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Is Tax-Funded Education Unconstitutional?

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This Article explains why tax-funded education is an unconstitutional establishment of religion in violation of the First Amendment. It analyzes the worldview that sustains the educational establishment and informs Supreme Court jurisprudence—a worldview that falsely bifurcates reality between the secular and the religious.

The Supreme Court has never given serious attention to defining the term religion as used in the First Amendment religion clauses. During the Virginia establishment controversy that culminated in 1786, Virginia provided a definition of religion and identified the fundamental principles on which religious liberty is based. That definition and those principles contrast with the subjective definition and discordant principles that mark modern Supreme Court jurisprudence. The present critique is not simply based on an originalist theory of constitutional interpretation, but rather it reflects a law-of-nature principle that civil government has no jurisdiction over the mind.

Public schools have become the chief means by which all levels of civil government have established religion in the United States. Four distinct forms of school-state relations parallel four distinct forms of church-state relations that have existed in colonial Virgina or in the United States. Only the model of free churches and free schools (i.e., privately funded churches and schools) is consistent with the First Amendment.

In defeating the Virginia state-church establishment of religion, Madison and Jefferson advocated for the principles that God has created the mind free and that it is "sinful and tyrannical" to tax a person for "propagation of opinions which he disbelieves." By 1819, Madison and Jefferson were instrumental in promoting the state-school establishment of religion through tax-funded schools. The Supreme Court, and most Americans, vacillate between the diametrically opposed principles that the state has no power to

establish an orthodoxy of opinion and that the most important function of state government is to inculcate values through public schools.

This vacillation is best explained by the fact that jurists and citizens hold two competing worldviews—one being orthodox Christianity and the other a worldview influenced by Aquinas and Kant that divides reality between the secular and religious. Consequently, the Court has condoned civil government establishing an orthodoxy of "secular" belief through a system of compulsory school attendance at taxpayer expense, while tolerating "religious" education that is privately funded. Based on orthodox Christian principles, civil government has no authority to provide tax funding for educational purposes of any kind.

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Professor of Law, Liberty University School of Law. The author is especially indebted to Herbert W. Titus, the founding Dean of Regent University School of Law, for his inspiration and insights into the meaning of the First Amendment and definition of the term *religion*.

ARTICLE

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Jeffrey C. Tuomala[†]

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CONTENTS

I. INTRODUCTION

This Article has four objectives. The first is to define the term "religion" as used in the First Amendment of the U.S. Constitution. Quite remarkably, the Supreme Court has never given serious attention to defining that term. The second objective is to show that tax-funded education constitutes an establishment of religion. The parallels between the forms of state-church relationships and state-school relationships—as establishments of religion—are striking. The third objective is to expose two variations of the false worldview that undergirds the Supreme Court's religious-liberty jurisprudence. The Court can escape the conclusion that tax-funded education constitutes an establishment of religion only by holding to a false bifurcation of reality between the "secular" and the "religious." The final objective is to make the case that a biblical worldview lays the only proper foundation for education and precludes civil government from exercising jurisdiction over education.

Part II recounts the eighteenth-century establishment controversy in Virginia that laid the foundation for religious liberty as incorporated into the U.S. Constitution.[1] A brief survey of four significant documents and their interrelation is essential for understanding the resolution of the Virginia establishment controversy and for properly understanding the First Amendment. This analysis is not based on an originalist theory of constitutional interpretation, but rather, it reflects a law-of-nature principle that civil government has no jurisdiction over the mind.

Part III builds on the proper definition of religion as settled in Virginia to demonstrate that tax-funded education constitutes an unconstitutional establishment of religion.[2] The Supreme Court's most recent decisions in education cases under the Establishment and Free Exercise Clauses give good

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[1] *See* discussion *infra* Section II. This Article does not address the question of whether the Fourteenth Amendment incorporates the religion clauses so as to make them apply equally to the states as to the federal government, but it assumes that both clauses are incorporated. Even if the Establishment Clause was not incorporated, the argument presented in this Article is that religious liberty is a fundamental right that is not dependent on a positive enactment or adoption in a constitution. Therefore, the analysis presented in this Article would be equally relevant when interpreting rights under any state constitutional provision protecting religious liberty.

[2] *See* discussion *infra* Section III.

reason to believe that the Court would uphold a voucher system with equal funding for public and private schools (both religious and non-religious). Those decisions also give reason to believe that the Court would allow the equal funding of religious and non-religious charter schools. However, following the principles settled during the Virginia establishment controversy, the state should not provide tax funding for any schools—whether they be traditional public schools, charter schools, private non-religious schools, or private religious schools.

Part IV identifies and explains two variations of the worldview on which the Court has operated in deciding religious liberty cases for nearly 80 years.[3] That worldview falsely bifurcates reality between the secular and the religious. The Court has thus allowed the state to establish an orthodoxy of "secular" belief through a system of compulsory school attendance at taxpayer expense while tolerating privately funded "religious" education. The philosophical and theological foundations for this worldview are found in the writings of Thomas Aquinas and Immanuel Kant. This worldview erroneously assumes that there is a "public" realm governed by autonomous reason that functions *independently* of God and a "private" realm governed by faith.

Part V constructs the biblical basis for two propositions.[4] The first proposition is that education must be Christian. The second proposition is that the state has no authority to establish schools or to provide tax funding for Christian education.

II. HISTORICAL CONTEXT: DEFINITIONS AND PRINCIPLES

The Supreme Court has looked to the history of Virginia's religious establishment leading up to the War for Independence and the ensuing controversy that culminated in 1786 with the disestablishment of the church and the establishment of religious liberty. Four documents written by four of Virginia's foremost statesmen—George Mason, James Madison, Patrick Henry, and Thomas Jefferson—played prominently in Virginia's disestablishment controversy. Most importantly, Virginia provided an

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[3] *See* discussion *infra* Section IV.

[4] *See* discussion *infra* Section V.

objective definition of "religion" and identified foundational principles of religious liberty that inform a proper understanding of the religion clauses.

A. Establishment and Disestablishment in Virginia

To understand why tax-funded education constitutes an unconstitutional establishment of religion, it is necessary to recount the historical background that shaped the principles that are memorialized in the First Amendment and which ought to inform the Supreme Court's religious liberty jurisprudence.

The text of the First Amendment religion clauses is short,[5] with terms undefined, and the Congressional record regarding the adoption of the First Amendment is scant.[6] The history of the Virginia controversy is extremely important for supplying a definition of religion and identifying the Amendment's underlying principles. The U.S. Supreme Court has treated two of the documents produced during the eighteenth-century Virginia establishment of religion controversy as the progenitors of the First Amendment. The first document is the *Bill for Establishing Religious Freedom* that Thomas Jefferson drafted in 1779 for the purpose of disestablishing the Anglican Church.[7] The Virginia General Assembly eventually enacted that Bill with some modifications as the *Statute for Establishing Religious Freedom* in 1786.[8]

The second document is the *Memorial and Remonstrance in Opposition to Religious Assessments*[9] that James Madison wrote in 1785. It opposed a *Bill Establishing a Provision for Teachers of the Christian Religion*[10] that Patrick Henry promoted, which would have provided tax funding for multiple educational establishments. In essence, Henry's Bill would have established a tax-funded voucher program for educational purposes. In *Everson v. Board*

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[5] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend I.

[6] *See generally* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 57–62 (2d ed. 2006).

[7] BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1779).

[8] STATUTE FOR ESTABLISHING RELIGIOUS FREEDOM (1786). The Statute had the effect of ensuring that no church or churches would be established in Virginia.

[9] JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, ¶ 1 (1785).

[10] A BILL ESTABLISHING A PROVISION FOR TEACHERS OF THE CHRISTIAN RELIGION (1784).

of Education,[11] the Supreme Court decision that incorporated the Establishment Clause into the Fourteenth Amendment, Justice Hugo Black wrote:

> This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute. *Reynolds v. United States*, [98 U.S. 145,] 164; *Watson v. Jones*, 13 Wall. 67; *Davis v. Beason*, 133 U.S. 333, 342.[12]

Madison and Jefferson made two supreme contributions to a proper understanding of religious liberty. In his *Memorial and Remonstrance*, Madison incorporated and expounded the definition of religion that he and

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[11] Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[12] *Id.* at 13. Justice Rutledge's dissenting opinion appended Madison's *Memorial and Remonstrance* and Henry's *Bill for Establishing a Provision for Teachers*. *Id.* at 63, 72 (Rutledge, J., dissenting). In *Davis v. Beeson*, 133 U.S. 333 (1890), the Court gave a longer explanation of the term "religion" but cited neither Madison nor Jefferson:

> The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.

Davis v. Beason, 133 U.S. 333, 342 (1890) (emphasis added).

George Mason had coauthored in the *Virginia Declaration of Rights*.[13] They defined religion as: "The duty which we owe to our Creator and the manner of discharging it."[14] Jefferson's contribution in drafting the *Virginia Statute for Establishing Religious Freedom* was to identify and expound the fundamental principle upon which religious liberty is based: "Almighty God hath created the mind free."[15]

Although the Supreme Court, in its First Amendment religion cases, has claimed to recognize the importance of the Virginia documents, the Court has failed to give serious attention to Madison's definition of religion. It is impossible for the Court to decide religion cases in any principled and consistent manner unless this central term is defined. In one late nineteenth-century case, *Reynolds v. United States*,[16] the Court did quote part of Madison's definition: "The duty we owe to our Creator." Madison's *Memorial and Remonstrance* is also reprinted as an appendix to Justice Rutledge's dissenting opinion in *Everson*.[17] The Supreme Court has ruled in numerous cases that the government unlawfully established religion or prohibited someone's free exercise of religion despite its failure to define religion.

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[13] THE VIRGINIA DECLARATION OF RIGHTS, § 16 (1776), *reprinted in* SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 311–12 (Richard Perry ed., 1978); MADISON, *supra* note 9, at ¶ 1.

[14] THE VIRGINIA DECLARATION OF RIGHTS, *supra* note 13, at § 16.

[15] STATUTE FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 8. While the Court or individual members have referred to the Virginia definition, they have not developed it. *See e.g.*, McGowan v. Maryland, 366 U.S. 420, 464 n.2 (1961); Wallace v. Jaffree, 472 U.S. 38, 53 n.38 (1985); Murdock v. Pennsylvania, 319 U.S. 105, 122 n.4 (1943) (Reed, J., dissenting); Walz v. Tax Commission, 397 U.S. 664, 719 (1970) (Douglas, J., dissenting) (Appendix II); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 341 n.2 (1987) (Brennan, J., concurring); City of Boerne v. Flores, 521 U.S. 507, 555 (1997) (O'Connor, J., dissenting); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1900 n.38 (2021) (Alito, J., concurring). The Court has also failed to recognize the full implications of Jefferson's leading principle that God has created the mind free, and the Court has been a catalyst for the religious cleansing of the public schools, while at the same time taking for granted the power of civil government to impose an orthodoxy of "secular" belief through that same public-school establishment.

[16] Reynolds v. United States, 98 U.S. 145, 163 (1879).

[17] *Everson*, 330 U.S. at 63 (Rutledge, J., dissenting).

