Convention in 1787,

the truth is, that the supreme, absolute and uncontrollable authority, *remains* with the people. . . . [T]he practical recognition of this truth was reserved for the honor of this country. I recollect no constitution founded on this principle: but we have witnessed the improvement, and enjoy the happiness, of seeing it carried into practice.<sup>70</sup>

The adoption of a written constitution commits us to a political structure in which sovereignty resides with the people. Once we accept this fundamental commitment, it is but a short step to recognizing that the people must retain the freedom to exercise their individual consciences.

In traditional Western politics prior to 1787, the religion of the sovereign became the established religion of state.<sup>71</sup> This is hardly surprising given the Hobbesian conception of sovereignty, wherein in the sovereign must have ultimate authority on all questions—including moral and religious ones.<sup>72</sup> Given the American conception of sovereignty, however, the issue of a state religion is considerably more problematic. Here, the sovereign is of many religious faiths; the people worship in many different ways and have diverse understandings of personal virtue. This helps to explain why many influential voices from the time of the

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<sup>68</sup> *Id.*

<sup>69</sup> See, e.g., THE FEDERALIST NO. 84, at 419 (Alexander Hamilton) (Terence Ball ed., 2003) (arguing against the inclusion of a Bill of Rights because such protections “have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants”).

<sup>70</sup> James Wilson, Address to the Pennsylvania Ratifying Convention (Dec. 4, 1787), in 1 THE FOUNDERS’ CONSTITUTION 62 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>71</sup> FELDMAN, *supra* note 54, at 10.

<sup>72</sup> See HOBBS, *supra* note 65, at 121-29.

founding—most notably Madison and Jefferson—strongly opposed the prospect of an established church.<sup>73</sup> Because the attempt to fashion some kind of representative state church could only dilute or profane true religion, these framers understood that the liberty of conscience was among those fundamental incidents of sovereignty that must remain with the people.<sup>74</sup> Simply put, the people—as sovereign—retain the authority to worship and apprehend virtue according to the dictates of individual conscience, while the state—limited to the express powers granted in the Constitution—lacks the authority to establish a particular mode of worship or conception of virtue. It is, in part, this underlying theoretical commitment that led many proponents of constitutional ratification to contend that the addition of a Bill of Rights—including the Establishment Clause—was at best redundant, and at worst dangerous.<sup>75</sup>

### The Constitutional Commitment to Self-Government

While our commitment to the liberty of conscience is evidenced by the adoption of a written constitution, it is also apparent in the structure of the particular document adopted. There is, of course, the First Amendment itself. Early drafts included specific protection for the “rights of conscience,”<sup>76</sup> although the final version abandoned that language in favor of the more particular proscription of all laws “respecting an

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<sup>73</sup> JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 6-7 (Marvin Meyer ed., 1981) (1785) (decrying state funding for Christian teachers); THOMAS JEFFERSON, VIRGINIA STATUTE OF RELIGIOUS FREEDOM, reprinted in THOMAS JEFFERSON: WORD FOR WORD 55-57 (Maureen Harrison & Steve Gilbert eds., 1993) (1779) (establishing and justifying separation of church and state in Virginia).

<sup>74</sup> E.g., JEFFERSON, *supra* note 73, at 56; MADISON, *supra* note 73, at 184, 186.

<sup>75</sup> See, e.g., THE FEDERALIST NO. 84 (Alexander Hamilton) *supra* note 69, at 420 (“For why declare that things shall not be done which there is no power to do?”); see also James Wilson, Address to the Pennsylvania Ratifying Convention (Nov. 28, 1787) in 1 THE FOUNDERS’ CONSTITUTION 453-54 (Philip B. Kurland & Ralph Lerner eds., 1987) (“But in a government consisting of enumerated powers . . . a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent.”).

<sup>76</sup> Michael W. McConnell, *The Origins and Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1483-87 (1990).

establishment of religion, or prohibiting the free exercise thereof.”<sup>77</sup> To the textualist, this omission perhaps suggests that the framers ultimately chose not to protect individual conscience, but from a larger structural perspective it becomes apparent that the overall constitutional architecture presupposes the freedom of conscience, making specific textual protections unnecessary.<sup>78</sup> That architecture reserves sovereignty to the people, favors localized political institutions with the authority to regulate everyday life, and finally surrenders to federal institutions only those powers necessary to the maintenance of a centralized government. Indeed, nowhere does the constitutional text suggest that the people could conceivably surrender their consciences—the very heart of popular sovereignty—to government regulation.

Thus, our examination of the structure that guarantees the liberty of conscience is not a search for specific textual references, but an effort to reveal the implicit framework upon which the text hangs. This structure is analogous to the shared grammar that makes language possible. When speaking, the words we use do not themselves reveal the underlying linguistic rules; to understand those conventions we must examine entire conversations and, eventually, seek out the fundamental assumptions beneath the words that make our sentences meaningful. Similarly, the structuralist places great significance on what is *not* there, on what is assumed, and on what inferences we can draw from those assumptions. This method makes it difficult to point to individual textual passages as proof, in themselves, of constitutional structure. In this case, however, the particular history of our constitutional ratification has left us with two nearly vestigial textual provisions that provide some positive evidence of the framers’ basic structural assumptions: the Ninth and Tenth Amendments.

Neither amendment identifies a specific or enforceable right, and, when taken at face value, these final provisions of the

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<sup>77</sup> U.S. CONST. amend. I.

<sup>78</sup> Indeed, Madison even suggested that too specific an enumeration of the rights of conscience might inadvertently limit the freedom. See DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 151 (1994).

Bill of Rights seem fairly uninformative.<sup>79</sup> Perhaps this is why courts have been reluctant to recognize constitutional challenges grounded solely in the language of either amendment.<sup>80</sup> Indeed, these provisions take on real meaning only when read in context, as foundational elements in the overarching structure of American constitutionalism. This context itself becomes clear only when we consider the historical reasons that the amendments originally found their way into the Bill of Rights. When viewed in light of that history, however, the Ninth and Tenth Amendments appear as evidence of our structural commitment to localized government, and, ultimately, to the dignity and sovereignty of the individual conscience. Thus, an examination of the constitutional structures that ensure the liberty of conscience must focus on these amendments.

The Tenth Amendment reserves to the states those powers not expressly granted to the national government.<sup>81</sup> Many Federalists saw the provision as structurally redundant,<sup>82</sup> but the need to formally recognize this principle was of such political importance that similar language appeared on most states' lists of proposed amendments during the ratification debates.<sup>83</sup> Indeed, it is in the ratification debates that the Amendment's meaning becomes most clear. These debates found perhaps their most sophisticated expression in a series of letters between constitutional architect James Madison and his political mentor, Thomas Jefferson, who was monitoring the ratification process from Paris.<sup>84</sup>

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<sup>79</sup> See U.S. CONST. amend. IX, X.

<sup>80</sup> Even the Warren Court's notable invocation of the "penumbra of privacy" did not rely exclusively on the language of the Ninth Amendment. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>81</sup> U.S. CONST. amend. X.

<sup>82</sup> See, e.g., JAMES MADISON, LETTER TO THOMAS JEFFERSON, 17 OCT. 1788, reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 205, 206 (Marvin Meyer, ed. 1973).

<sup>83</sup> E.g., MASSACHUSETTS RATIFYING CONVENTION, RATIFICATION AND PROPOSED AMENDMENTS, 6 FEB. 1788, reprinted in 1 *THE FOUNDERS' CONSTITUTION* 461-62 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>84</sup> See generally MAYER, *supra* note 78, at 148-58 (describing Jefferson's response to Madison's arguments against a Bill of Rights).

While Madison suggested that the addition of a bill of rights was unnecessary given the republican structure of the proposed government, Jefferson insisted that such a bill was “what the people are entitled to against every government on earth.”<sup>85</sup> In response to Jefferson’s particular concerns about federal usurpation of state authority, Madison suggested that the “limited powers of the federal Government, and the jealousy of the subordinate Governments” would provide greater security for states’ rights than mere “parchment barriers” ever could.<sup>86</sup> Madison had earlier explained this structural safeguard in the *Federalist*:

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people.<sup>87</sup>

In time it became clear, however, that the states would not ratify the Constitution without a bill of rights, and the Tenth Amendment was an attempt to formalize the implicit structural commitment to localized government that Madison recognized and defended. Thus, through historical accident, the Amendment is left as positive evidence of an otherwise hidden foundational assumption: it speaks expressly to what is *not* there in terms of federal power.

Today some view the Tenth Amendment as more symbol than substance,<sup>88</sup> but as a symbol it is emblematic of one of the principal structural geniuses of our republican democracy: federalism. To the extent that government must regulate the details of our everyday lives,<sup>89</sup> the federalist structure reflects an inherent

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<sup>85</sup> *Id.* at 150 (quoting THOMAS JEFFERSON, LETTER TO JAMES MADISON, 20 DEC. 1787).

<sup>86</sup> MADISON, *supra* note 82, at 206.

<sup>87</sup> THE FEDERALIST NO. 45 (James Madison).

<sup>88</sup> See *New York v. United States*, 505 U.S. 144, 156-57 (1992) (“the Tenth Amendment itself . . . is essentially a tautology.”).

<sup>89</sup> THE FEDERALIST NO. 45 (James Madison).

preference for localized forms of government. The idea is that democracy works best when individual communities are left to govern themselves.<sup>90</sup> To understand the power of this concept one need only imagine the impropriety of a monolithic set of public ordinances intended to govern the entire nation, including such heterogeneous communities as San Francisco, California and Normal, Illinois. In this sense, the preference for localized government is further evidence of our constitutional foundation in diversity, which remains our democracy's greatest structural security.<sup>91</sup> As Madison eloquently explained in Federalists 10 and 51, the more that power and influence is diffused among numerous states, groups, and ideas, the more difficult it is for tyranny to take root.<sup>92</sup>

The Ninth Amendment expresses the federalist preference for localized government and democratic diversity in terms of the individual citizen.<sup>93</sup> Just as the Tenth Amendment has come to represent federalism, the Ninth Amendment symbolizes the structural commitment to reserve the essential elements of sovereignty and self-determination to the people.<sup>94</sup> Like the Tenth Amendment, the Ninth Amendment identifies no positive right, but rather is an attempt to express a fundamental structural assumption in writing. Again, this unusual effort to make explicit the underlying constitutional structure is a result of the peculiar history of ratification.