The problem that arises from a failure to define religion was on full display in Judge Myron Thompson's opinion in the case of *Glassroth v. Moore*.[18] Judge Thompson ruled that Chief Justice Roy S. Moore was guilty of establishing religion when he placed a Ten Commandments monument in the Alabama Judicial Building.[19] Judge Thompson rejected Chief Justice Moore's interpretation of James Madison's definition of religion, but he refused to provide any definition in its place.[20] Judge Thompson justified his refusal, claiming that he could not "formulate" a definition of religion and that it would be "unwise and even dangerous, to put forth, as a matter of law *one* definition of religion."[21] Despite his refusal and inability to define a term that he used more than 60 times in his opinion, Judge Thompson found Chief Justice Moore guilty of establishing religion.[22]

Since the respective powers of civil government and duties of religion are not detailed in the First Amendment, we must look outside of that text. One possible extra-textual source would be the history and traditions of the people. This was not satisfactory to Madison and Jefferson because it was those very historical practices that they discredited on the basis of divine authority.

Note that the First Amendment proscribes "laws respecting the establishment of religion," not the establishment of a church. The prohibition on the establishment of religion is vastly broader in coverage than a prohibition on an established church. Forms of religious establishment include, but are not limited to, tax support for a particular denomination or

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[18] *See* Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002).

[19] *Id.* at 1318.

[20] Chief Justice Moore's interpretation of Madison's definition was narrower than the interpretation put forward in this Article, but the main point is that Judge Thompson offered no definition of his own nor did he rely on any definition that the Supreme Court has provided. *See generally id.* at 1311.

[21] *Id.* at 1313 n.5, 1314 (emphasis added).

[22] *Id.* at 1318. It should be noted that displaying a monument with the Ten Commandments in a courthouse for the purpose of acknowledging the source of law does not constitute an establishment of religion. Certainly, the civil magistrate who exercises authority as God's minister of justice has a duty to acknowledge that source of authority for the law. *See Romans* 13:4. What he does not have is the power to establish institutions, whose purpose it is to tell citizens what is proper to believe or disbelieve regarding orthodoxy of belief.

even multiple denominations, for ministers, or for places of worship. It is helpful to consider the many forms of religious establishment that existed in Virginia prior to its disestablishment of religion in 1786. The history of the Virginia establishment controversy is not recounted here simply for the purpose of making an "originalist" argument, but rather for the light it reflects on the true meaning of religious liberty.

B. Establishment of Religion in the Virginia Colony

To understand the expansive scope of the language "no law respecting an establishment of religion," it is helpful to consider the range of activities the establishment of religion covered in Virginia before it, in principle, disestablished religion. Originally, the Virginia colony had one established church—the Anglican Church—with no toleration for other denominations.[23] When it was first settled in 1607, colonists had to take the Anglican Oath of Supremacy.[24] In its strictest form, the law required attendance at Anglican worship services and prohibited attendance at almost all alternate services.[25] Furthermore, the colonial government licensed ministers, and ordination could be obtained only in and from the Anglican Church.[26] Church government and the form of worship were also prescribed by law.[27] Although not necessarily required by law, in large measure, the membership of church vestries and civil offices were interlocking.[28] Virginia even prohibited unauthorized preaching and, at one time, attempted to exclude religious dissenters from the colony.[29] All of these activities (church attendance, licensure, preaching, worship, church government) are readily identified as "religious" in nature.

Establishment of religion in the Virginia colony took several other forms, with the civil government regulating activities and providing services, which today would *not* be readily identified as religious. Virginia law charged

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[23] JOHN RAGOSTA, RELIGIOUS FREEDOM: JEFFERSON'S LEGACY, AMERICA'S CREED 42 (2013).

[24] *See id.*

[25] *Id.* at 46–47.

[26] *Id.* at 48.

[27] *Id.* at 75.

[28] *Id.* at 9, 60, 75.

[29] RAGOSTA, *supra* note 23, at 48.

church vestries with investigating and reporting certain types of moral offenses, including the mistreatment of slaves.[30] Churches were also responsible for administering programs to care for the poor and for orphans.[31] Although the churches were not responsible for operating schools, state licensure of teachers was generally limited to clergy and members of the Anglican Church.[32] Because it was understood that good morals are necessary for self-government and that religious instruction is necessary for good morals, the church was to provide moral instruction.[33] Moreover, only Anglican ministers could perform marriages.[34]

Most of the activities that fell within the establishment of religion required a source of funding. Until the War for Independence, Virginia taxed everyone for the support of the Anglican Church.[35] These monies were applied to build church facilities, pay pastors, and provide funds for charity.[36]

Great Britain enacted the English Act of Toleration in 1689, but for several years, Virginia refused to implement it, arguing that the Act did not apply in the colonies.[37] This resistance began to change as people from other denominations settled in Virginia in large numbers,[38] and eventually, Virginia began to tolerate dissenting denominations. But even by the 1770s, Virginia was perhaps the least tolerant of non-established denominations, in terms of both its laws and their enforcement, of any colony in America.[39] After Virginia implemented some measures of toleration, religious dissenters still had to pay taxes in support of the Anglican Church.[40] The dissenting churches supported their own religious activities by voluntary contributions

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30 *Id.* at 46–47.

31 *Id.* at 46, 50, 69.

32 *Id.* at 46–48.

33 *See generally id.* at 77.

34 *Id.* at 46, 50, 69.

35 RAGOSTA, *supra* note 23, at 46, 69.

36 *Id.* at 46, 50.

37 *Id.* at 48–49.

38 *Id.* at 50, 52.

39 *Id.* at 53–54, 72, 74.

40 *Id.* at 58–59.

of tithes, not taxes.[41] The Virginia legislature also placed other burdens on dissenters by restricting the licensure of preachers and limiting places of assembly.[42] Civil authorities, and even bands of citizens, vigorously enforced the regime of limited toleration until the eve of the War for Independence.[43]

The scope of beliefs, opinions, speech, and activities protected by the First Amendment religion clauses is very broad. Everyone recognizes that the Establishment Clause prohibits tax-funded ministers' salaries and church buildings, compelled attendance, and prescribed forms of worship. Similarly, everyone recognizes that the Free Exercise Clause prohibits laws punishing those who attend unauthorized worship services or engage in proselytizing. The jurisdiction of religion, however, is much broader than such quintessential "religious" activities as prayer, Bible reading, proselytizing, and worship.

In principle, Virginia came to understand—based on the laws of nature and nature's God—that the jurisdiction of religion includes matters of education and charity.[44] As for education, the mind is to be free from the control of civil government because the duties we owe to our Creator include all matters of thought and opinion, not just such doctrinal issues as the nature of communion, mode of baptism, the significance of the Incarnation, and the meaning of the Trinity. Freedom of the mind is far more encompassing; it includes freedom from being forced to finance the propagation of ideas, opinions, and beliefs with which one does not agree, or even those with which one does agree. Similarly, charity—by its very nature—cannot be compelled. To do so forces people into a relationship with others that rightly can only be based on mutual "forbearance, love, and charity."[45]

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[41] RAGOSTA, *supra* note 23, at 56, 65–66. This created a gross disparity in resources, which is still evident in Colonial Williamsburg. At one end of town is the stately Bruton Parish Church, and at the other end the very rude and humble Presbyterian meeting house.

[42] *Id.* at 48.

[43] *Id.* at 49, 52–56.

[44] *See* THE VIRGINIA DECLARATION OF RIGHTS, *supra* note 13, at § 16.

[45] *Id.*

C. Disestablishment in Virginia

Although religious dissenters in Virginia were at first placated with religious *toleration*, they pressed their demands for religious *liberty* during the War for Independence. To procure the support of religious dissenters (primarily Baptists and Presbyterians) for the war effort, the legislature suspended and later revoked tax assessments for religion.[46] The dissenters found allies in the Anglican Church—most notably Madison and Jefferson—who helped move colonial Virginia from the most religiously repressive state to become the state, in principle, that had the strongest protections for religious liberty.[47]

1. The Virginia Declaration of Rights

Anticipating that the American colonies would soon unite in declaring independence from Great Britain, a convention of delegates representing the people of Virginia assembled and adopted a constitution on June 29, 1776.[48] The convention had already adopted a Declaration of Rights on June 12.[49] Included in the Declaration of Rights was Section 16, which James Madison and George Mason collaborated in drafting.[50] Especially important is the section's definition of the term "religion":

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.[51]

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[46] RAGOSTA, *supra* note 23, at 58, 67.

[47] *Id.* at 60–62, 74–75.

[48] SOURCES OF OUR LIBERTIES, *supra* note 13, at 301–10.

[49] *Id.* at 311–12.

[50] MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 21–22 (1978).

[51] THE VIRGINIA DECLARATION OF RIGHTS, *supra* note 13, at § 16.

In practice, even though Virginia still had an established church with mere religious tolerance, the principles of religious liberty had become enscripturated. The Virginia legislature still imposed tax assessments on all citizens for the support of Anglican clergymen, teachers, buildings, and charity.[52] The legislature also continued to govern the Anglican Church. Increasingly, however, statutory measures disestablishing the Anglican Church were enacted during the War for Independence.[53] It was not until after the war that Virginia effected by statute a more comprehensive disestablishment not only of the Anglican Church, but of religion generally.[54]

As religion is the duty owed to our Creator, only our Creator can define that duty. Of course, in one sense, all duties are owed to God, but Madison was drawing a *jurisdictional* line between duties owed exclusively to God (governed by "reason and conviction") and those duties that the civil magistrate may enforce (by "force or violence").[55] It is the law of nature and nature's God, not positive enacted law, that ultimately provides the objective standard for drawing the jurisdictional lines between that which belongs to civil government and that which belongs exclusively to God and, therefore to religion. An understanding of the Framers' intent is useful in defining the exact jurisdictional boundary between state and religion, but neither the Framer's intent nor the original public meaning is definitive.

Matters included in the jurisdiction of religion and which are to be governed only by the conscience are quite expansive. Included within the definition of religion is the "mutual duty" of love and charity, indicating that what we commonly call "welfare" is not within the jurisdiction of civil government.[56] A system of "charity" based on compulsion, whether administered by the church or the state, is not charity.[57] Colonial Virginia's system of "charity" had been based on compulsion ("force or violence" rather

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[52] *See* RAGOSTA, *supra* note 23, at 64, 69.

[53] *Id.* at 65, 69.

[54] *Id.* at 99–100.

[55] THE VIRGINIA DECLARATION OF RIGHTS, *supra* note 13, at § 16.

[56] *Id.*

[57] *Id.*

than "reason and conviction")[58] and was administered by the church as a tax-funded ecclesiastical function.[59]

2. A Bill Establishing a Provision for Teachers of the Christian Religion

The decisive battle for disestablishment and true religious liberty was fought in Virginia between 1784, when Patrick Henry introduced *A Bill Establishing a Provision for Teachers of the Christian Religion*,[60] and 1786, when Virginia enacted its *Statute for Establishing Religious Freedom*.[61] Henry proposed the Bill in order to counter the rising immorality that accompanied the war. The preamble of Henry's Bill stated:

> Whereas the general diffusion of Christian *knowledge* hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned *teachers* who may be thereby enabled to devote their time and attention to the duty of *instructing* such citizens, as from their circumstances and want of *education*, cannot otherwise attain such *knowledge*; and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of preeminence amongst the different societies or communities of Christians[.][62]

The choice of language in the preamble—knowledge, teachers, instructing, education—made it clear that the focus was on education, not the general ministries of churches. It is understandable that there would not be a clear distinction between schools and churches at that time. Most, if not all,

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[58] *Id.*

[59] *Id.*

[60] A BILL ESTABLISHING A PROVISION FOR TEACHERS, *supra* note 10; Everson v. Bd. of Educ., 330 U.S. 1, 72 (1947) (Supplemental Appendix).

[61] STATUTE FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 8.

[62] A BILL ESTABLISHING A PROVISION FOR TEACHERS, *supra* note 10, at ¶ 1 (emphasis added).

education was private, and, prior to this, the Anglican Church had been largely responsible for licensing teachers.[63] The purpose of the proposed Bill was to improve the morals of the people, which is conducive to societal peace.

Henry's Bill had four operative sections. The first two sections explained how taxes would be collected and distributed:

> *Be it therefore enacted by General Assembly*, That for the support of Christian *teachers*, per centum on the amount, or in the pound on the sum payable for tax on the property within this Commonwealth is hereby assessed . . . .
>
> *And be it enacted*, That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid . . . .[64]

These first two operative sections of the Bill would have established what we today term a voucher system for funding multiple denominational establishments. The Bill would have imposed a property tax to support teachers, and taxpayers would direct the tax collected to be paid to the "society of Christians" of their choice.[65] As indicated in the preamble, all denominations would be treated equally on a non-preferential basis. [66]

The last two operative sections of the Bill identified who had the authority to disburse the funds appropriated:

> *And be it further enacted*, That the money to be raised by virtue of this Act, shall be by the Vestries, Elders, or Directors of each religious society, appropriated to a provision for a Minister or Teacher of the Gospel of their

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[63] *See* RAGOSTA, *supra* note 23, at 48.

[64] A BILL ESTABLISHING A PROVISION FOR TEACHERS, *supra* note 10, at ¶¶ 2, 3.

[65] *Id.* at ¶ 3.

[66] *See id.* at ¶ 1. "Quakers and Menonists" were excepted from the tax and allowed to fund their activities through voluntary assessments. *Id.* at ¶ 5. The Bill did not include non-Christian religions. However, the main rationale for rejecting the Bill was not that it was preferential to Christianity but that it supported any matter of opinion.

> denomination, or the providing places of divine worship, and to none other use whatsoever . . . .[67]
>
> *And be it enacted*, That all sums which at the time of payment to the Sheriff or Collector may not be appropriated by the person paying the same, shall be accounted for with the Court in manner as by this Act is directed; and after deducting for his collection, the Sheriff shall pay the amount thereof . . . into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever.[68]

Funds appropriated for societies of Christians were to be disbursed by the governing bodies of the respective societies to ministers or teachers of the gospel or for buildings. In other words, funds were provided for teachers and facilities for educational purposes.[69] Taxpayers had the option of having the government use their funds for public schooling ("seminaries of learning") within their respective counties.[70] Although it did not provide tax support for religious sects other than Christian ones, the Bill was essentially neutral among Christian denominations and between religious and public schools.[71]

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[67] *Id.* at ¶ 4.

[68] *Id.* at ¶ 6.

[69] The arrangement is not unlike that of Christian schools today, which are often in church facilities.

[70] A BILL ESTABLISHING A PROVISION FOR TEACHERS, *supra* note 10, ¶ 7.

[71] *See generally id.* At least three early state constitutions had provisions for the establishment of multiple religious denominations that were similar to the statutory scheme that Patrick Henry had proposed for Virginia: Maryland (November 3, 1776), Massachusetts (October 25, 1780), and New Hampshire (June 2, 1784). SOURCES OF OUR LIBERTIES, *supra* note 13, at 346, 373, 382. Citizens in those states had the constitutional right to direct payment of their tax assessments to the particular religious denomination or ministry that they wished to support. Education was part of the multiple-denominational religious establishment in those states. Included in the articles addressing religious liberties were specific provisions for schools and teachers to provide instruction in piety, morality, and religion. *See* MASS. CONST. of 1780, Part I, art. III, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 13, at 374; N.H. CONST. of

3. Memorial and Remonstrance in Opposition to Religious Assessments

James Madison viewed Henry's Bill with great alarm; and to his dismay, he found that the dissenting denominations who had been his allies in working to end religious assessments during the war were now ready to support Henry's Bill.[72] To marshal support in opposition, Madison was able to delay a vote on Henry's Bill by shrewd political maneuvering.[73] As part of his campaign, Madison wrote the famous *Memorial and Remonstrance in Opposition to Religious Assessments* (1785).[74] Not only was Madison able to muster the votes necessary to defeat Henry's Bill, he was able to procure enough support to enact the *Virginia Statute for Establishing Religious Freedom*.[75] The *Virginia Statute*[76] and Madison's *Memorial and Remonstrance* thus became widely acclaimed as the progenitors of the First Amendment. Unfortunately, some of the most fundamental principles articulated in both documents are generally ignored despite that acclaim.

If anything, Madison placed religious freedom on an even stronger law-of-nature footing than did Jefferson. He began the first paragraph of the *Memorial and Remonstrance* by quoting Section 16 of the Virginia Declaration of Rights, stating:

> Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The

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1784, Part I, art. VI, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 13, at 382. The Constitution of Maryland also included provisions for the poor. MD. CONST. of 1776, art. XXXIII. In other words, the laws respecting religion in those states included tax support not only for ministers and places of worship but for schools. In fact, worship and school instruction were viewed as twin means of furthering the common good. MASS. CONST. of 1780, Part I, arts. III, VII, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 13, at 374–75.

[72] RAGOSTA, *supra* note 23, at 81.

[73] *Id.* at 84–85.

[74] *Id.* at 84–85, 88–89; Everson v. Bd. of Educ., 330 U.S. 1, 63 (1947) (Appendix).

[75] RAGOSTA, *supra* note 23, at 88–89.

[76] The author refers to the *Virginia Statute for Establishing Religious Freedom* interchangeably as the *Virginia Statute*.

> Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.[77]

Once again Madison drew a jurisdictional line between duties enforceable by civil laws (governed by "force or violence") and those duties that cannot be enforced by civil magistrates.[78] Those duties that cannot be enforced by civil magistrates are within the jurisdiction of religion (governed by "conviction and conscience").[79] If the state has no legitimate interest in punishing an action, it is within the jurisdiction of religion, i.e., the freedom of conscience. Stated another way, religion encompasses all matters that are not within the police powers of civil government.

Continuing on in the first paragraph and building on his definition of religion, Madison explained the nature and source of all inalienable rights. Our rights in relation to others derive from the fact that we owe duties to God with which no one can interfere.

> It is unalienable also, because what is here a right towards men, is a duty towards the Creator. 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. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And . . . every man who becomes a member of any particular Civil Society, [must] do it with a saving of his allegiance to the Universal Sovereign.[80]

Madison then laid out the hierarchical legal structure that must govern every society. Civil magistrates have only those powers that the people delegate to them. And the people have only those powers which the Universal Sovereign has delegated to them. God has not delegated to the people or civil magistrates the power to interfere with those duties owed exclusively to God.

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77 MADISON, *supra* note 9, at ¶ 1.

78 *Id.*

79 *Id.*

80 *Id.*

> We maintain therefore that in matters of Religion, no man[']s right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.[81]
>
> Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited . . . . The preservation of a free government requires not merely that the metes and bounds which separate each department of power be invariably maintained, but, more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people.[82]

In the context of religious liberty cases decided over the past eighty years, religion is usually defined subjectively—at least implicitly.[83] In other words, either the individual or collective conscience of some group determines whether an activity is or is not religious. That is not how Madison defined religion or explained the role of conscience. He defined the respective jurisdictions of the civil government and religion by an objective standard. Once a matter is objectively defined as falling within the jurisdiction of religion, the individual conscience becomes the sole governing standard.[84]

For example, a person's conscience does not determine whether using peyote as a sacramental ritual or offering human sacrifices is an act of religion. Those practices are within the jurisdiction of civil government to control by force or violence because they are by nature illegal. On the other hand, the choice of reading materials for children is not within the

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[81] *Id.*

[82] *Id.* at ¶ 2.

[83] *See infra* Section I.D., I.E.

[84] MADISON, *supra* note 9, at ¶ 1.

jurisdiction of civil government. Therefore, it is conscience that governs the parents' choice of whether to read the Bible, *The Federalist Papers*, or *Curious George* to their children. Likewise, conscience determines whether a person exercises his or her duty to worship God by singing only *Psalms* unaccompanied by musical instruments or by singing songs accompanied by a praise band.

It is very helpful to keep in mind that Madison defines "religion" in a legal context and is not giving it a theological definition or treating it simply as a sociological, psychological, or theological phenomenon. The jurisdiction of religion includes not only prayer, Bible reading, worship, and proselytizing, but also education, charity, and more. Religion includes any thought, speech, or action not properly within the jurisdiction of civil government to sanction. That includes the kind of house you buy, the food you eat, the materials you read, or the career you pursue.

Only God—who created, sustains, and judges everyone—can define what belongs to Caesar (civil government) and what belongs exclusively to Himself.[85] The only objective source for distinguishing that which is in the jurisdiction of civil government from that which is within the jurisdiction of religion is the Bible. It is clear from the *Virginia Statute* and the *Memorial and Remonstrance* that the Bible provides the objective standard for making this distinction. A fact seldom acknowledged is that the principle of religious liberty is founded upon the truth of Christianity. In paragraph 12, Madison wrote:

> Because the policy of [Patrick Henry's] Bill is adverse to the diffusion of the *light of Christianity*. The first wish of those who enjoy this *precious gift* ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of *false Religions*; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the *light of revelation* from coming into the Region of it and countenances by example the nations

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[85] "Then he said to them, 'So give back to Caesar what is Caesar's, and to God what is God's.'" *Matthew* 22:21 (New Int'l). *See infra* note 106.

> who continue in darkness, in shutting out those who might convey it to them. Instead of Leveling as far as possible, every obstacle to the victorious *progress of Truth*, the Bill with an ignoble and *unchristian timidity* would circumscribe it with a wall of defence against the encroachments of error.[86]

The Framers of the Virginia documents obviously contemplated that the Bible sets out the jurisdictional bounds of civil government and religion. But it is not the "original intent" or understanding of the Framers, the will of legislators, or the consensus of the community that conclusively determines the jurisdictional bounds. Fortunately, the law of nature, the understanding of the Framers, and the consensus of the people coincided in the enactment of the *Virginia Statute*.

Madison warned that because Henry's Bill was contrary to the objective standard that God has established, it would have the opposite effect from that intended.[87] In other words, failure to act on the correct principles has a deleterious effect that is contrary to the intended and hoped-for consequences.

> Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them, and not only during the period of miraculous aid, but long after it had been left to its own evidence and the ordinary care of Providence. Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have preexisted and been supported before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in

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[86] MADISON, *supra* note 9, at ¶ 12 (emphases added).

[87] *Id.* at ¶¶ 6, 7.