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<sup>90</sup> See e.g., ROBERT A. NISBET, *THE QUEST FOR COMMUNITY: A STUDY IN THE ETHICS OF ORDER AND FREEDOM* 248-79 (Oxford Univ. Press, 1953) (juxtaposing centralized or "unitary" democracy with localized communitarian government that emphasizes diversity and plurality).

<sup>91</sup> See MAYER, *supra* note 78, at 151 ("Madison thought the diversity spawned by a free government a surer protection for natural rights than mere statement of them on a piece of paper.") (internal quotations omitted).

<sup>92</sup> THE FEDERALIST NOS. 10, 51 (James Madison).

<sup>93</sup> U.S. CONST. amend. IX ("The enumeration of certain rights shall not be construed to deny or disparage others retained by the people.").

<sup>94</sup> See JAMES MADISON, ADDRESS TO THE HOUSE OF REPRESENTATIVES, 8 JUNE 1789, reprinted in 5 THE FOUNDERS' CONSTITUTION 399 (Philip B. Kurland & Ralph Lerner eds., 1987) (1789) (explaining that the Ninth Amendment secures all unenumerated rights and powers to the people).

At the North Carolina Ratifying Convention, James Iredell gave eloquent voice to one of the principal objections levied against the addition of a bill of rights to the proposed Constitution:

No man, let his ingenuity be what it will, could enumerate all the individual rights *not* relinquished by this Constitution. Suppose, therefore, an enumeration of a great many, but an omission of some, and . . . [if] the omitted rights should be invaded . . . what would be the plausible answer of the government to such a complaint? Would they not naturally say . . . “So long as the rights enumerated in the bill of rights remain unviolated, you have no right to complain.”<sup>95</sup>

Iredell and others feared perverse invocation of the maxim that “an affirmation in particular cases implies a negation in all others.”<sup>96</sup> And so, when the Bill of Rights became inevitable, Madison worked to include the Ninth Amendment in an effort to give explicit protection to the unenumerated rights and freedoms retained by the people as sovereign.<sup>97</sup>

Madison’s fears went even deeper, however; he worried that the effort to explicitly protect particular rights might fail for imperfect language, or be subject to political compromise. Thus, even those rights singled out in the Bill might be expressed or construed more narrowly than the constitutional structure assumed. He was particularly concerned about the freedom of conscience, as he explained in his correspondence with Jefferson:

[T]here is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public

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<sup>95</sup> JAMES IREDELL, ADDRESS TO THE NORTH CAROLINA RATIFYING CONVENTION, 28 JULY 1788 *reprinted in* 1 THE FOUNDERS’ CONSTITUTION 475 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added).

<sup>96</sup> JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1898 (1833), *reprinted in* 5 THE FOUNDERS’ CONSTITUTION 400 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>97</sup> MADISON, *supra* note 94, at 399.

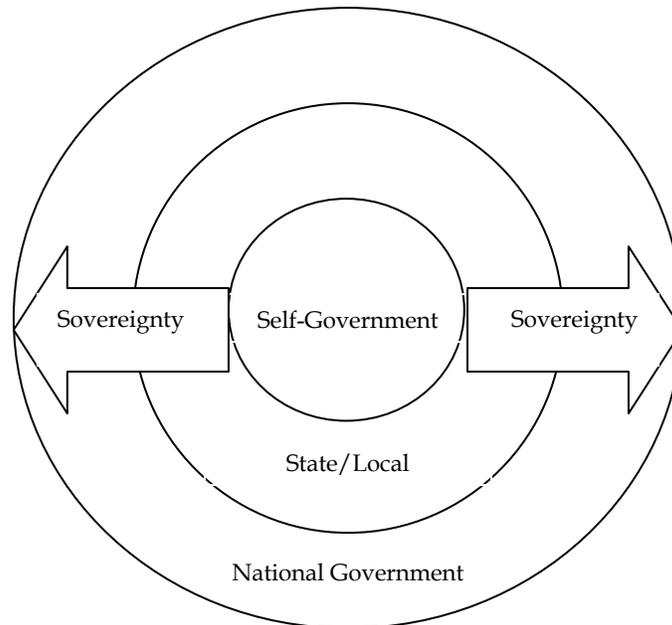
definition, would be narrowed much more than they are likely ever to be by an assumed power.<sup>98</sup>

The Ninth Amendment preemptively counters the evil whereby the absolute and essential rights of sovereignty might fall victim to too narrow a definition. The Amendment's inclusion in the Bill of Rights is meant to prevent future generations from forgetting that fundamental, if implicit, constitutional structures reserve ultimate sovereignty, and all its necessary incidents, to the people; for Madison and Jefferson, among others, the right to the free exercise of conscience was surely one of the most essential sovereign rights so reserved.

The Ninth Amendment, then, is positive evidence of the structural emphasis on the primacy of individual rights, and, as such, it parallels the federalist preference for local government expressed in the Tenth Amendment. Together, these amendments suggest a model of American republican democracy made up of three concentric circles—with sovereignty (and, ultimately, responsibility) concentrated in the center and surrendered gradually, and only expressly, to the outer rings:

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<sup>98</sup> MADISON, *supra* note 82, at 205-06.



This model, which places self-government at the center of republican democracy, reflects the structural commitment to the individual liberty of conscience evident in the decision to adopt a written constitution.<sup>99</sup> Further, this structure forms an integral part of the larger republican architecture, which Madison envisioned safeguarding individual liberty by encouraging democratic diversity.

Charles Black devoted the bulk of his lectures on the structural method of interpretation to construing the Bill of Rights as though the Fourteenth Amendment did not exist.<sup>100</sup> At one point, he even made the somewhat controversial suggestion that the religion clauses would apply to the states even if not “incorporated” doctrinally through the Fourteenth Amendment.<sup>101</sup> Given the

<sup>99</sup> I am also indebted to Paul Hurd of the Hyde School for this model.

<sup>100</sup> BLACK, *supra* note 15, at 33-66.

<sup>101</sup> See *id.* at 61-62; *but see*, *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 8, 13-15 (1947) (incorporating the Establishment Clause). Before *Everson*, the Court had held that the states were free to establish a church if they so chose. *Permoli v. New Orleans*, 44 U.S. 589, 609 (1845).

fundamental structural commitments to the liberty of conscience described above, this section presumes to take Black's suggestion one step further: to posit that an established church—on either the state or national level—would be antithetical to our constitutional structure even if the Establishment Clause itself did not exist. Establishing a church adopts a codified, top-down conception of virtue, conscience, and worship, while the American model moves from the bottom up. Our democracy begins at the level of individual conscience, which informs the virtuous citizen, who in turn participates—through representation—in an exchange of ideas and beliefs on the communal and national levels. This theoretically results in a just state deriving its power and legitimacy from the sovereign consent of the governed.<sup>102</sup>

### The Dialectic of Virtue

To this point, this paper has focused exclusively on our structural commitment to the *liberty* of conscience, and it has not yet spoken to the restraints—the duties and responsibilities—that conscience and virtuous choice must impose upon us. Such a one-sided discussion surely leaves some readers pondering a moral culture surrendered to indeterminacy and relativism and wondering whether a democracy can long exist without endorsing and promoting some shared, normative conception of virtue. The Constitution, however, does not concede a culture of relativism—it is not, as Ivan Karamazov suggested, that “everything is permitted.”<sup>103</sup> Instead, our democratic institutions entrust we the people with the practice of virtue. With this in mind, it is important to consider again the democratic conception of the liberty of conscience within the historical and theoretical context of the constitutional founding.

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<sup>102</sup> See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>103</sup> FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV, BOOK V, CHAP. 5, reprinted in 52 GREAT BOOKS OF THE WESTERN WORLD 136 (Constance Garnett trans., Encyclopedia Britannica, Inc. 1952) (1880). Garnett translates the Russian phrase “vsio pozvoleno” as “all is lawful,” but I have used the ubiquitous English translation here. *Id.*

Those Enlightenment thinkers who defended the liberty of conscience did not seek protection for an individual's right to make free religious *choices*; rather they conceived of a virtuous citizenry claimed, a priori, by profound religious *duties*.<sup>104</sup> Madison, in particular, saw these duties as rooted in a personal relationship with God and expressed in scripture or acquired through revelation.<sup>105</sup> From this perspective, the liberty of conscience does not free the individual to imagine any formulation of virtue or worship that may strike her momentary fancy, but it is instead the political recognition that deeply felt moral duties lay claim to each of us—duties with which a just state may not interfere.<sup>106</sup> This ideal certainly does not suggest that questions of virtue and morality are matters open to indeterminate personal choice. Instead, it recognizes that profound moral obligations guide our thoughts about the world and our role in shaping it.<sup>107</sup>

This leaves us to consider, then, the processes by which individual citizens engage in moral contemplation in a republican democracy. While many gifted scholars have devoted their efforts to the refined study of moral and ethical growth in a democratic society,<sup>108</sup> it is sufficient for the purposes of this paper to describe this process in terms of what I will call the *dialectic of virtue*. The dialectic's thesis is the liberty of conscience, or the individual moral autonomy described above; its antithesis is virtue—the obligations of conscience.<sup>109</sup> When an individual successfully participates in the

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<sup>104</sup> MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 66 (1996); accord MADISON, *supra* note 73, at 7; JEFFERSON, *supra* note 73, at 55; LOCKE, *supra* note 61, at 3.

<sup>105</sup> MADISON, *supra* note 73, at 187; accord JOHN NOONAN, *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 72-74 (1998).