> those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits.[88]

Madison concluded the *Memorial and Remonstrance* by setting forth two opposing sources of ultimate authority. "Either then, we must say, that the Will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred."[89] He affirmed his reliance on the sacred, stating that he and the other subscribers were "earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, [will illumine] those to whom it is addressed."[90]

4. Virginia Statute for Establishing Religious Freedom

During the War for Independence, Thomas Jefferson had introduced the Bill for Establishing Religious Freedom (1779), which targeted certain establishment practices, [91] but the Bill languished until 1786 when the Virginia legislature enacted it as a statute with minor modifications.[92]

Several provisions of the Bill addressed matters that protect the free exercise of religion. In large measure, the Bill also effected the disestablishment of the Anglican Church and preempted a system of multiple establishments in which the citizens would be permitted to support the

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[88] *Id.* at ¶ 6. Much of the rest of Madison's *Memorial and Remonstrance* recounts the problems that have arisen historically with state establishment of religion and the blessings that accompany disestablishment. Tyranny results even where there are multiple denominational establishments. *Id.* at ¶¶ 2, 3. Christianity had its greatest luster in "ages prior to its incorporation with Civil policy." *Id.* at ¶ 7. Established religion leads to discord and transformation of the mutual duties of "Christian forbearance, love, and charity" into "animosities and jealousies." *Id.* at ¶ 11. This language Madison also took from Section 16 of the Virginia Declaration of Rights, and it reinforces the fact that charity as a matter of the heart is a duty within the jurisdiction of religion. THE VIRGINIA DECLARATION OF RIGHTS, *supra* note 13, at § 16.

[89] MADISON, *supra* note 9, at ¶ 15.

[90] *Id.*

[91] *See* BILL FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 7.

[92] RAGOSTA, *supra* note 23, at 90.

church of their choice—all funded by the state.[93] It would additionally serve to sever the linkage between church membership and civil office. Jefferson's preamble to the Bill, though modified somewhat by the legislature, set out the general principles that were to provide the basis for disestablishment of religion in the fullest sense.[94]

The first lines of the Statute's preamble make it clear that the principle of religious liberty is not limited to those matters normally associated with the religious *cultus*.[95] It includes the freedom of the mind in regard to all subject matter. It identifies the same objective source of right—God, the "Holy Author of our religion" and "Lord both of body and mind"—as does the Virginia Declaration of Rights and Madison's *Memorial and Remonstrance*.[96]

> Whereas, *Almighty God hath created the mind free*; that all attempts to influence it by temporal punishments or [burdens], or by civil incapacitations tend only to beget habits of hypocrisy and meanness, and are a departure from the *plan of the holy author* of our religion, who being *Lord, both of body and mind* yet chose not to propagate it by coercions on either, as was in his Almighty power to do . . . .[97]

Following the practice of Christ Himself, the State may not establish an orthodoxy of opinion or belief by coercion. Unlawful coercive measures include not only civil punishments but taxation for the "propagation of opinions which [the citizen] disbelieves" or even that the citizen does believe.[98] The Statute states that taxation for such purposes is "sinful and tyrannical."[99] Taxation for education, even for a voucher system as Henry's Bill proposed, is immoral and unlawful. No distinction is to be made between

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[93] *See generally id.* at 92.

[94] BILL FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 7, at ¶ 1.

[95] STATUTE FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 8. "Cultus" is used in the sense of the form of worship and rituals.

[96] *See* THE VIRGINIA DECLARATION OF RIGHTS, *supra* note 13, at § 16; MADISON, *supra* note 9.

[97] STATUTE FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 8 (emphases added).

[98] *Id.*

[99] *Id.*

opinions narrowly defined as religious and opinions about "secular matters," for example, "physics or geometry":

> [T]hat to compel a man to furnish *contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical*; that even the forcing him to support this or that teacher of his own religious persuasion is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, . . . that *our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry* . . . .[100]

The Statute then draws the same distinction that Madison made between matters that are properly within the jurisdiction of civil government and those that are properly within the jurisdiction of religion. The civil magistrate has no power in the "field of opinion" or over speech or sentiments that have an "ill tendency." The civil magistrate has jurisdiction only over "overt acts against peace and good order." Legislation that funds education with taxes "destroys all religious liberty."

> [T]hat to suffer the civil magistrate to intrude his powers into the *field of opinion* and to restrain the profession or propagation of principles on the supposition of their *ill tendency* is a dangerous fallacy which at once destroys all religious liberty because he being of course judge of that tendency will make his opinions the rule of judgment and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is *time enough for the rightful purposes of civil government, for its officers to*

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[100] *Id.* (emphases added). In 1846, the highest Court in Virginia interpreted the *Virginia Statute for Establishing Religious Freedom* as protecting equally "the Christian and the Mahometan, the Jews and the Gentile, the Epicurean and the Platonists, . . . so long as they keep within its [the law's] pale . . . ." RAGOSTA, *supra* note 23, at 99. In other words, all matters of opinion are to be treated equally without making a false distinction between religious and secular.

> *interfere when principles break out into overt acts against peace and good order*.[101]

Lastly, the *Virginia Statute* espouses a view that sounds very much like the "free marketplace of ideas" rationale that finds its way into modern freedom-of-speech jurisprudence. Error is to be countered by free debate, not punishment of speech or state-funded ideology as proposed in Henry's Bill. The scope of ideas and opinions protected by the *Virginia Statute* is much wider than those often thought of as narrowly belonging to the religious *cultus*.

> [A]nd finally, that Truth is great, and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them.[102]

The operative section of the *Virginia Statute* protecting against the establishment of religion and ensuring its free exercise provides:

> Be it [therefore] enacted by [the] General Assembly that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief, but that all men shall be free to profess, and by argument to maintain, their opinions in matters of Religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.[103]

The Virginia General Assembly concluded the Statute with an acknowledgment that it had no power to bind future Assemblies.[104] Yet the General Assembly was compelled to "declare that the rights hereby asserted,

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101 STATUTE FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 8 (emphases added).

102 *Id.*

103 *Id.*

104 *Id.*

are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right."[105] In other words, these are principles not of positive law but the law of nature and nature's God. For that reason, Jefferson would have had to concede that if the Statute had any admixture of error, the Assembly's intent would have to yield to that higher law of God.[106]

D. Defining Religion by a Subjective Standard

Although the Supreme Court frequently looks to the Virginia establishment controversy when deciding religious liberty cases, it has not given serious attention to defining the term "religion" as used in the First Amendment. However, in two cases the Court carefully defined the terms "religious belief" and "Supreme Being" as used in a federal statute, which is emblematic of a prevailing—but implicitly subjective—approach to defining religion. The subjective approach creates a recognized but unresolved tension between the Free Exercise Clause and the Establishment Clause.

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[105] *Id.*

[106] Later in life, Madison expressed his disapproval of states that had not implemented the principles embodied in the First Amendment. Like the principles Madison and Jefferson championed in Virginia's disestablishment controversy, the First Amendment distinguishes that which jurisdictionally belongs exclusively to God from that which He has delegated to Caesar.

> Ye States of America which retain in your Constitutions or Codes, any aberration from the sacred principle of religious liberty by giving to Caesar what belongs to God, or joining together what God has put asunder, hasten to revise your systems, and make the example of your Country as pure and complete, in what relates to the freedom of the mind and its allegiance to its maker, as in what belongs to the legitimate objects of political and civil institutions.

RAGOSTA, *supra* note 23, at 132 (quoting Madison in *Detached Memorandum* at 492). That Caesar himself belongs to God is evident from the fact that God establishes all nations, and He holds them accountable and judges them according to His law. *Colossians* 1:16; *Luke* 1:52; *Revelation* 19:16. The principles of religious liberty embodied in the Constitution are founded not upon compromise or expediency but rather on the truths of the Christian faith. *See also* HUGH HECLO, CHRISTIANITY AND AMERICAN DEMOCRACY 27–29 (2007).

1. "Religious belief" As Used in a Federal Statute

In the context of the eighteenth-century Virginia establishment controversy, religion was defined in terms of an objective standard—the laws of nature and nature's God as revealed in the Bible. Religion includes all those matters that are outside the jurisdiction of civil government. Only after conduct is determined as falling outside the jurisdiction of civil government is a person's conduct governed solely by the individual's conscience.[107]

For the moment our attention turns to a very different time and context from those considered thus far. Although the Supreme Court has cited Madison's definition of religion, it has not carefully explicated or applied that definition in cases decided under the First Amendment religion clauses. Instead, the Court has *implicitly* defined religion in terms of a subjective standard. Sometimes it is the subjective standard of an individual and sometimes it is the subjective standard of a collective body. In effect, the Court usually decides whether the individual's subjective judgment prevails, or the collective's subjective judgment prevails.

However, in two Vietnam-era conscientious objector cases the Court explicitly followed a subjective approach in defining the term "religious training and belief" as used in the Universal Military Training and Service Act.[108] A review of these cases provides the opportunity to contrast the objective and subjective approaches. The Act exempts persons from "combatant training and service" in the military "who by reason of their religious training and belief are conscientiously opposed to participation in war in any form."[109] It then defines "religious training and belief" as follows: "[A]n individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[110]

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[107] Of course, for those matters that are properly within the jurisdiction of civil government the individual should also obey as a matter of conscience and not just fear of punishment. *Romans* 13:5.

[108] Universal Military Training and Service Act, 50 U.S.C. app. § 3806(j).

[109] United States v. Seeger, 380 U.S. 163, 164–65 (1965).

[110] *Id.* at 165 (quoting Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (1958 ed.)).

By invoking "a Supreme Being," the Act appears to make the same distinction that Madison made between the Creator and the creature. However, unlike Madison, the Act then tries to make a distinction between religious and non-religious or secular beliefs (i.e., political, sociological, philosophical, and merely personal).[111] The definition of "religious" in the Act is thus tied to the meaning of "a Supreme Being," which the Act does not define; but as we see below, the Court did define, giving this Supreme Being a very different meaning than Madison gave to the "Creator." Congress thus appears to afford conscientious objector status to those who object to military service on the basis of religious beliefs, but not to those who object on the basis of non-religious beliefs.

Even though the two cases, *United States v. Seeger*[112] and *Welsh v. United States*,[113] dealt with the term "religious" as used in a statute, the Court's very broad definition of religious was likely driven by First Amendment concerns, and we might expect the Court to take a similar approach if it ever decides to define religion as used in the First Amendment.[114]

2. Conscientious Objector Cases

Daniel Seeger was one of the three parties in *United States v. Seeger* challenging their draft classification. Seeger claimed that he should be exempted from military service because of his "religious" beliefs, but he did not claim belief in a "Supreme Being," which on its face would seem to place him outside the Act's protection.[115] He said that he held a "'belief in and

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111 *Id.*

112 *Id.*

113 Welsh v. United States, 398 U.S. 333 (1970).

114 These Vietnam-era cases should be read against the backdrop of *United States v. Ballard*, 322 U.S. 78 (1944). In *Ballard*, the Supreme Court ruled that a court is not permitted to make findings regarding the truth or falsity of any belief system. The courts, however, are to judge whether a person's beliefs are sincerely held. For example, a person makes an appeal for funds claiming to be a prophet of some new religion. A court can't judge whether he really is a prophet or whether tenets of the religion are true, but it can judge whether the person sincerely believes that he is a prophet and that his beliefs are true. This distinction creates tension, since it is hard to be convinced that a person sincerely believes dubious things, especially when making fundraising appeals. This subjective approach to defining religion carries over into the Court's jurisprudence, especially in Free Exercise Clause cases.

115 *Seeger*, 380 U.S. 163.

devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed. . . . without belief in God.'"[116] In short, his religion *appeared* to be one that did not include God.[117] Nevertheless, the Court found that Seeger qualified for the statutory exemption giving the following explanation:

> Within that phrase [religious training and belief] would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.[118]

The Court essentially told Seeger that his understanding of "Supreme Being" and therefore of religious belief was too narrow, but the Court did not base this on any objective standard for defining Supreme Being or religion. The Court adopted an individualistic subjective standard—any "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."[119] Only Christianity with its distinction between the Creator and the creature truly recognizes a Supreme Being. By obliterating that distinction, the Court eliminated any objective basis for defining our duties or placing any limitations on the state.