<sup>106</sup> Seen in this light, the state that forces an individual to abandon a religious duty not only denies an individual freedom; it also commits an affront against God. MADISON, *supra* note 73, at 184; accord NOONAN, *supra* note 105, at 73.

<sup>107</sup> SANDEL, *supra* note 104, at 65-66.

<sup>108</sup> See, e.g., REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* 257-77 (1960) (exploring the conflicts between individual and social morality); see generally HANNAH ARENDT, *THE LIFE OF THE MIND* (1978) (advancing a sophisticated Aristotelean perspective of ethical development).

<sup>109</sup> Some commentators would take issue with my treatment of religious conscience or duty as synonymous with the secular conception of conscience or virtue for

dialectic—that is, when, given complete moral autonomy, she engages her conscience and moral self—the dialectic produces its synthesis: moral growth and genuine human flourishing. The realization of this synthesis in the citizenry is among the highest goals to which a democratic state can aspire.<sup>110</sup>

But efforts to coerce others, or society at large, with the example of our own virtue run headlong into the paradox at the dialectic's heart, because virtue requires that we practice personal virtue *for its own sake*, rather than in the hopes of bringing about some political or social outcome. As Reinhold Niebuhr observed:

The paradox of the moral life consists in this: that the highest mutuality is achieved where mutual advantages are not consciously sought as the fruit of love. For love is purest where it desires no returns for itself; and it is most potent where it is purest. Complete mutuality, with its advantages to each party to the relationship, is therefore most perfectly realised where it is not intended, but love is poured out without seeking returns. That is how the madness of religious morality, with its trans-social ideal, becomes the wisdom which achieves wholesome social

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constitutional purposes. See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 194-95 (1990) (speculating that the decision to omit the word conscience from the First Amendment suggests that the framers sought only to protect religious belief and practice). While it is certainly true that Madison and others conceived of the liberty of conscience in reference to organized religious principles—particularly Christian principles—it is also true that the constitutional structure they devised should apply with equal force to protect other, diverse formulations of virtue. See Steven D. Smith, *What Does Religion Have to Do With Conscience?*, 76 U. COLO. L. REV. 911, 912 (2005) (“A virtual consensus in the academic community and the courts holds that it would be unacceptable to give constitutional protection to religiously-formed conscience, but not to what we can call the ‘secularized conscience.’”).

<sup>110</sup> Compare ARISTOTLE, *POLITICS*, reprinted in 9 GREAT BOOKS OF THE WESTERN WORLD 476 (Benjamin Jowett trans., Encyclopedia Britannica, Inc. 1952) (350 B.C.) (arguing that happiness is the chief end of both individuals and the state) with ARISTOTLE, *NICOMACHEAN ETHICS* 1098a, reprinted in 9 GREAT BOOKS OF THE WESTERN WORLD 352 (W.D. Ross trans., Encyclopedia Britannica, Inc. 1952) (350 B.C.) (defining happiness as “activity of the soul in accordance with virtue”).

consequences. . . . Love must strive for something purer than justice if it would attain justice.<sup>111</sup>

Nonetheless, this passage makes clear that, while we cannot engage in individual virtue with the *intention* to bring about a better society, the *effect* of many individuals practicing virtue is what makes democracy possible.<sup>112</sup>

Taking Niebuhr's point a step further, the democratic state cannot coerce virtue without robbing the individual of the profound rewards of practicing virtue for its own sake. The dialectic of virtue reflects this paradox; the state alone cannot sustain both its thesis and antithesis. Any state effort to compel a particular moral outlook acts to diminish individual moral autonomy,<sup>113</sup> but the state that completely fails to recognize or encourage public morality risks losing its shared cultural values and devolving into what Professor Michael Sandel decries as a "procedural republic."<sup>114</sup>

This paper argues that the Constitution addresses the dialectic by committing the state firmly to the protection of the thesis—the liberty of conscience—as described above.<sup>115</sup> In this sense, our constitutional structure concedes that we cannot sustain the dialectic of virtue entirely by resort to the institutions of state.<sup>116</sup> Rather, constitutional structure calls for the interaction of two separate support systems: one political, and the other social.

Constitutional structure implicitly relies on our social institutions—families, churches, charities, clubs, and professional associations, among others—to help engender a collective moral consciousness, and to thus remind us of the burdens of conscience. My family has burdened me by insisting that I neither lie, cheat, nor steal; my church has asked me to treat others as I would be treated; various charities have inspired me to sacrifice myself for the good of the whole; my clubs have encouraged me to participate in the

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<sup>111</sup> NIEBUHR, *supra* note 108, at 265-66.

<sup>112</sup> *Id.* at 258.

<sup>113</sup> See *supra* notes 72-75 and accompanying text.

<sup>114</sup> See SANDEL, *supra* note 104, at 23, 54.

<sup>115</sup> See *supra* notes 66-70 and accompanying text.

<sup>116</sup> See *supra* note 1 and accompanying text.

civic and political life of my community; and many other social actors have informed my sense of justice and personal virtue in other important ways. It is left to these social bodies, then, to establish the institutions of our national moral and religious culture. Without such an establishment we would be vulnerable to what Professor Sandel has labeled the “voluntarist” justification: a rationale that elevates the freedom of choice itself to the status of a democratic virtue.<sup>117</sup> By venerating free choice without at least equally dignifying its necessary counterpoint, virtuous choice, Sandel fears that the voluntarist justification “may end by impoverishing political discourse and eroding the moral and civic resources necessary to self-government.”<sup>118</sup> The constitutional structure described herein, however, entrusts the duty of ennobling a culture of virtuous choice to our social institutions. The great responsibility of moral guidance and instruction falls to these institutions precisely because social groups do *not* embody the force of law or political power, and individuals are thus free to reject their calling.<sup>119</sup> In other words, our social institutions can sustain the dialectic’s antithesis without destroying the thesis—moral autonomy—which is necessary to its very existence. To this end, however, our social institutions must also remain independent of any state interference or coercion on moral or religious issues.

The constitutional structure of disestablishment, then, rests upon two distinct foundations. First, the Constitution requires that the government guarantee the liberty of conscience, and thus the institutions of state must not take any particular position on religious or moral issues. This sustains moral autonomy, the thesis of the dialectic of virtue.<sup>120</sup> Second, the structure implicitly commits our social institutions to the development of a virtuous citizenry, and thus our political institutions must neither influence nor interfere with these groups regarding moral issues. Our religious freedom exists in the space between these two foundations; it is, in

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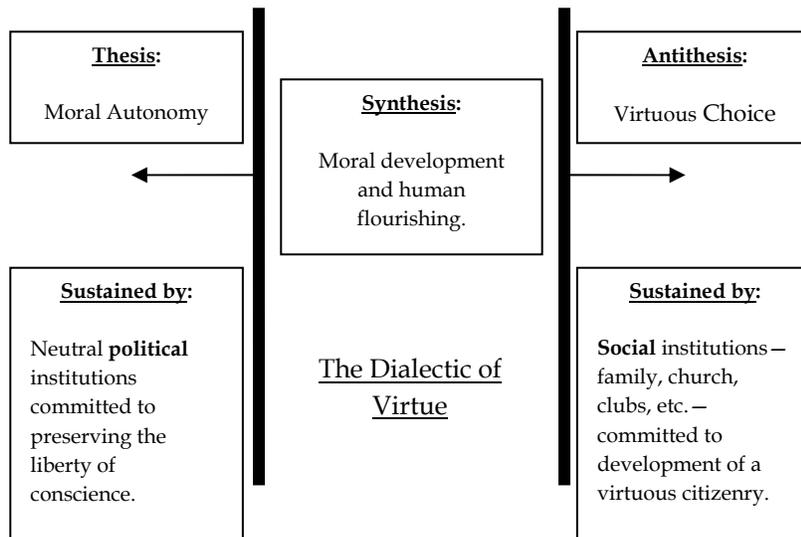
<sup>117</sup> SANDEL, *supra* note 104, at 62-65.

<sup>118</sup> *Id.* at 23.

<sup>119</sup> See *supra* notes 65-67 and accompanying text.

<sup>120</sup> See *supra* notes 98-99 and accompanying text.

essence, the product of an ongoing dialogue between political and social institutions. The following figure depicts both the dialectic and the constitutional structure that sustains it:



The structural method thus reveals a fairly straightforward and uncontroversial constitutional principle of disestablishment: political institutions must enforce the liberty of conscience by neither coercing nor instructing citizens on ethical issues, and social institutions must remain free to instruct and promote virtue without state interference. As discussed, this basic structural formulation sustains the dialectic of virtue, and allows individual citizens the opportunity to flourish and evolve through genuine moral reasoning and reflection. As with all constitutional principles, however, the difficulties arise in application. That is, courts and judges still face the sometimes-formidable task of differentiating truly political institutions from truly social ones for purposes of the constitutional dialectic. The next section, then, undertakes to apply these structural commitments to several modern Establishment Clause issues.

### Applying the Structural Model

The structure of disestablishment identified above is only useful inasmuch as it helps to clarify the real church-state controversies that complicate modern political life. Thus far, the structural method has produced a fairly straightforward constitutional principle: no religious or moral instruction or guidance from political institutions, and no government interference with our social institutions' efforts toward the same. To its great credit, this model does not involve the courts in the dubious doctrinal processes of hypothesizing a "secular purpose" for particular types of religious speech, or of delineating a constitutionally permissible level of state "entanglement" with religion.<sup>121</sup> Nor, thankfully, does this approach appear to result in the kind of unseemly conflict between free speech and establishment that has stumbled into recent First Amendment doctrine.<sup>122</sup>

Still, as Robert Frost reminds us, "[s]omething there is that doesn't love a wall,"<sup>123</sup> and the centuries have grown thick between the stones of our constitutional structure. Hence, it will surely be difficult to mend the disestablishment walls—to apply the structural model to real disputes at this point in constitutional time—when years of doctrine have embedded particular expectations about church-state separation deep in the national

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<sup>121</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) ("First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion[.] . . . finally, the statute must not foster an excessive entanglement with religion."); see also *Agostini v. Felton*, 521 U.S. 203, 234 (1997) (clarifying *Lemon's* third prong to ask whether a program will "result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement").