Another problem with the *Seeger* Court's opinion is that it did not really attempt to distinguish religious beliefs from political, sociological,

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[116] *Id.* at 166.

[117] This is contrary to the Christian belief that, because God is a personal being who created the world, there are no impersonal standards of ethics. *See Genesis* 1.

[118] *Seeger*, 380 U.S. at 176.

[119] *Id.* at 176.

philosophical, and merely personal beliefs.[120] In defining religious beliefs as those "parallel to that filled by the God of those admittedly qualifying," the Court essentially obliterated any meaningful distinction between religious and philosophical beliefs since all the basic issues in philosophy are mirrored in theology. The basic issues are: What is the nature of being (metaphysics)? How do we know (epistemology)? What are the standards of right and wrong (morals and ethics)?[121]

In part, the Court justified its expansive definition of religion based on the ever-broadening understanding of the modern religious community. In other words, the Court looked not just to the individual's religion subjectively defined but also to the collective's view of religion subjectively defined. This leaves open the prospect that the collective's subjective definition can override the individual's subjective definition. In First Amendment cases it would ultimately be the Supreme Court's subjective definition that prevails.

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[120] However, the Court relied on its decision in *United States v. Ballard*, 322 U.S. 78 (1948) for the proposition that religion is an intensely personal matter, which would seem to eliminate the statutory exclusion of merely personal beliefs. *Seeger*, 380 U.S. at 184. In the free exercise case of *Wisconsin v. Yoder*, the Supreme Court held that the state could not force Amish parents to send their children to school after completing eighth grade. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972). The Court did not define religion, but it did say that parents who object to school simply for philosophical or personal reasons would not be similarly protected. *See id.* at 216. Professor Conkle notes that the Court's definition of liberty in *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), which claims a person has "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of life," would seem to eliminate any distinction between the religious and the philosophical. DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 66 (2d ed. 2009).

[121] In answering the metaphysical question, orthodox Christianity has always held to a distinction between the Creator and His creation; whereas all other beliefs systems hold to a monistic order in which all being is ultimately one. While some philosophers have taken the position that the most basic reality is atomistic, even those systems are monistic in the sense that they recognize no fundamental dualism between God the Creator and His creation. Christianity answers the epistemological question, basing all knowledge on God's revelation to man in the created order, in man's conscience, and in Scripture. Man is therefore constantly confronted with the revelation of God and must interpret everything in light of it. Finally, orthodox Christianity answers ethical and moral questions by discerning God's revelation and applying it by the counsel and instruction of the Holy Spirit. It is hard to imagine any belief system that does not espouse corresponding beliefs regarding these three basic issues in theology and philosophy. CORNELIUS VAN TIL, THE DEFENSE OF THE FAITH 196 (4th ed. 2008) [hereinafter THE DEFENSE OF THE FAITH].

Of course, the Justices would argue that they are simply applying the understanding of the people in 1791 (if the justices are constitutional originalists)[122] or the understanding of the people at any given point in time (if the justices are living constitutionalists).[123] In either case, the Justices would be appealing to a subjective judgment of the American people rather than an objective standard for defining religion.

The fact of the matter is that outside of orthodox Christianity, with its distinction between the Creator and the creature, there is no possibility of an objective standard for anything. This is reflected in the Court's acknowledgment of modern definitions of religion that are anthropocentric rather than theocentric. We can't appeal to God because we don't really know whether He exists. In other words, a personal God whose existence we can neither prove nor disprove is nothing more than a projection of the human consciousness. People make God in their own image rather than God making us in His image.[124] The *Seeger* Court drew from the writings of several modern theologians and ethicists, including those of David Saville Muzzey:

> "Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. What ultimate reality is we do not know; but we have the faith that it

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[122] *See generally* THE HERITAGE GUIDE TO THE CONSTITUTION 21–26 (David F. Forte & Matthew Spaulding eds., 2d ed. 2014).

[123] *Id.*

[124] "For those who think as she [theologian Dorothy Mary Emmet] does, Jesus is nothing more than the kind of person they would like to be and could be if only they lived up to their own ideals." THE DEFENSE OF THE FAITH, *supra* note 121, at 149.

> expresses itself in the human world as the power which inspires in men moral purpose."[125]

In a similar vein, the Court quoted existentialist theologian Paul Tillich for the proposition that God and religion may be defined as the source of our being and ultimate concern.[126]

> "And if that word [God] has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, or your ultimate concern, *of what you take seriously without any reservation.* Perhaps, in order to do so, you must forget everything traditional that you have learned about God . . . ."[127]

Defining God as one's "ultimate concern" wipes out the distinction not only between religious and philosophic beliefs but between religious and political, social, and merely personal beliefs as well. In a sense, the elimination of distinctions between types of beliefs is consistent with the *Virginia Statute*, which says the state can no more impose religious beliefs on a person than beliefs regarding physics and geometry.[128] This creates a problem for the Court, however, in that it contradicts the whole edifice of the Supreme Court's religious liberty jurisprudence that creates a false bifurcation between the religious and the secular.

The Supreme Court took its subjective approach even further in *Welsh v. United States*[129] when it ruled that the appellant was entitled to conscientious objector status under the same statute as Seeger, despite the fact that Welsh not only disclaimed belief in a Supreme Being, but also denied that his beliefs

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[125] United States v. Seeger, 380 U.S. 163, 183 (1965) (quoting DAVID SAVILLE MUZZEY, ETHICS AS A RELIGION 95 (1951)). In particular, the language, "[i]nstead of positing a personal God, whose existence man can neither prove nor disprove," reflects the influence of Kant. *See infra* Section IV.E.3.

[126] *See* COLIN BROWN, PHILOSOPHY & THE CHRISTIAN FAITH 191–200 (1968).

[127] *Seeger*, 380 U.S. at 187 (alteration in original) (quoting PAUL TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948)).

[128] STATUTE FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 8.

[129] Welsh v. United States, 398 U.S. 333, 335 (1970).

in opposition to military service were based on religious beliefs.[130] Nevertheless, the Court held that Welsh's views were, in fact, religious and that he was entitled to conscientious objector status.[131] The Court's opinion in *Welsh* simply reinforces the conclusion that the Court, in effect, obliterated the distinction between religious belief and practice and non-religious belief and practice, at least for the purposes of the Universal Military Training and Service Act.

Modern post-Kantian philosophy and its theological offspring as reflected in the Court's opinions are marked by a radical subjectivism.[132] This subjectivism was evident in the Court's opinions and non-legal sources on which it relied in *Seeger* and *Welsh*. On the one hand, the Court defers to the subjective psychological judgment of the individual or the collective subjective judgment of some non-governmental collective. On the other hand, the Court must place some limit on how far individuals can go in subjectively defining "religious" for themselves. Therefore, the Court—which, unlike Madison, has no objective standard by which to provide a definition—ends up placing its own collective subjective judgment as a limit on what the individual may subjectively define as religious.[133] The Court does this either by deferring to what Congress and state legislatures implicitly define as religious or by appealing to the collective understanding of the American people in 1791 or in the present day. Either way, if the Justices do not take Madison's objective approach, they must act as the mediators of the collective conscience of the American people.[134]

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[130] *Id.* at 335–38, 341. In 1967, as a response to the Court's decision in *Seeger*, Congress amended 50 U.S.C.A. § 456(j) deleting the language "Supreme Being."

[131] *Id.* at 343.

[132] *See infra* Section IV.E.3.

[133] The subjective psychological approach tends to the anarchic, in which every man defines what lies within the jurisdiction of religion for himself. The subjective sociological approach eventually tends toward the totalitarian, in which the collective defines what is and what is not within the state's jurisdiction.

[134] The Commonwealth of Virginia and Madison based religious liberty on the truth of Christianity, especially the doctrine of creation, as revealed in Scripture. Without the Creator-creature distinction, there is no higher authority than man to whom to appeal for justification of any law or definition of any term. Scripture provides an objective standard for identifying

3. Implications of Broad and Narrow Definitions of Religion

The conscientious objector statutory cases bear a marked similarity to First Amendment Free Exercise cases. If religion were to be defined as broadly in Establishment Clause cases as it is defined in *Seeger* and *Welsh*, it would create significant challenges. There arguably would be no limitation on what constitutes religion as defined by one's "ultimate concern" or "beliefs that run parallel to orthodox religious beliefs." In *Torasco v. Watkins,* the Court even identified "Ethical Culture" and "Secular Humanism" along with Buddhism and Taoism as *religions* "which do not teach what would generally be considered a belief in the existence of God."[135] It logically follows that if the Establishment Clause prohibits teaching such tenets of Christianity as the Ten Commandments or creationism in public schools, then it also would prohibit teaching tenets of Ethical Culture and Secular Humanism. This would toll the death knell of public schools.

On the other hand, if the Court defines religious beliefs and practices narrowly, as conceived by mainstream religious groups in the Christian West, certain sincerely held non-mainstream beliefs and practices might not be protected under the Free Exercise Clause. For example, if no statute exempts conscientious objectors from military service, they would have to claim an exemption under the Free Exercise Clause. If religion is narrowly defined under that clause as "traditional" religion requiring a belief in a Supreme Being, neither Seeger nor Welsh would have been exempt from the draft. But if religion under the Free Exercise Clause is defined broadly and subjectively as one's "ultimate concern," Seeger and Welsh would arguably be entitled to an exemption from military service as a constitutional right, not just a statutory right.

In short, if religion is broadly defined, the state will fall into numerous Establishment Clause violations. If religion is narrowly defined, the scope of

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what belongs to Caesar and what belongs to God. Madison's objective standard is unpalatable to modern jurists who define religion subjectively, thus creating special problems for religion clauses jurisprudence.

[135] Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

Free Exercise Clause protection will be rather limited.[136] Professor Tribe suggested a solution: define "religion" narrowly under the Establishment Clause and broadly under the Free Exercise Clause, even though the term "religion" is used only once in the First Amendment. Part of the problem is that Tribe does not define religion at all. His so-called solution would allow the state to continue participating in the marketplace of ideas—and operating its educational establishment—while giving fringe religions exemption from generally applicable laws under the Free Exercise Clause.[137]

If one's ultimate concern is not God the Creator (i.e., not orthodox Christianity[138]), then one's ultimate concern would likely be something in the natural order (e.g., materialistic evolutionary secular humanism). Under

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[136] Nothing in the Court's *Seeger* and *Welsh* opinions suggests that Congress would violate the Free Exercise Clause if it did not give an exemption for those who object to military service on religious grounds. And nothing in the Court's opinions suggests that the conscientious objector provisions of the statute violated the Establishment Clause because it exempted only religious objectors. The Court seems to have treated the statute as a permissible accommodation of religious beliefs.

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> Religion in America, always pluralistic, has become radically so in the latter part of the twentieth century. . . . There are, of course, many traditionally theistic American theologians, but for many others there has been a shift in religious thought from a theocentric, transcendental perspective to forms of religious consciousness that stress the immanence of meaning in the natural order. . . . Clearly, the notion of religion in the free exercise clause must be expanded beyond the closely bounded limits of theism to account for the multiplying forms of recognizably legitimate religious exercise. It is equally clear, however, that in the age of the affirmative and increasingly pervasive state, a less expansive notion of religion was required for establishment clause purposes lest all "humane" programs of government be deemed constitutionally suspect. Such a twofold definition of religion—expansive for the free exercise clause, less so for the establishment clause—may be necessary to avoid confronting the state with increasingly difficult choices that the theory of permissible accommodations . . . could not indefinitely resolve.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 826–28 (1978) (footnote omitted).