<sup>122</sup> See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (holding that a public school's decision not to provide its gymnasium—a limited public forum—for religious instruction "constitute[d] impermissible viewpoint discrimination"); see also *Widmar v. Vincent*, 454 U.S. 263, 274-77 (1981) (reasoning that use of University facility for religious meetings would neither advance nor endorse religion because the school allowed many secular groups to also use the facility, creating a kind of limited public forum).

<sup>123</sup> ROBERT FROST, *Mending Wall*, in *THE POETRY OF ROBERT FROST* 33 (Edward C. Latham ed., 1979).

consciousness. But the current doctrinal approach to the Establishment Clause has come under increasingly intense criticism,<sup>124</sup> and at least one member of the Court has acknowledged the near “unintelligibility” of the *Lemon* test following two fractured decisions from the Supreme Court’s 2005 term—one allowing, and one disallowing state displays of the Ten Commandments.<sup>125</sup> In an effort to present a clearer and more consistent approach, this section suggests possible applications of the structural model to two modern Establishment controversies: (1) current proposals to increase government aid to religious charities; and (2) the ongoing battle over religion in the public schools.

### **Government Aid to Religious Charities**

Shortly after taking office in 2001, President George W. Bush announced his plan to make religious charities an integral part of his administration’s social services package.<sup>126</sup> He proposed to expand government funding under the Charitable Choice provisions of the 1996 Welfare Reform Act, which Congress enacted “to allow States to contract with religious organizations . . . on the same basis as any other nongovernmental [social service] provider.”<sup>127</sup> A new House bill quickly followed, armed with stronger language and aimed at ending “discrimination against religious organizations . . . in the administration and distribution of

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<sup>124</sup> See Lisa M. Kahle, Comment, *Making “Lemon-Aid” from the Supreme Court’s Lemon: Why Current Establishment Clause Jurisprudence Should Be Replaced by a Modified Coercion Test*, 42 SAN DIEGO L. REV. 349, 356-64 (2005) (collecting various criticisms of the *Lemon* test).

<sup>125</sup> *Van Orden v. Perry*, 125 S. Ct. 2854, 2867 (2005) (Thomas, J., concurring) (permitting display of Ten Commandments on the grounds of the Texas state capitol by 5-4 vote); see also *McCreary County v. ACLU*, 545 U.S. 844 (2005) (precluding display of Ten Commandments in Kentucky courthouses by 5-4 vote). These disparate outcomes are the result of a wayward doctrinal approach that examines whether or not a display is likely to prove “divisive.” *Perry*, 125 S. Ct. at 2871 (Breyer, J., concurring). Though currently in jurisprudential vogue, the principle of “divisiveness” bears no weight in the structure of disestablishment.

<sup>126</sup> Bartrum, *supra* note 59, at 207.

<sup>127</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604a(b) (2000).

government assistance.”<sup>128</sup> The resulting controversy brought national attention to the issue of public funding for “faith-based” social organizations. By that time, however, the so-called “Armies of Compassion”<sup>129</sup> stood on fairly firm constitutional ground, thanks largely to three important Supreme Court decisions. This part briefly examines both the history of state funding for religious charities and those three cases. It then applies the structural model described above, and concludes that state aid to religious charities collapses the constitutional dialectic by compromising the independence and autonomy of social institutions dedicated to moral development and guidance.

### A Brief History of State Funding for Religious Charities

Government funding of religious charities is not a new idea; in the mid-nineteenth century, both Protestant and Catholic institutions received aid for programs to help orphans, alcoholics, juvenile delinquents, and the mentally ill.<sup>130</sup> Post-bellum industrialization and urbanization increased the need for such charities to fill the widening gaps in state social services. With state funding, churches gradually built an infrastructure of support organizations to aid and instruct the less fortunate.<sup>131</sup> As Professor Feldman observes:

The key fact about the full range of charitable institutions in this period . . . is that almost none were state-run, but nearly all, whether nonsectarian or Catholic, received significant government assistance. Before the rise of the welfare state, government dealt with the problems of poverty largely by relying on private institutions and

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<sup>128</sup> Charitable Choice Act of 2001, H.R. 7, 107th Cong. § 1991(b)(3) (2001).

<sup>129</sup> See *Rallying the Armies of Compassion*, <http://www.whitehouse.gov/news/reports/faithbased.html> (last visited Oct. 6, 2006) (outlining the Bush social service agenda).

<sup>130</sup> FELDMAN, *supra* note 54, at 92-93.

<sup>131</sup> *Id.* at 93-94.

supplementing their financial needs when it became obvious that it was in the public interest to do so.<sup>132</sup>

Throughout the nineteenth century, religious charities served a necessary social function. As a result, the Supreme Court approved government support for these organizations.<sup>133</sup>

Harsh social realities made the Court reluctant to confront the theoretical problems that such aid presented. In its lone nineteenth-century opinion on the subject, *Bradfield v. Roberts*, the Court avoided the sticky conceptual questions and simply held that, for constitutional purposes, the Catholic charitable corporation formed to run a Washington, D.C. hospital was not a religious organization:

Assuming that the hospital is a private eleemosynary corporation, the fact that its members . . . are members of a monastic order or sisterhood of the Roman Catholic Church, and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial . . . . That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body.<sup>134</sup>

The pressing need for social service providers in pre-welfare America overwhelmed any lingering constitutional doubts about the separation of church and state, at least at the federal level. The Court was willing to assume—for First Amendment

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<sup>132</sup> *Id.* at 94.

<sup>133</sup> *Id.* at 97. See also *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding federal assistance to a Catholic hospital).

<sup>134</sup> *Bradfield*, 175 U.S. at 297-98.

purposes—that church charities lost their religion when they undertook social service missions.<sup>135</sup>

On the state level, the issue was somewhat more complicated. Toward the end of the nineteenth century, state support for certain religious charities began to run into measured opposition. As Catholics began to seek public funding for their own schools, many states took steps to sever any connection between the Catholic Church and state government.<sup>136</sup> Fearful of publicly funded Catholic schools, Protestant nativists in the 1840s and 1850s championed “separationism,” or the strict segregation of government from sectarian religion, as a fundamental American principle.<sup>137</sup> Three decades later the nativists joined forces with a growing “secularist” movement to support several attempts to amend the Constitution to explicitly prohibit state contribution to religious schooling.<sup>138</sup> Growing anti-Catholic sentiment eventually spilled into the world of religious charities, and states that did not rely as heavily on sectarian charities began to deny public funds to them.<sup>139</sup> A majority of states, however, relied so heavily on church-run charities that these charities continued to receive assistance

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<sup>135</sup> *Id.* The conceptual problem with this rationale is plain: in providing for the poor, church groups in fact *fulfill* rather than *abdicate* their religious missions. See *infra* notes 172-75 and accompanying text.

<sup>136</sup> Fearful of publicly funded Catholic schools, Protestant nativists in the 1840s and 1850s championed “separationism,” or the strict segregation of government from sectarian religion, as a fundamental American principle. HAMBURGER, *supra* note 54, at 288. Three decades later the nativists joined forces with a growing “secularist” movement to support several attempts to amend the Constitution to explicitly prohibit state contribution to religious schooling. *Id.* at 296-99. The most popular of the proposed Amendments—known as the “Blaine Amendment” in honor of its sponsor, Congressman James Blaine of Maine—passed in the House by a vote of 180-7, but fell two votes short of a super-majority in the Senate. *Id.* at 298 n.28. The political agitation surrounding this secularist movement contributed to a more generalized protest against all church-state interactions, including the funding of church charities. FELDMAN, *supra* note 54, at 96-97.

<sup>137</sup> HAMBURGER, *supra* note 54, at 288.

<sup>138</sup> *Id.* at 296-99. The most popular of the proposed Amendments—known as the “Blaine Amendment” in honor of its sponsor, Congressman James Blaine of Maine—passed in the House by a vote of 180-7, but fell two votes short of a super-majority in the Senate. *Id.* See also text accompanying notes 254-256.

<sup>139</sup> FELDMAN, *supra* note 54, at 96.

from both state and federal governments into the early twentieth century.<sup>140</sup>

With the New Deal, an increased network of state social services arrived, which began to blunt the sharpest of capitalist inequities. Federal law became less tolerant of state-funded religious charities, and the government slowly began to withdraw support for the explicitly religious portions of sectarian charities' missions.<sup>141</sup> When the need for private social service providers diminished, society became less willing to tolerate the Establishment implications of direct state aid to religious charities.<sup>142</sup> Religious charities faded from national prominence and church groups became reliant on private donations to support their social missions. Despite the cultural shift, however, the Supreme Court's jurisprudence has never evolved to expressly forbid state funding for religious charities.

#### **The Modern Court and Charitable Choice**

In the last twenty years, the Court has made it clear that the constitutional door remains officially open to state sponsorship of church charities, so long as the charities do not proselytize. In *Bowen v. Kendrick*, the Court upheld a program that offered federal grants to religious organizations devoted to combating teenage pregnancy.<sup>143</sup> Chief Justice Rehnquist noted that the Court had "never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs."<sup>144</sup> Echoing *Bradfield*, Rehnquist applied the *Lemon* test and concluded that the program served a secular purpose and did not impermissibly advance religion. Rehnquist gave short shrift to *Lemon's* "excessive entanglement" prong, observing only that the charities in question were not the kind of "pervasively sectarian"

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 98-99.

<sup>142</sup> *Id.* at 99.

<sup>143</sup> *Bowen v. Kendrick*, 487 U.S. 589, 593-96 (1988).