[138] *See* JOHN M. FRAME, THE DOCTRINE OF THE CHRISTIAN LIFE 41–44, 64–65 (2008). Christianity is the only religion that is truly transcendent in the sense of recognizing the distinction between the Creator and creature as fundamental.

Tribe's proposal, the Free Exercise Clause would protect the religion of orthodox Christianity and the religion of materialistic evolutionary secular humanism. The Establishment Clause would prohibit only teaching the religion of orthodox Christianity in public schools. It would not prohibit teaching materialistic evolutionary secularism in public schools because that would not be a religion for Establishment Clause purposes. Thus evolution, which makes the material realm man's ultimate concern, may be taught in the public schools without violating the Establishment Clause, but creationism may not be taught.

On the one hand (the Establishment Clause hand), the Supreme Court and constitutional commentators wish to divide all of reality into the non-religious (secular) and the religious. On the other hand (the Free Exercise Clause hand), they wish to largely obliterate the distinction between the secular and religious. This approach to defining religion is schizophrenic. It can only be cured by consistently implementing the objective definition of religion as provided in the Virginia Declaration of Rights and expounded in Madison's *Memorial and Remonstrance*.

E. Smith*, RFRA, and the Failure to Define Religion*

In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court rejected the claim that the Free Exercise Clause protects the use of the illicit drug peyote as part of Native American religious rituals. [139] As typical, the Court did not define the term "religion," but it is clear from the widespread negative reaction to the Court's decision in *Smith* that a large portion of the interested public and Congress define the term subjectively. In effect, if an adherent sincerely believes that the use of peyote is a required religious practice, then that practice is constitutionally protected unless the government can demonstrate that it has a compelling interest in suppressing it.

1. *Smith*

It is instructive to use the Supreme Court's opinion in *Smith* and its ensuing controversy to highlight the issue of defining religion. The Court in *Smith* did not expressly define religion. It might appear at first blush that the

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[139] Emp. Div. v. Smith, 494 U.S. 872, 890 (1990).

Court rejected a subjective approach to defining religion while *Smith*'s critics embraced a subjective definition of religion, but that would overly simplify the matter.

Fred Smith's employer, a drug rehabilitation organization, fired him for using peyote, a proscribed substance under Oregon criminal law.[140] Because Smith's termination was for criminal misconduct, the state of Oregon denied his claim for unemployment compensation.[141] He claimed that the denial of benefits violated his right to freely practice his Native American religion, which included use of peyote as one of its practices.[142] Justice Scalia, writing for the Court, ruled that the Free Exercise Clause categorically does not give persons the right to violate neutral and generally applicable criminal laws.[143] Consequently, the Court rejected Smith's claim that it should subject the Oregon law to review under the *Sherbert* test because of the burden it placed on Smith's "religious" practice.[144]

Smith argued that the Court should basically adopt an individualist subjective approach to defining religion.[145] In effect, he argued that using peyote is a religious practice because he and his co-religionists claimed that it was. Although the Court did not expressly say so, it accepted the Oregon legislature's judgment that using peyote does not constitute religion, but rather it is criminal behavior within the state's jurisdiction to prohibit (in Madison's words, by "force or violence").[146]

Few Supreme Court decisions have met such criticism across the theological and political spectrum as did the *Smith* decision.[147] The Court's

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140 *Id.* at 874.

141 *Id.* at 874–75.

142 *Id.* at 874–75.

143 *Id.* at 885.

144 *Id.* at 882–83. The *Sherbert* test arose out of the case of *Sherbert v. Verner*, 374 U.S. 398 (1963). Justice Scalia referred to it as a balancing test, but it is frequently characterized as a strict scrutiny test because it requires the government to show that it has a "compelling interest" and "no alternative forms of regulation." *Sherbert*, 374 U.S. at 403, 407.

145 *Smith*, 494 U.S. at 876, 878.

146 *Id.* at 890.

147 MCCONNELL ET. AL., *supra* note 6, at 150.

dissenters and its critics adopted the individualist-subjective view that a practice is religious as determined by the individual adherent.[148]

Contrary to what appears to be the prevailing opinion, the *Smith* Court was right, based on the assumption that the criminalization of peyote usage is properly within the jurisdiction of civil government (using Madison's objective definition of religion). However, the defense of *Smith* requires qualification. The first qualification is that Justice Scalia should have defined the term religion as Madison did. Had he followed Madison's approach, he would have determined whether the use of peyote is a duty owed exclusively to God and is therefore governed only by the individual conscience.

The second qualification involves the standard of review for determining whether some behavior is properly criminalized. The standard that the Court normally applies in reviewing a law is the rational basis test, which the Oregon statute would easily pass. The problem with the rational basis test, as Justice Thomas has argued in other cases, is that it is too deferential to Congress and state legislatures.[149] The focus of attention in cases like Smith's should be ensuring that the conduct criminalized is truly criminal in nature.

The *Smith* Court did not subject the Oregon statute to serious review by asking whether the activity of using peyote is religious or criminal in nature

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[148] *See Smith*, 494 U.S. at 919–20.

[149] Justice Thomas believes that the rational basis test is too deferential to Congress and that the Court should apply the test that Chief Justice Marshall formulated in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819): "[A]ppropriate" and "plainly adapted" are hardly synonymous with "means-end rationality." Indeed, "plain" means "evident to the mind or senses: OBVIOUS," "CLEAR," and "characterized by simplicity: not complicated." *Plain*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 886 (10th ed. 2001). *See also Plainly*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Noah Webster ed., facsimile ed. 1995) (1828) (defining "plainly" as "[i]n a manner to be easily seen or comprehended," and "[e]vidently; clearly; not obscurely"). A statute can have a "rational" connection to an enumerated power without being obviously or clearly tied to that enumerated power. To show that a statute is "plainly adapted" to a legitimate end, then, one must seemingly show more than that a particular statute is a "rational means," to safeguard that end; rather, it would seem necessary to show some obvious, simple, and direct relation between the statute and the enumerated power. *Cf.* 8 THE WRITINGS OF JAMES MADISON 448 (G. Hunt ed. 1908); Sabri v. United States, 541 U.S. 600, 612–13 (2004) (Thomas, J., concurring).

as judged by an objective standard as Madison would have.[150] Implicitly, it deferred to Oregon's collectivist subjective judgment that peyote use is criminal in nature rather than religious.[151] If peyote use were not harmful in the sense that it could be properly criminalized, every individual would have the right as a matter of conscience to decide whether to use it.[152]

2. Congressional Attempt to "Overrule" *Smith*

Congress attempted to overrule the *Smith* decision by enacting the Religious Freedom Restoration Act (RFRA)[153] in 1993. RFRA requires that

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[150] This should not be surprising, given that Justice Scalia was a legal positivist, and that natural law has no place in interpreting the Constitution. Note, *Justice Breyer: The Court's Last Natural Lawyer?*, 136 HARV. L. REV. 1368 (2023).

[151] As an originalist, in establishment cases, Scalia generally looked to the collective-subjective judgment of the American people in 1791 or 1868 to uphold laws favoring religion. *See e.g.*, McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 886–89 (2005) (Scalia, J., dissenting).

[152] Biblically speaking, every act that may be properly criminalized is also immoral (a sin), but not every immoral act (a sin) may be criminalized. Thus, unlike purely positivist legal regimes, the Bible places limits on what the state may criminalize. The positivist knows no such limits. For purposes of analyzing the *Smith* decision, this Article assumes that peyote use may be properly criminalized but recognizes that criminalization of drugs presents numerous thorny issues.

[153] 42 U.S.C. §§ 2000bb to 2000bb-4. In effect, as it applied to the states, RFRA could be viewed as an attempt by Congress to overrule *Smith*. Based on several Supreme Court precedents, Congress believed that it could—under its Fourteenth Amendment, § 5 enforcement power—require the states to comply with RFRA. The Court has recognized that Congress has the power under § 5 to provide remedies for state violations of the Constitution. There is little controversy regarding that power. But the Court has gone further and has held that, where states have a history of widespread violations, Congress may enact prophylactic measures to prevent future violations of the Constitution. For example, only purposeful discrimination on the basis of race is unconstitutional. Laws that have a discriminatory effect on the basis of race are not unconstitutional. However, where states have a history of widespread purposeful discrimination on the basis of race, Congress can provide remedies for state laws that have a discriminatory effect as well as laws that have a discriminatory purpose. Based on this theory, Congress decided that it could enact RFRA to provide remedies against state laws that burdened religion even though they did not target religion. The attempt to overrule *Smith* was thwarted in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Although there was plenty of evidence of state actions incidentally burdening religion, there was little evidence of states targeting religion. *Id.* at 529–30, 534–35. The Court ruled that RFRA could not be

courts apply the strict scrutiny standard of review in challenges to legislation that imposes a substantial burden on religion. RFRA in effect codified the *Sherbert* standard of review[154] that Smith argued should have been applied in his case.[155] Under that test, any law, state or federal, that places a substantial burden on religion would be struck down if it fails the strict scrutiny test:

> [Federal and state government] shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except [that] Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[156]

RFRA does not expressly define religion, but implicitly it adopts the individual adherent's subjective claim that his or her practice is religious. Under the RFRA test, if the Court finds that Fred Smith sincerely believes peyote use is a religious duty, then it is a religious duty and it will be protected unless the Court believes the law survives strict scrutiny. A court must decide whether the law places a substantial burden on that practice and whether the state has a compelling interest in burdening that practice.[157] To be compelling, the government's interest must necessarily be legitimate. But what is the standard of legitimacy? Does the Court have an objective standard to draw from? Does the Court apply its own subjective judgment as to what is religious? Or does it discern the subjective-collectivist judgment of the American people?

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applied to the states, but in subsequent cases the Court has ruled that Congress can impose the strict scrutiny standard on the federal government. *See e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690–91 (2014). In response to the Court's decision in *City of Boerne v. Flores*, many states enacted their own state RFRA laws.

154 Sherbert v. Verner, 374 U.S. 398, 403, 407 (1963).

155 *Emp. Div. v. Smith*, 494 U.S. 872, 876 (1990).

156 42 U.S.C. §§ 2000 bb-1(a) to (b). RFRA is amazingly broad in scope. It does not attempt to require a narrow exception from a law burdening a specific religious practice, but rather from all laws substantially burdening religion.

157 *Id.*

Once again, the problem with the *Smith* decision is not the holding. The real problem is that the Court never identifies an objective standard of legitimacy for determining whether the state has acted within its jurisdiction when criminalizing peyote use or whether it has intruded into the jurisdiction of religion, which is governed only by one's conscience. The more fundamental problem is that all members of the Court, conservatives and liberals alike, hold to a form of sociological positivism when interpreting the religion clauses. For conservatives it is the original understanding or collective conscience of the American people in 1791.[158] For liberals it is the evolving collective conscience of the American people at the present moment in history.[159]

III. CHURCH–STATE AND SCHOOL–STATE PARALLELS

The fundamental principles of religious liberty that "God has created the mind free"[160] and that it is "sinful and tyrannical"[161] to tax people for the propagation of opinions they don't believe apply equally to state-established churches and state-established schools. The various means by which civil governments historically used the church to establish an orthodoxy of beliefs find their parallels in the modern states' use of tax-funded schools to establish an orthodoxy of beliefs. Additionally, the four basic forms of church-state relations have their exact counterpart in four basic forms of school-state relationships.