<sup>144</sup> *Id.* at 609.

institutions that would require close supervision or possibly engender administrative entanglements.<sup>145</sup>

Two years later, the Court decided another case that would have important implications for state funding of faith-based charities. Although *Mitchell v. Helms* addressed state aid to religious schools (not charities), Justice Thomas's plurality opinion is significant for several reasons. First, it invoked a new formulation of the so-called "private choice principle" in holding that even direct, non-incidental aid to a religious school may be constitutionally permissible.<sup>146</sup> Historically, the private choice principle had permitted state aid to religious schools so long as the government distributed funding in a neutral manner among private individuals, who then chose to use this money in support of a religious organization.<sup>147</sup> *Mitchell* is significant because the Court manipulated the private choice rationale to uphold a program that sent state assistance directly to parochial schools; the only "private choice" involved was the students' decision to attend religious school.<sup>148</sup>

Perhaps more importantly, the *Mitchell* plurality hinted that a funding program that discriminates against an organization based on its religious viewpoint might itself be unconstitutional.<sup>149</sup> Thomas observed that the neutral distribution program ensured that "eligibility for aid is determined in a constitutionally permissible manner," thus implying that any discrimination in the

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<sup>145</sup> *Id.* at 615-17.

<sup>146</sup> *Mitchell v. Helms*, 530 U.S. 793, 809-11 (2000). The permissibility of indirect and incidental aid has its roots in one of the seminal Establishment Clause cases, *Everson v. Board of Education*, 330 U.S. 1, 12, 17-18 (1947), which permitted state funded transportation to parochial schools as an indirect and incidental benefit.

<sup>147</sup> See *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

<sup>148</sup> The program at issue in *Mitchell* distributed aid to local education agencies in Jefferson Parish, Louisiana. *Mitchell*, 530 U.S. at 800. The agencies then distributed the money to area schools, including parochial schools, based on the size of their student populations. *Id.* Thus, Thomas argued that the students' private choice of a particular school determined the allocation of state funding. *Id.* at 811, 820-21. Justice O'Connor, however, expressed significant concerns about this twisted application of the private choice principle. *Id.* at 843-44 (O'Connor, J., concurring).

<sup>149</sup> *Id.* at 820; accord Bartrum, *supra* note 59, at 199 n.193.

allocation process might be unconstitutional.<sup>150</sup> This rationale, which seemed to turn the well-established “neutrality” doctrine on its head,<sup>151</sup> earned the Court’s explicit support just a year later in a decision that surely cleared away any remaining doubts about the constitutionality of the charitable choice program.<sup>152</sup>

In *Good News Club v. Milford Central School*, the Court held that a public school violated a religious organization’s free speech rights when it denied the group permission to use its facilities for Bible lessons and Scripture memorization after school.<sup>153</sup> The school conceded that it had created a limited public forum by opening its doors after hours to a variety of secular community groups, but argued that it had a constitutional duty to exclude groups that sought to use the facilities for purely religious purposes.<sup>154</sup> Justice Thomas’s unlikely majority opinion turned the First Amendment back upon itself and brought the Establishment Clause squarely into conflict with freedom of speech.<sup>155</sup> Using the once-venerable neutrality doctrine in just the novel way that *Mitchell* presaged, Thomas concluded that “no Establishment Clause concern” justified the violation of the organization’s free speech rights.<sup>156</sup>

Thomas began this break with traditional neutrality principles by arguing that the school faced “an uphill battle” because “allowing the [Good News] Club to speak on school grounds would ensure neutrality, not threaten it.”<sup>157</sup> Because the school allowed a wide variety of groups to use its space, he

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<sup>150</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001).

<sup>151</sup> The neutrality doctrine, as traditionally understood, requires the government to “pursue a course of complete neutrality towards religion” by excluding all religious speech and messages from our public institutions. *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). Justice Thomas, however, implies that neutrality requires just the opposite: complete public inclusion of all religious sects. See Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 680 (2002).

<sup>152</sup> *Good News Club*, 533 U.S. at 112-13.

<sup>153</sup> *Id.* at 112; See also Bartrum, *supra* note 59, at 203.

<sup>154</sup> *Good News Club*, 533 U.S. at 106.

<sup>155</sup> *Id.* at 102.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 114. This plainly is not the same conception of neutrality that precluded even voluntary student-led prayer before a high school football game. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

summarily dismissed any suggestion that the Club's use of public facilities might lead a reasonable observer to assume that the school endorsed the group's message.<sup>158</sup> Finally, Thomas revealed the real rationale behind the renovated neutrality doctrine: "[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive hostility toward the religious viewpoint if the Club were excluded from the public forum."<sup>159</sup> Thomas's argument revived a long-standing concern that the traditional neutrality doctrine worked to establish an anti-religious, or secular, viewpoint.<sup>160</sup> The new neutrality doctrine, which seems to offer total inclusion for all religious perspectives, thus cleared the constitutional ground for the 2001 Charitable Choice Bill, with its promise to end discrimination against religious charities in the allocation of government funds.<sup>161</sup>

The 2001 bill, however, did meet with substantial resistance, particularly regarding the controversial issue of the charities' religiously motivated hiring practices.<sup>162</sup> One provision of the original statute, for instance, exempted beneficiary charities from the employment practice provisions of the Civil Rights Act, thereby permitting the charities to continue discriminating against potential employees for religious reasons.<sup>163</sup> The controversy also focused attention on language in the statute that prohibits charities from spending government funds "for sectarian worship,

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<sup>158</sup> *Good News Club*, 533 U.S. at 115.

<sup>159</sup> *Id.* at 118. Thomas's argument here revives a long-standing concern that the traditional neutrality doctrine works to establish an anti-religious, or secular, viewpoint. *E.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968) (Black, J., concurring); *Sch. Dist. Of Abington Township v. Schemp*, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting). From the structural perspective it is precisely the government's role to remain irreligious and endorse no ethical code; it is left to our social institutions to endorse and establish a moral or religious viewpoint.

<sup>160</sup> *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968) (Black, J., concurring); *Sch. Dist. Of Abington Township v. Schemp*, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting).

<sup>161</sup> H.R. 7, 107th Cong. § 1991(b)(3) (2001).

<sup>162</sup> Bartrum, *supra* note 59, at 210-12.

<sup>163</sup> 42 U.S.C. § 604a(d), (f) (2006).

instruction, or proselytization.”<sup>164</sup> These provisions expose an essential structural problem that arises when the government provides funding to religious charities: the state may become an obstacle to social institutions intent on fulfilling their independent structural duty to encourage moral development.

### **Charitable Choice and the Structure of Disestablishment**

A structural analysis of this issue must first examine whether these charities are political or social institutions. It is probably uncontroversial to conclude that such organizations—particularly *church* charities—are social institutions. The question then becomes whether government aid interferes with these institutions’ role in the constitutional dialectic: to promote individual moral development and flourishing. Such aid does interfere with the charities’ constitutional function for several reasons.

First and foremost, as Yogi Berra might have put it, state funding threatens to take the charity out of charities. That is, social charities function not only to the benefit of those they serve, but also to the benefit of those who serve in them and donate to their coffers. Religious charities are effective, in part, because individuals *choose* to devote their time and money to a virtuous cause, thus realizing the synthesis of the constitutional dialectic. State assistance threatens to turn these virtuous social institutions into bureaucratic agencies, likely reducing their effectiveness and certainly compromising the opportunity these organizations provide us to be charitable for charity’s sake. Charities exist as a manifestation of the sense of moral obligation that the dialectic’s antithesis encourages—but state funding compels donation through taxation, thus transforming an act of virtue into an act of obedience.

In this regard, it is important to reexamine the conceptual and structural problems that the *Bradfield* Court swept under the constitutional carpet in the late nineteenth century—problems that the modern Court has continued to ignore as it opens doors to

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<sup>164</sup> 42 U.S.C. § 604a(j) (2006).

increased state interaction with religious organizations. Recall that in *Bradfield*, the Court, eager to help private institutions dull the capitalist sword, concluded that religious charities become secular organizations when they serve a secular purpose.<sup>165</sup> The modern Court has uncritically accepted this proposition both in general<sup>166</sup> and—as *Bowen* made clear—in the particular case of religious charities.<sup>167</sup> The problem with this approach is that it is built upon a half-truth, and, to make matters worse, the half of the truth it relies on misses the constitutional point. Sectarian charities serve *both* secular and religious purposes; but up until now, the Court has been sufficiently satisfied with the former reality to consciously ignore the latter. In actuality religious charities *do* provide a secular benefit in providing social services; virtually every religious program serves *some* secular purpose.<sup>168</sup> In truth those benefits are only a happy by-product of the charities' real commitment to their profoundly religious missions.

What is important from the structural perspective, and therefore from the constitutional perspective, is not the secular purposes charities serve, but rather their structural purpose within the dialectic of virtue. Charities' structural purpose is to encourage public virtue, not to help the state provide social services. Indeed, religious charities developed wholly to fulfill a religious and moral mission, entirely appropriate given the necessity of pursuing virtue for virtue's sake. In this sense, these charities are paradigmatic institutions of the social "establishment" that maintains the dialectic's antithesis. By recognizing only the secular benefits charities provide—what are, in effect, the pleasant political side effects of public virtue—the Court strips such institutions of their profound moral purposes and identities. State funding of these charities thus collapses the Establishment paradox, and therefore the constitutional dialectic, by transforming manifestations of

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<sup>165</sup> *Bradfield v. Roberts*, 175 U.S. 291, 298 (1899).

<sup>166</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (searching state-funded religious organizations or messages for a "secular purpose").

<sup>167</sup> *Bowen v. Kendrick*, 487 U.S. 589, 613-14 (1988).

<sup>168</sup> E.g., Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 795 (2001).

public virtue into institutions of the state. In so doing, government assistance sadly reduces the sacred to the secular.

State aid creates other related and equally important problems for religious charities. Notably, government assistance necessarily comes with limitations and guidelines. The current legislation exempting religious charities from the Civil Rights Act tends to work the very mischief Madison protested in his *Memorial and Remonstrance*: the program compels citizens to contribute tax dollars to organizations that engage in conduct they may find blasphemous.<sup>169</sup> If, however, the statute were to require the charities to abide by the employment practices provisions, it would compel the religious organizations to abandon, or at least ignore, some of their core religious values—at least if they want to participate in the program. Likewise, the ban on proselytizing interferes with the church groups' independence in offering moral guidance and instruction, as the dialectic requires. One charity leader summed it up well: “[I]f there is language in the legislation that says not to tell people to develop a relationship with God[,] that’s not good for us.”

<sup>170</sup> By denying these religious institutions the opportunity to fulfill their moral—and thus constitutional—purpose, state funding of church charities does the structure of disestablishment a profound disservice.

### **Religion in the Public Schools**

Given the structure of disestablishment described above, it is hardly surprising that our public schools have emerged as the primary Establishment Clause battleground: they seem to straddle the constitutional dialectic to serve as *both* political and social institutions. As such, our common schools embody the collapse of the disestablishment dialogue and the emergence, in its place, of a schizophrenic monologue. Modern public schools are almost necessarily an extension of the state: they rely nearly exclusively on government funding, they further state objectives, and attendance is

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<sup>169</sup> MADISON, *supra* note 73, at 1866-7.

<sup>170</sup> Bartrum, *supra* note 59, at 211 (quoting Lea Setegn, *Scott Attacks 'Faith-Based Initiative'*, RICH. TIMES-DISPATCH, July 3, 2001, at B7).

compulsory. But, at their core, schools are among the most powerful and important of our social institutions. They give shape and guidance to our intellectual, social, and ethical development; they teach us how to reason, how to cooperate, and how to compromise; and they prepare us to become virtuous participants in our republican democracy. Because the public schools present such a difficult Establishment issue, it is important to revisit not only the structural commitments described above, but also to recall the central purpose—fostering individual moral reasoning and growth—of separating church from state in the first place.

This part, then, briefly examines the history of religion in the American schools in an attempt to illuminate their evolution from primarily social institutions into quasi-political institutions. It then very briefly recounts the Supreme Court’s modern approach to religious speech in the public schools. Finally, it suggests a controversial structural solution: that we continue state funding of public schools, but that we treat them as social institutions for constitutional purposes. That is, allow public schools to present whatever religious or moral messages they choose. While this solution certainly stands in stark contrast with many of Madison’s original ideas about disestablishment,<sup>171</sup> it serves the basic democratic goal of religious and political diversity he described in *The Federalist*,<sup>172</sup> and it might also resolve the most divisive Establishment issue of our time.

### **A Brief History of Religion in the Public Schools**

There were no public schools in the modern sense during the American Revolution or the constitutional founding, and thus the originalist approach is of limited application to this subject.<sup>173</sup>

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<sup>171</sup> MADISON, *supra* note 73, at 6-7 (protesting a program that would spend tax dollars to aid Christian teaching).

<sup>172</sup> THE FEDERALIST NO. 51 (James Madison).

<sup>173</sup> FELDMAN, *supra* note 54, at 57. Establishment jurisprudence has evolved to countenance two distinct issues related to religion and schooling: religious speech in public schools—the topic of this part—and state aid to parochial schools. See Lupu, *supra* note 168, at 771-779 (detailing the development of these separate spheres of Establishment doctrine). The framers were plainly conscious of the second

Indeed, early American education varied widely depending on the economic and social circumstances of the particular colonies. Southern colonies such as Virginia—established to turn a profit for English planter companies—initially devoted little attention to intellectual inquiry and development, and schooling often consisted of attending church on a daily basis.<sup>174</sup> The New England colonies, however, developed as an association of small, deeply religious communities, and from early on education was an important means of keeping religious order.<sup>175</sup> Thus Massachusetts enacted its famous “Old Deluder Satan Law” in 1647, which required towns of more than fifty households to provide religious schooling to counter “the chief project of the old deluder, Satan, [which is] to keep men from the knowledge of the Scriptures.”<sup>176</sup> Despite their differences, however, almost all colonial schools shared at least some common foundation in Protestant Christianity.<sup>177</sup>

With the Enlightenment came a change in educational philosophy, however, as Americans began to believe that the freedom of thought was central to the evolution of civil society.<sup>178</sup> Similar intellectual developments in England had contributed to the growth of dissenting private “academies” intended to provide a practical alternative to religious schooling, and the colonists adopted this approach in the latter half of the eighteenth century.<sup>179</sup> These academies provided a curriculum devoted not just to religious order, but also to intellectual and scientific development, and in so doing provided a model for the emergence of secondary education.<sup>180</sup> Still, most colonial schooling was left either to churches, families, or individual townships;<sup>181</sup> only the wealthy could afford to attend the exclusive private schools of the day.

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possibility—indeed, it is the subject of Madison’s *Memorial and Remonstrance*—but they would not have had reason to address the first issue.

<sup>174</sup> JOEL SPRING, *THE AMERICAN SCHOOL: 1642-1993* 13 (3d ed. 1994).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 7.

<sup>177</sup> *Id.* at 6.

<sup>178</sup> *Id.* at 16.

<sup>179</sup> *Id.* at 22-23.

<sup>180</sup> *Id.*

<sup>181</sup> FELDMAN, *supra* note 54, at 57-58.

However, with the election in 1820 of the “unpolished frontiersman,” Andrew Jackson, the educated classes became increasingly aware that some form of broad-based public schooling was necessary to prepare the American masses for democracy.<sup>182</sup> This awareness gave rise to the common, or public, school movement.<sup>183</sup>

The common school movement differed from the educational status quo in at least three important ways.<sup>184</sup> First, in an effort to ease social hostilities, common school advocates hoped to educate children of all classes, ethnicities, and religions in a common schoolhouse.<sup>185</sup> Second, the movement intended to use education as an instrument of government policy—as a means of resolving and controlling social problems.<sup>186</sup> Third, common schooling required the states to establish localized control boards to homogenize the curriculum and oversee educational standards.<sup>187</sup> These three developments reflected the relatively new idea that schooling could play a critical role in shaping a person’s character, and that, for this reason, universalized common education was a powerful tool for social and economic improvement.<sup>188</sup>

With its twin social and intellectual goals, then, the common school movement assumed—from its inception—that moral instruction would form an integral part of public education:

If the point of the common schools was to gentle the unlettered and the ill-bred, so that they would participate in the republican project instead of subverting it, then surely the schools must give children the solid morals that they might not get at home. Teaching them to read and write without inculcating proper moral values

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<sup>182</sup> *Id.* at 58-59.

<sup>183</sup> *Id.*

<sup>184</sup> SPRING, *supra* note 174, at 63.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 63-64.

<sup>188</sup> *Id.* at 64.

would have been, on this theory, worse than irresponsible—it would have been a waste of money.<sup>189</sup>

For the Protestants behind the common school movement, teaching morality meant teaching the King James Bible; yet by the late 1830s an explosion in sectarian diversity left Christians more divided than ever on matters of biblical orthodoxy—and so from the early going the common school movement faced a religion crisis.<sup>190</sup>

The solution came to be known as “nonsectarianism,” or the conviction that Christians share the same fundamental values, derived from the Bible, which the common schools could teach without offense to any particular sect.<sup>191</sup> While nonsectarianism had its critics—both devout Protestants who found it too diluted and Catholics who recognized it as disguised Protestantism—the doctrine enjoyed considerable success, and has had a lasting impact on American education and public life.<sup>192</sup> By the 1840s, however, Irish Catholics fleeing the potato famine flooded into New York City and began to push for state funding of their own religious schools.<sup>193</sup> The Catholics met with stiff resistance, however, as the New York Public School Society took a principled, if hypocritical, stand for the separation of church and state.<sup>194</sup> As one commentator observed,

the ostensibly nonsectarian schools of the Public School Society had some broadly Protestant, if not narrowly sectarian, characteristics. One goal of the society was “to inculcate the sublime truths of morality and religion contained in the Holy Scriptures,” and its schools required children to read the King James Bible in which

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<sup>189</sup> *Id.* at 59.

<sup>190</sup> HAMBURGER, *supra* note 54, at 220.

<sup>191</sup> FELDMAN, *supra* note 54, at 61.

<sup>192</sup> *Id.* at 60-63.

<sup>193</sup> HAMBURGER, *supra* note 54, at 220; accord Lupu, *supra* note 168, at 780-81.

<sup>194</sup> HAMBURGER, *supra* note 54, at 220-23 (quoting RAY A. BILLINGTON, *THE PROTESTANT CRUSADE, 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* 143-44 (1938)).

Catholics were condemned as deceitful, bigoted, and intolerant.<sup>195</sup>

Although these early school disputes in New York stoked the fires of anti-Catholic animus and provided grist for the political mill, the issue remained largely confined to the social and political spheres, and it was not until after the Civil War that the controversy took on a constitutional dimension.<sup>196</sup> As the aptly named “Bible wars” grew increasingly violent in New York and elsewhere, Congressman James Blaine of Maine seized the political opportunity to propose a constitutional amendment prohibiting state support for religious—by which everyone understood Catholic—schools.<sup>197</sup> Though the Blaine Amendment ultimately failed,<sup>198</sup> the Congressman’s efforts succeeded in stirring up strong Protestant opposition, and Catholics were eventually forced to drop their requests for state assistance.<sup>199</sup> For the time being, nonsectarianism triumphed as the moral doctrine of the common school, but by the early years of the twentieth century a competing ideology began to take hold of the American consciousness: secularism.

Secularism, a term invented in the 1850s by Englishman George Jacob Holyoake,<sup>200</sup> urged people to “focus on things of this world, not the world to come, and to rely on empirically observable facts, not theories of the unseen.”<sup>201</sup> As a philosophy, secularism

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<sup>195</sup> *Id.*

<sup>196</sup> FELDMAN, *supra* note 54, at 70-71.

<sup>197</sup> Lupu, *supra* note 168, at 781. Blaine had Presidential aspirations, and he hoped to capture the support of a unified Protestant voting bloc. FELDMAN, *supra* note 54, at 73-77.