A. Education As an Establishment of Religion and the Freedom of the Mind

The scope of beliefs, opinions, speech, and activities protected by the religion clauses is very broad. As noted above, the early government in Virginia placed education and charity within the jurisdiction of the tax-funded church.[162] But that changed, at least in principle, when Virginia recognized that education and welfare are within the jurisdiction of religion,

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158 *See generally* THE HERITAGE GUIDE TO THE CONSTITUTION, *supra* note 122, at 21–26.

159 *See generally id.*

160 STATUTE FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 8.

161 *Id.*

162 *See* discussion *supra* Section II.B.

not because they were historically operated by a state-funded church, but rather because they are by their very nature to be governed by reason and conviction, not force or violence.[163] In short, the state has no jurisdiction over the mind because God created it free, or over the heart because charity is a mutual obligation of love.[164]

The freedom-of-the-mind principle applies to all manner of opinions and beliefs. No false distinction is to be made between "religious" opinions and "secular" opinions. All opinions and beliefs fall under the jurisdiction of religion. Certainly, early Virginians did not believe that the state is free to enslave the mind regarding political philosophy or any other kind of ideology.[165]

The Preamble to the *Virginia Statute* identifies several means by which civil governments sometimes attempt to enslave the mind in violation of the people's inalienable and natural rights. One is for civil government to "[set]up [its] own opinions and modes of thinking as . . . true."[166] For more than 150 years, civil governments in the United States have set up their own opinions and modes of thinking as true—primarily through tax-funded public schools. Parents who want to opt their children out of compelled attendance in public schools because of convictions regarding the source of truth and standards of morality must fund a separate school system. In effect, this constitutes a civil incapacitation because of one's beliefs.[167]

Remember that the First Amendment proscribes laws "respecting an establishment of religion," not the establishment of a church.[168] An established church constitutes just one form of an unlawful establishment of religion. During the nineteenth century, the church as the main instrument

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[163] *See* discussion *supra* Section II.C.

[164] THE VIRGINIA DECLARATION OF RIGHTS, *supra* note 13, at § 16.

[165] *See* STATUTE FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 8. Since God Himself "chose not to propagate [religion] by coercion," it is the height of presumption for civil government to claim that power. *Id.* The Statute further states that our civil standing is not conditioned on any distinction between religious opinions and other kinds, e.g., "opinions in physics or geometry." *Id.*

[166] *Id.*

[167] *See id.*

[168] U.S. CONST. amend. I.

for unlawfully establishing religion was replaced by the public school as the primary instrument used for unlawfully establishing religion.

Massachusetts attained the distinction of being the last state to disestablish its churches.[169] More accurately, Massachusetts ended its tax funding of multiple established denominational churches.[170] Coincidentally, the "common school" movement under the leadership of Horace Mann gained great momentum in Massachusetts as the churches were being disestablished.[171] Although Massachusetts disestablished its churches in 1833, it did not disestablish religion. It became the model for the state establishment of religion in other states through its tax-funded system of public schools.

B. Comparison of Churches and Schools As Institutions of Religious Establishment

Historically there have been numerous characteristics of church-state relations that constitute an establishment of religion. These characteristics of church-state establishments have remarkable counterparts in contemporary school-state establishments. The table below identifies the characteristics of the state church establishment in colonial Virginia and the parallel characteristics of state school establishment that are typical in our day.

Colonial Virginia church establishment	**Contemporary school establishment**
State governance of the Anglican Church	State school boards as governing bodies
Tax funding for houses of worship	Tax funding for schoolhouses

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[169] John Witte, Jr. & Justin Latterell, *The Last American Establishment: Massachusetts, 1780–1833*, *in* DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776-1833 399 (Carl H. Esbeck & Jonathan J. Den Hartog Des., 2019).

[170] *See id.* at 400.

[171] ROUSAS JOHN RUSHDOONY, THE MESSIANIC CHARACTER OF AMERICAN EDUCATION: STUDIES IN THE HISTORY OF THE PHILOSOPHY OF EDUCATION 25–32 (1963).

Licensing of ministers and teachers	Licensing of administrators and teachers
Tax funding for ministers' salaries	Tax funding for school personnel
Prescribed doctrine	Prescribed curriculum
Indoctrination of biblical law	Inculcation of values
Compulsorychurch attendance	Compulsoryschool attendance
Enforcement of some civil moral laws	Discipline for student misbehavior
Welfare service for the poor and orphans	Free meals and daycare programs

It would be impossible to detail all the variations in church-state and school-state relations that have existed over the centuries.[172] For present purposes, the topics of church-state and school-state relationships are organized according to four basic models. The history of church-state relationships in Virginia provides examples of these four basic models that run parallel to four models of school-state relations that have existed at one time and place or another in the United States.[173]

The four models are (1) a single established church or school, (2) a single established church or school with toleration of dissenting churches or schools, (3) multiple established churches or schools, and (4) free churches or schools.[174] While the fourth model for the relationship between church and state has gained near universal acceptance in the United States, the contemporary relationship between school and state still falls predominantly within the second model. In other words, we have a system of free churches

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[172] NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE 15–32 (2023). The authors provide a survey of various establishment practices in the American colonies.

[173] *See supra* Section II.B–C. and *infra* Section III.B.1–4.

[174] *See infra* Section III.B.1–4.

in the United States and established schools with toleration for dissenters. For the sake of manageability, these four models focus primarily on the factor of state funding.

1. Single Established Church or School

The Anglican Church for much of the sixteenth and seventeenth centuries in England exemplified the single established church model.[175] In its English form, the King ruled as head of the church, issuing regulations for the governance of the church, financing church operations through taxes assessed on all persons, appointing priests, and approving doctrine and forms of worship.[176] Most of the King's subjects were members of the church and attendance was required at state church services and prohibited elsewhere.[177] The Anglican Church was likewise established in colonial Virginia from the Colony's founding in 1607 through much of the eighteenth century.[178]

There is one notorious example of an attempt to establish a single state-school system in the United States. The people of the state of Oregon in 1922 passed an initiative amending the Compulsory Education Act, thereby compelling all children to attend state-funded and state-governed schools.[179] The purpose of the law was to ensure that all school children would be thoroughly Americanized and inculcated with the values and views thought vital for citizenship.[180] The law aimed to put dissenting schools, especially Roman Catholic parochial schools, out of existence.[181] Various groups, including the Ku Klux Klan, were major proponents of the Oregon

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[175] HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 208–09 (2003) [hereinafter LAW AND REVOLUTION II].

[176] *See id.* at 208, 210.

[177] *Id.* at 210.

[178] *See supra* Section II.B–C.

[179] Pierce v. Soc'y of Sisters, 268 U.S. 510, 530 (1925).

[180] *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

[181] *See* Patrick J. Ryan, Pierce v. Soc'y of Sisters, ENCYCLOPEDIA.COM (May 14, 2028) https://www.encyclopedia.com/social-sciences-and-law/law/court-cases/pierce-v-society-sisters.

legislation.[182] The U.S. Supreme Court struck down the law in *Pierce v. Society of Sisters* noting that parents have a right to direct the education and rearing of their children.[183]

2. Single Established Church or School With Toleration of Dissenting Churches or Schools

Following the political upheavals in the seventeenth century, England moved toward the second model, a toleration model in church-state relations, which took place in stages. The 1689 English Act of Toleration initiated the most significant stage.[184] The Anglican Church was still the sole established church in England, but others were tolerated.[185] Kings and queens still headed the Anglican Church, governed it, and supported it with taxes; however, they tolerated the existence of other churches.[186] These churches were free to govern themselves, ordain their own ministers, and adopt their own doctrinal statements and forms of worship.[187] Members were allowed to attend their own church services.[188] The dissenters were therefore burdened with financially supporting two churches, one established and the other tolerated.[189] The toleration model advanced more slowly in the Virginia colony than in England.[190]

Although the relationship of church and state in the United States has moved completely beyond this second model of a state established church with toleration for others, the relationship between school and state in the United States still resides largely within the second model. The states fund "public" schools at the primary and secondary level almost to the exclusion of funding for religious and other private schools. State support that has gone

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182 PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 415–22 (2002). Other groups included "Federated Patriotic Societies, the Masons, and smaller groups that appealed to white supremacist, anti-Catholic, anti-Semitic, and nativist beliefs." Ryan, *supra* note 181.

183 *See Pierce*, 268 U.S. at 534–35.

184 *See* LAW AND REVOLUTION II, *supra* note 175, at 228–29.

185 *Id.* at 228.

186 *Id.* at 228–29, 349–51.

187 *See id.*

188 *See id.* at 228–29, 349–51.

189 *See id.* at 351.

190 *See generally* RAGOSTA, *supra* note 23, at 42–100.

to private religious schools for assistance with transportation, textbooks, teachers' salaries, and tuition has been hotly contested in the courts and has resulted in different and inconsistent outcomes in the Supreme Court. To the extent that limited state aid to religious schools has been upheld, the funding schemes are a step in the direction of the third model.[191]

All state constitutions make some provision for public schools.[192] During Reconstruction, Southern states were required to adopt new constitutions as a condition of restored representation in Congress.[193] Included in many of these state constitutions were provisions for tax-funded schools.[194] If the schools were to serve the purpose of changing attitudes toward African-Americans, they were not very successful because segregated schools were widespread and a major source of contention.[195] They were successful, however, in furthering the policy of tax-funded institutions designed to establish an orthodoxy of beliefs and opinions. This model for school-state relationships is not consistent with the jurisdictionalist approach of Madison and Jefferson.

3. Multiple Established Churches or Schools

In a system of multiple established churches, the state taxes all citizens and supports all churches, often by allowing citizens to designate which church is to receive the taxes that they are assessed. That was the form of establishment that existed in Massachusetts by 1780.[196] It was essentially this third model of religious establishment that Patrick Henry proposed for Virginia in *A Bill*

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[191] *See e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (tuition vouchers for parents sending children to private schools); Agostini v. Felton, 521 U.S. 203 (1997) (public employees providing remedial instruction on private schools' premises); Mitchell v. Helms, 530 U.S. 793 (2000) (educational materials and equipment, including computers, for private schools).

[192] Molly A. Hunter, *State Constitution Education Clause Language*, EDUC. JUST., https://edlawcenter.org/assets/files/pdfs/State%20Constitution%20Education%20Clause%20Language.pdf (last visited Feb. 28, 2024).

[193] *See Reconstruction Acts*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Reconstruction-Acts (last updated Feb. 18, 2024).

[194] Livia Gershon, *Bringing Universal Education to the South*, JSTOR (Jan. 24, 2018), https://daily.jstor.org/bringing-universal-education-to-the-south/.

[195] *See id.*

[196] *See* discussion *supra* Section III.A.