<sup>198</sup> The Blaine Amendment was probably ultimately done in by Protestant fears that the language could be interpreted to forbid any Bible reading, even nonsectarian instruction, in the public schools. Lupu, *supra* note 168, at 781.

<sup>199</sup> FELDMAN, *supra* note 54, at 91.

<sup>200</sup> HAMBURGER, *supra* note 54, at 294 n.20. Holyoake claimed that he first used the word “Secularist” in his periodical, *The Reasoner*, on December 3, 1851. *Id.*

<sup>201</sup> FELDMAN, *supra* note 54, at 113. Holyoake found “secularism” a more appealing label than others applied to his views at the time: “The term ‘Secularism’ has not been chosen as a concealment, or a disguise, or as an apology for free inquiry, but as expressing a certain positive and ethical element, which the terms ‘Infidel,’ ‘Sceptic,’ or ‘Atheist,’ do not express.” HAMBURGER, *supra* note 54, at 294 n.20 (quoting George

developed hand in hand with several significant advances in the sciences—perhaps most notably the publication of Charles Darwin’s *The Origin of Species* and its sequel *The Descent of Man*—which presented a serious challenge to the biblical creation story.<sup>202</sup> The theory began to gather steam in America, and soon a movement was afoot to remove religion from all public institutions, including the common schools.<sup>203</sup> Though the movement initially met with strong opposition, by the 1920s leading secularists like attorney Clarence Darrow of the famed Scopes Monkey Trial had positioned themselves as bulwarks of rationality and reason set against the superstitious voices of an anachronistic fundamentalism.<sup>204</sup> By the 1940s, secularism had found favor with the justices of the Supreme Court, and the modern conception of public schools as an extension of the secular state—dedicated to a “strict and lofty neutrality” in matters of religion—took root in the legal landscape.<sup>205</sup> Thus, by the mid-twentieth century our schools, which at the time of the constitutional founding were paradigmatically social institutions, had traversed the constitutional dialectic and taken their modern place as quasi-political institutions.

### **The Court and Religious Speech in the Public Schools**

The Supreme Court opinions devoted to this issue since incorporation of the Establishment Clause in 1947 are too numerous to consider in their entirety here, and thus this analysis is limited to four important decisions. The first two—*Engel v. Vitale* and *Abington School District v. Schempp*—are considered together.<sup>206</sup>

In *Engel*, the Court struck down a policy in the New York public schools that required students to recite the Regents’ Prayer

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J. Holyoake, *Outlines of Secularism*, 16 THE REASONER: GAZETTE OF SECULARISM 17 (Jan. 8, 1854)).

<sup>202</sup> FELDMAN, *supra* note 54, at 111.

<sup>203</sup> *Id.* at 125-130.

<sup>204</sup> *Id.* at 137-142.

<sup>205</sup> *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 24 (1947).

<sup>206</sup> *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

before classes each day.<sup>207</sup> Justice Hugo Black reasoned that the prayer might offend non-Christian students, even if the schools permitted them to opt out of the recitation.<sup>208</sup> In *Schempp*, the Court employed a similar rationale to invalidate school programs in Pennsylvania and Maryland that required Bible reading and recitation of the Lord's Prayer.<sup>209</sup> These two cases set the modern ground rules for religious speech in public schools in at least two important ways.

First, after careful discussion, the Court concluded that the cases implicated the Establishment Clause rather than the Free Exercise Clause.<sup>210</sup> Indeed, in *Schempp*, the Court explained that challenges brought under the latter clause require proof of some governmental coercion, while the former clause requires no such showing.<sup>211</sup> Thus, while it is perhaps plausible that banishing religious speech from the public schools could work a violation of students' free exercise rights,<sup>212</sup> the Court, at an early stage, decided to treat school speech as an Establishment issue.

Second, the Court concluded that even voluntary, non-denominational prayer in school violated the constitutional separation of church and state.<sup>213</sup> As Justice Black announced in *Engel*, "[n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause."<sup>214</sup> The emerging neutrality doctrine, then, dealt a legal deathblow to nonsectarianism, and further seemed to suggest that any religious speech, even that which did not require student participation, violated the constitutional mandate.

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<sup>207</sup> *Engel*, 370 U.S. at 423-24.

<sup>208</sup> *Id.*

<sup>209</sup> 374 U.S. at 223.

<sup>210</sup> *Engel*, 370 U.S. at 430-31.

<sup>211</sup> 374 U.S. at 222-23.

<sup>212</sup> The Court has begun to return to this position in many ways, particularly given the free speech analysis in *Good News Club*. See *supra* notes 148-151 and accompanying discussion.

<sup>213</sup> *Engel*, 370 U.S. at 430.

<sup>214</sup> *Id.*

Seventeen years later the Court extended this rationale to invalidate written, as well as verbal, religious messages in the public schools.<sup>215</sup> In *Stone v. Graham*, the Court struck down a Kentucky statute that required public schools to post a “durable permanent copy” of the Ten Commandments in every elementary and secondary classroom in the state.<sup>216</sup> The law further required that each copy of the Commandments bear the notation: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”<sup>217</sup> Nonetheless, in a per curiam opinion, the Court concluded that the statute failed to satisfy *Lemon’s* secular purpose requirement, and summarily reversed the state court decision upholding the statute.<sup>218</sup>

Notably, the Court rejected Kentucky’s claim that the Commandments were qualitatively different than the verbal speech at issue in previous cases: “[It is not] significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel*, for ‘it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment.’”<sup>219</sup> While this *ipse dixit* presents the Court’s conclusion as straightforward, the case actually represents a marked expansion of the neutrality doctrine. The doctrine now appeared to preclude not only direct religious speech, but also the display of seemingly passive religious messages and symbols that had to that point avoided constitutional scrutiny. The Commandments in *Stone* were posted at the state’s behest; in another twenty years the Court would take the further step of forbidding even voluntary, student-led religious speech at public school functions.<sup>220</sup>

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<sup>215</sup> *Stone v. Graham*, 449 U.S. 39 (1980).

<sup>216</sup> *Id.* at 41 (quotations and citation omitted).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 42-43. The Court neither heard oral argument nor accepted briefs on the merits before deciding the case. *Id.* at 47 (Rehnquist, J., dissenting).

<sup>219</sup> *Id.* at 42 (quoting *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963)).

<sup>220</sup> *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

In *Santa Fe Independent School District v. Doe*, the Court confronted a Texas public school policy that permitted a student to initiate and lead a Christian invocation over the public address system prior to varsity football games.<sup>221</sup> Relying on Justice O'Connor's opinion in *Westside Community Schools v. Mergens*, the district argued that, as private speech, the invocations deserved constitutional protection pursuant to either the Free Speech or Free Exercise Clause.<sup>222</sup> Writing for the majority, Justice John Paul Stevens rejected that argument, observing that the prayers were "authorized by a government policy and take place on government property at government-sponsored school-related events," and further suggesting that the school had not demonstrated that it would allow any or all private citizens to also express themselves over the public address system before games.<sup>223</sup> Thus, Stevens concluded that the religious speech, while ostensibly student-initiated, was actually attributable to the school district.<sup>224</sup>

The school district also argued that, because students *chose* to attend the football games, the pre-game invocations did not result in the kind of impermissible coercion that had characterized earlier school prayer cases.<sup>225</sup> Thus, the district reasoned, the school did not require students to hear or read a religious message, as was the case in *Engel*, *Schempp*, and *Stone*. Stevens disagreed, pointing out that high school students feel tremendous pressure to attend social events, and that some students—such as the players—actually did not choose to be there for the prayer.<sup>226</sup> Observing that, "the government may no more use social pressure to enforce

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<sup>221</sup> *Id.* at 294.

<sup>222</sup> *Id.* at 302. O'Connor's observation that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect" recalls aspects of the structural model I have presented. Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990) (emphasis added).

<sup>223</sup> *Santa Fe*, 530 U.S. at 302. A student representative, chosen through a dual student-body election process, was the only person allowed to address the crowd. *Id.* at 302-03.

<sup>224</sup> *Id.* at 310.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 311-12.

orthodoxy than it may use more direct means,” Stevens concluded that “[t]he constitutional command will not permit the District ‘to exact religious conformity from a student as the price’ of joining her classmates at a varsity football game.”<sup>227</sup> The Court struck down the policy and enjoined further invocations at Santa Fe High School.

In 2007, then, legal secularists can claim almost total victory in school speech cases. Institutions originally created to bring religion and morals to the working class now, in the name of neutrality, must banish any and all religious speech—even student-initiated speech—from school events. Public schools, which began as something like state-sponsored social institutions, have become exclusively political institutions, serving the thesis of the constitutional dialectic by protecting moral autonomy and the liberty of conscience. But whether this conception of the public schools truly serves the structure of disestablishment, or democratic society as a whole, remains an open question. After all, public schools are in many ways our paradigmatic social institutions, and are well suited—indeed, designed—to guide and instruct young Americans of all classes and races about life in a republican democracy, including the profound responsibilities of public virtue. Indeed, it is hard to see the sense in confining these organizations to the side of the constitutional dialectic that forces them to clumsily serve state neutrality when they are much better equipped to promote virtuous living. The final part of this section, then, proposes that we step back and recognize public schools for what they truly are: state-funded social institutions.

### **The Structural Approach: Public Schools as State-Funded Social Institutions**

To this point, this paper has argued that the Establishment Clause requires us to delineate between political institutions and social institutions, and to ensure that each group is free to fulfill its structural role without interference from the other. Thus, the concept of a “state-funded social institution” seems oxymoronic, as

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<sup>227</sup> *Id.* at 312 (quoting *Lee v. Weisman*, 505 U.S. 577, 594, 596 (1992)).

state funding would appear to turn a social institution into a political institution—the very kind of encroachment cautioned against in the discussion of religious charities above.<sup>228</sup> At this point in our history, however, public schools represent a special case, and therefore we must treat them differently than any other institution for Establishment purposes. It is far too late in the development of our national system of education to suggest that we do away with public school funding and return to a model of community education based on private donations. Despite being trapped in the state-funded school paradigm, however, perhaps we can do the next best thing: do away with the curricular limitations that state assistance imposes.

One approach that seems aimed at a similar end is the private choice principle as applied in the school voucher context.<sup>229</sup> In *Zelman v. Simmons-Harris*, the Court upheld the Ohio Pilot Scholarship program, a school voucher plan in which at least ninety-six percent of the voucher funding found its way to religious schools.<sup>230</sup> The scholarship program provided direct aid vouchers to families based on financial need, and the families were free to redeem them at a public or private school of their choosing.<sup>231</sup> Because the money ended up primarily in religious schools, several taxpayers challenged the program as a violation of the Establishment Clause.<sup>232</sup> Chief Justice Rehnquist, for the majority, invoked the private choice principle and concluded that because the

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<sup>228</sup> Indeed, one of the primary reasons to keep charities off of state assistance is to avoid the problem we now face with our public schools. Public schools now depend for their existence on state funding, and thus are forced to compromise much of the curricular freedom necessary to perform their constitutional function as social institutions. We should try to prevent this public dependence, and the accompanying constitutional dilemma, from developing in the world of religious charities. See *supra* notes 181-187 and accompanying text.

<sup>229</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (applying private choice principle to uphold a school voucher program that paid for parochial schooling). Vouchers approach the problem from the opposite end of the Establishment spectrum: they seek public funding for religious schools, while I suggest the permissibility of religious speech in public schools.

<sup>230</sup> *Id.* at 646.

<sup>231</sup> *Id.* at 645-46.

<sup>232</sup> *Id.* at 644.

program distributed money in a neutral way to needy families whose private choices resulted in payment to religious schools, the program passed constitutional muster.<sup>233</sup>

Voucher programs like that at issue in *Zelman* appear to work towards the goal of schools as state-funded social institutions, with the private choice principle acting as a kind of constitutional money launderer. But such doctrinal gyrations are inefficient, and have real social costs. Among those costs is the possibility that voucher programs and the resulting student flight will only contribute to the hastening decline of our public schools, and, perhaps, the loss of what some call “public space”:

Public schools are one of the few institutions in the United States where people from different backgrounds come together to negotiate common values and to determine the course of our shared future. It is public spaces, such as those schools, that give meaning to citizenship—because it is in those spaces that we are all equal.<sup>234</sup>

Whether that public space is truly lost—or simply moved—with the closing of a public school is an open question, but there is no doubt that forcing public schools to compete for their state dollars with constitutionally-unbound private schools in an open market is both unfair and inefficient. In a pure voucher or school choice system, public schools would seem doomed to wither on the vine, their facilities and teachers eventually making their way—perhaps—into the private choice sector.<sup>235</sup>

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<sup>233</sup> *Id.* at 653-55.

<sup>234</sup> Denise C. Morgan, *The Devil is in the Details: Or, Why I Haven't Yet Learned to Stop Worrying and Love Vouchers*, 59 N.Y.U. ANN. SURV. AM. L. 477, 479 (2003) (citing Denise C. Morgan, *Deregulating Education in United States, from Vouchers to Home Schooling to the End of Voluntary Desegregation: Is the Cost Too High?*, Findlaw's Writ (Sept. 17, 2002)).

<sup>235</sup> In reality, many magnificent old public school buildings remain closed and vacant in our inner cities. See, e.g., David A. Vise, *D.C. School Properties To Be Seized; Control Board Moves To Dispose of Surplus*, WASH. POST, April 2, 1997, at B1 (detailing proposal to sell two dozen vacant school buildings to private developers).

More efficient and more honest than the search for constitutional loopholes through which to funnel public funds into religious schools is a move to permit religious speech and instruction in our existing public schools. Of course, such a proposal appears squarely in conflict with the more sophisticated disestablishment ideas prevalent at the constitutional founding.<sup>236</sup> In his *Memorial and Remonstrance*, Madison protested a program that would fund “Teachers of the Christian Religion” because it would compel citizens, through taxation, to support religious teachings they might find blasphemous: “It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.”<sup>237</sup> But Madison would not have been aware of the Establishment problem that modern public schools present—powerful and dynamic social institutions handicapped by the necessity of state funding—and one cannot help but suspect that he would shudder at the prospect of an educational system bereft of spiritual or moral instruction.

The radical proposal, then, is that we grant local school districts the freedom to develop any curriculum they choose—sectarian, nonsectarian, secular, atheist, or agnostic. Districts could support several schools with different curricula designed to represent their diverse religious communities. Alternatively, districts might opt for an inclusive curriculum that incorporates many religious perspectives. On the other hand, of course, a district might choose to establish one majority curriculum to the detriment of religious minorities. To combat this latter evil, districts must provide monetary support for parental choice and educational diversity, whether that entails home schooling, community-based private schooling, or even voucher programs. While the proposal to allow a variety of religious teachings in public schools is probably at odds with Madison’s views in the *Memorial and Remonstrance*, the

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<sup>236</sup> MADISON, *supra* note 73, at 183-186.

<sup>237</sup> *Id.* at 184. It bears note that Madison’s objection is more accurately leveled at the voucher approach—which seeks public funding for religious schools—but I concede that the end result of my proposal (religious speech in public schools) is the same.

effect of promoting religious diversity actually works to prevent religious tyranny in the way he envisioned in Federalist No. 51:

[S]ociety itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects.<sup>238</sup>

To this end, religious speech in public schools would act to diffuse the secularist hegemony some perceive as dictating their children's education,<sup>239</sup> while simultaneously stabilizing and enriching our communities by building on the quintessential American foundation of diversity.

It is difficult to predict what such a proposal might look like if actually realized, and it is certainly unlikely that it will be any time soon. It is increasingly evident, however, that the current constitutional doctrine regarding public schools does a profound disservice to the structural dialectic at the heart of disestablishment. When we step back to consider the role that schools must play in republican democracy, dependent as we are on that "additional spring" of public virtue,<sup>240</sup> it is clear to which side of the constitutional dialectic schools belong. The attempt to neutralize public education as a branch of the amoral state misapprehends the constitutional structure of disestablishment—and a change might do us good.

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<sup>238</sup> THE FEDERALIST NO. 51 (James Madison), *supra* note 63, at 254.

<sup>239</sup> See, e.g., Irwin W. Lutzer, Editorial, *A Conservative Response: Imposing Left Morality*, CHI. TRIB., May 22, 2005, at C1 (describing secularism as the imposition of a left-wing ideology disguised as neutrality).

<sup>240</sup> MONTESQUIEU, *supra* note 62, at 22.

### Conclusion

A constitution is only as noble as the uses to which it is put. Among the most lasting and noble functions of the American Constitution is to create a shared intellectual space—to bind us together in a principled, transcendent forum where we must negotiate the terms of our own democracy. And that negotiation has rules, born of our legal heritage, our learned customs and traditions, and our evolving understanding of democratic justice. There are accepted— and therefore legitimate—ways to debate constitutional meaning: original intent, plain meaning, *stare decisis*. This paper contends that the structural method can be among the most helpful. Although some originalists suggest that any interpretation not based on a founding document or practice is merely unfettered activism, the structuralist, like the textualist or doctrinalist, in fact attempts to apply equally objective principles to her constitutional work. For the structuralist, those principles derive from the relationships the Constitution creates between various democratic institutions, and the theoretical commitments those relationships imply.

This paper has attempted to reveal the constitutional structures that give shape to the Establishment Clause and our founding commitment to the liberty of conscience. It is this liberty that ensures our freedom to engage our moral sensibilities, to form our own ideas about right and wrong, and to practice virtue—the highest of human callings. But a virtuous choice is only so if freely made, and thus the Establishment Clause requires our political institutions to vigorously defend our right to follow any moral code, or none at all. This freedom of choice, however, is a means and not an end, as freedom itself is not virtue. We must choose well, and we need guidance, encouragement, and support to do so; and so our democracy must rely on well-organized social institutions to promote public virtue. These social institutions do not embody the force of law, and so do not destroy the freedom to choose, but they do encumber us with profound moral duties. By participating in this dialectic—by choosing well when given the freedom of choice—we are able to practice virtue and flourish. The

constitutional commitment, then, is to preserve the structure of this dialectic: to ensure that our political institutions protect and encourage the freedom of choice, while our social institutions are free to offer moral guidance and instruction.

This paper has examined two modern Establishment controversies in light of this structure. The analysis is fairly straightforward regarding state aid to religious charities, but it is more complex and difficult in the realm of public education. These complexities arise because schools, in their natural and historical state, are social institutions, but public funding has transformed them into quasi-political institutions for constitutional purposes. The controversial proposal that we treat schools as state-sponsored social institutions recognizes that treating schools as secular political institutions forces them into a role in which they not are particularly well equipped to succeed. Permitting schools to offer any and all religious instruction they choose would violate what are now deeply embedded constitutional expectations, but would enable us to make full and appropriate use of a potentially powerful social institution. The requirements that would accompany this proposal—such as a corresponding increase in the diversity of educational opportunities available to all parents, and the freedom to opt out of public schooling if available opportunities prove religiously offensive—are real and complex, but are also necessary if schools are to fulfill their role in the constitutional dialectic.

Just as Phillip Bobbitt was satisfied to discover judicial conscience at the center of constitutional practice, I am happy to find individual conscience at the core of republican democracy. After all, as Judge Learned Hand once observed, “[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.”<sup>241</sup> As long as our political institutions make good on the constitutional promise to ensure the liberty of conscience, and so long as we continue to form and protect independent social institutions dedicated to moral growth and flourishing, the republic of virtue will remain safe in our sovereign

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<sup>241</sup> Learned Hand, *The Spirit of Liberty 1944*, reprinted in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND*, 189-90 (Irving Dilliard ed., 3d ed. 1963).

hearts: free, as we are, from all tyranny but the still, small voice within.