Establishing a Provision for Teachers of the Christian Religion (1784).[197] Henry's Bill was a voucher measure funding education rather than a traditional tax to fund the gospel ministry of churches.[198]

In recent decades, the Supreme Court has approved state tax-and-spending provisions that are in principle the same as Henry's proposed voucher measure. The two Establishment Clause cases most clearly on point are *Mueller v. Allen*[199] and *Zelman v. Simmons-Harris*.[200] In *Mueller*, the Court upheld tax deductions for certain school expenses incurred by parents of children in all schools—public, private religious, and private non-religious.[201] In *Zelman*, the Court upheld a system in which vouchers could be used for religious and non-religious private school tuition.[202] But in neither case did the states provide anywhere near the level of support for children attending private schools as they did for public schools. Examples of the third model (state funding for multiple established churches or schools) are found in Europe, particularly in the Netherlands.[203]

More recently, three Free Exercise Clause cases have gone even further in requiring, not just allowing, equality of financial treatment for religious and non-religious facilities or education. The Supreme Court has held that when a state provides certain benefits for *private* secular facilities or education it must include religious facilities and education on an equal basis.[204]

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197 A BILL ESTABLISHING A PROVISION FOR TEACHERS, *supra* note 10.

198 *See id.*

199 Mueller v. Allen, 463 U.S. 388 (1983).

200 Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

201 *Mueller*, 463 U.S. at 403–04.

202 *Zelman*, 536 U.S. at 662–63.

203 Madison and Jefferson emphatically rejected the voucher system of equal funding for all as beyond the jurisdiction of civil government. "Almighty God has created the mind free" and it is "sinful and tyrannical" to tax a person for the propagation of beliefs and opinions with which he disagrees and even for the support of those with which he may agree. STATUTE FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 8. Many countries, particularly in Europe, have vouchers for use in private schools. *How Does School Choice Work In Other Countries*, EDCHOICE, https://www.edchoice.org/school-choice/faqs/how-does-school-choice-work-in-other-countries/ (last visited Feb. 5, 2024).

204 *See infra* Part III.B.3.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court ruled that a state must afford churches an equal opportunity to apply for state-provided rubberized playgrounds as it does for non-religious organizations.[205] Similarly, the Court ruled in *Espinoza v. Montana Department of Revenue* that if a state grants tax credits for educational purposes it must treat funds used for religious and non-religious purposes equally. [206] Lastly, in *Carson v. Makin*, the Court ruled that when a state does not have public schools in some areas and provides tuition assistance for attendance in private schools, it must treat religious and non-religious private schools equally.[207] In all three cases, the Court reasoned that the Free Exercise Clause requires equal treatment for religion and non-religion. In those three cases the Court ruled that the states did not have sufficient anti-establishment interests to satisfy the strict scrutiny standard of review necessary to defeat the Free Exercise Clause claims.

Logically, if the government may not discriminate between religion and non-religion, as it often professes, the government must provide the same amount of support for private religious education—be it in the form of direct grants, charter schools, tuition assistance funds, or vouchers—as it does for the public schools. Equality of funding might lead to an exodus from state schools, thus breaking the virtual public-school monopoly, but state funding would still constitute an establishment of religion from the jurisdictionalist perspective of Madison and Jefferson.[208]

4. Free Churches or Schools

Regarding funding for churches, Virginia essentially rejected the third model (multiple established churches) and adopted the fourth model (free churches). As a result of the controversy over Henry's Bill, the free church model was firmly established in Virginia and eventually came to dominate the American landscape. Jefferson's Statute and Madison's *Memorial and Remonstrance* provide the doctrinal basis for the free church model.[209]

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[205] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 466–467 (2017).

[206] Espinoza v. Montana Dep't. of Revenue, 140 S. Ct. 2246, 2260–63 (2020).

[207] Carson v. Makin, 596 U.S. 767, 778–81, 788–89 (2022).

[208] *See infra* Part IV.D.

[209] *See supra* Part II.

The free church is one of America's greatest contributions to the world.[210] A free church is not headed by a King or other civil authority, but rather is self-governing, does not owe its existence to licensure by the state, and adopts its own doctrine and form of worship and government. The free church receives no money from the state, has voluntary attendance, and is subject only to laws that the state lawfully enacts and imposes generally on all.

The system of free churches did not arise simply from political compromise or the inability of any one denomination to maintain political control.[211] That system arose not from political expediency, but rather from Christian doctrine as articulated in the *Virginia Statute* and the *Memorial and Remonstrance*. The free church model eventually replaced the numerous forms of state-church establishment that existed in the early years of the Republic.

A parallel change took place in American Presbyterian theology, triggered no doubt in part by its experience in the New World. Its governing document, *The Westminster Confession of Faith* (1647),[212] presumed an established church. The united Synods of Philadelphia and New York met in Philadelphia on May 28, 1787, to consider changes to Chapters XX:4, XXIII:3, and XXXI:1, 2.[213] Those chapters were amended, in 1788, based on a doctrine of church-state relations in keeping with the fourth, free-church model.[214] Oliver Cromwell had been a chief proponent of this model in seventeenth-century England, but he had been unable to transition the country to the free-church model from an establishment model. His views did not endear him to Congregational, Presbyterian, and Anglican partisans, who adhered to establishment views.[215]

No state in the United States currently operates on the basis of a free school system, although free schools were probably predominant in colonial America and the nation's early history. However, a system of free schools is the only one compatible with the Establishment Clause and a republican

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210 *See* HECLO, *supra* note 106, at 20–34.

211 *See id.* at 26–27.

212 WESTMINSTER ASSEMBLY, THE WESTMINSTER CONFESSION OF FAITH (1647).

213 1 PHILIP SCHAFF, THE CREEDS OF CHRISTENDOM 806 (6th ed. 1977).

214 *Id.* at 806–10.

215 *See* LAW AND REVOLUTION II, *supra* note 175, at 219-21.

form of government. The free school model is the only one of the four models of school-state relations consistent with the jurisdictionalist approach.

Institutional Forms of Religious Establishment	
Church-State Relations	School-State Relations
(1) *Single established church.* One tax-funded church with compulsory attendance (early colonial Virginia).	(1) *Single established school.* One tax-funded school system with compulsory attendance (Pierce v. Society of Sisters).
(2) *Single established church with toleration for dissenting churches.* One tax-funded church with other tolerated churches not tax-funded (later colonial Virginia).	(2) *Single established school with toleration for dissenting schools.* One tax-funded school system with right to form private schools not tax-funded (most school systems today).
(3) *Multiple established churches.* Each person directs tax to church of choice (Massachusetts in the early nineteenth century; Patrick Henry's Bill).	(3) *Multiple established schools.* Each student uses a voucher at school of choice (Zelman; Patrick Henry's Bill).
(4) *Free church.* No tax funding for churches; churches are supported solely by tithes, gifts, and offerings (Thomas Jefferson and James Madison).	(4) *Free school.* No tax funding of schools; schools supported by tuition, gifts, etc. (pre-Civil War in North and South).

IV. DOUBLE-MINDEDNESS OR DISPARATE WORLDVIEWS?

Despite the stand that Jefferson and Madison championed for the freedom of the mind during the Virginia establishment controversy, they became leading proponents of tax-funded schools in later years. This same inconsistency between professions that the mind is free and also that the state has the power to establish an orthodoxy of opinion and belief marks the Supreme Court's First Amendment jurisprudence. This inconsistency is best explained by the fact that the members of the Court hold to a worldview that falsely bifurcates reality between the secular and the religious.

A. A Fundamental Contradiction—The Rockfish Gap Commission and the University of Virginia

During later years in their lives, Thomas Jefferson and James Madison dramatically deviated from the principles they had advanced during the Virginia establishment controversy. Jefferson claimed that he had "sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man"[216]—and yet he, along with Madison, came to support tax-funded schools and universities. Jefferson and Madison were members of the Rockfish Gap Commission, which met in 1818 to consider the state of education in Virginia. The Commission issued a report recommending the legislative establishment of tax-supported primary schools and of the University of Virginia.[217] The report included a recommendation that ethics and religion be taught from a non-sectarian perspective.

These recommendations contradicted the basic principles upon which Virginia's *Statute Establishing Religious Freedom* was based—that "God [has] created the mind free," that it is "sinful and tyrannical" to compel a person "to furnish contributions of money for the propagation of opinions which he disbelieves."[218] It also contradicted the statement Jefferson made in his draft Bill "that the opinions of men are not the object of civil government, nor under its jurisdiction."[219]

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[216] RAGOSTA, *supra* note 23, at 1.

[217] 4 THE ANNALS OF AMERICA 510–14 (Encyc. Britannica 1968).

[218] STATUTE FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 8.

[219] BILL FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 7.

There are several possible explanations for this contradiction. One is that Jefferson and Madison changed their minds in later years and came to believe that God didn't create the mind free and that it is not sinful and tyrannical to tax people to propagate opinions that they don't believe. Another explanation is that they didn't see the contradiction between what they professed and how they proceeded to act. Perhaps they simply argued as eighteenth century sophists who shaped their arguments so as to appeal to their intended audience in order to attain their policy objectives.

Whatever the explanation for the contradiction, Jefferson and Madison had been outsiders going into the Virginia establishment controversy. Often, outsiders who find themselves in politically weak positions appeal to high principle, and maybe that is what Jefferson and Madison did in championing religious liberty and the freedom of the mind.[220]

The *Rockfish Gap Commission Report* determined that primary education for children should be established for several purposes.[221] Clearly, these recommendations were designed to teach children what to value, what to think, and how to act. The Report said that schooling should include the following purposes for students:

> To improve, by reading, his morals and faculties.
>
> To understand his duties to his neighbors and country, and to discharge with competence the functions confided to him by either.
>
> To know his rights; to exercise with order and justice those he retains; to choose with discretion the fiduciaries of those he delegates; and to notice their conduct with diligence, with candor, and judgment.
>
> And, in general, to observe with intelligence and faithfulness all the social relations under which he shall be placed.

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[220] This explanation, which is quite persuasive, was suggested by my former research assistant Joshua Turner. Mr. Turner is a Liberty Uinversity School of Law graduate and is currently serving in the Office of the Solicitor General for the State of Idaho.

[221] 4 THE ANNALS OF AMERICA, *supra* note 217, at 510–14.

> To instruct the mass of our citizens in these their rights, interests, and duties as men and citizens. . . .[222]

The Commission also addressed the purposes that should mark "the higher branches of education, of which the legislature require the development."[223] These, too, included teaching students what to value, what to think, and how to act. Examples given were:

> To form the statesmen, legislators, and judges on whom public prosperity and individual happiness are so much to depend.
>
> To expound the principles and structure of government; the laws which regulate the intercourse of nations; those formed municipally for our own government; and a sound spirit of legislation which, banishing all arbitrary and unnecessary restraint on individual action, shall leave us free to do whatever does not violate the equal rights of another.
>
> To harmonize and promote the interests of agriculture, manufactures, and commerce, and, by well-informed views of political economy, to give a free scope to the public industry. . . .
>
> . . . .
>
> And generally to form them to habits of reflection and correct action, rendering them examples of virtue to others and of happiness within themselves.[224]

The Commission explained that this kind of education was necessary in order to avoid falling into the same condition as Native Americans, who had not progressed as far as white Americans because of their lack of a proper education. It described Native Americans' present condition as one of "barbarism and wretchedness" brought on by "a bigoted veneration for the supposed superlative wisdom of their fathers and the preposterous idea that

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222 *Id.* at 510.

223 *Id.* at 511.

224 *Id.* at 511.

they are to look backward for better things and not forward . . . ." [225] Tax-funded schools were to perform a salvific role in Virginia society.[226]

The Commission claimed that the fruit of the alliance between an established church and state had created a mindset among white Americans similar to that of Native Americans—the tenets being to "oppose all advances which might unmask their usurpations and monopolies of honors, wealth, and power, and fear every change as endangering the comforts they now hold."[227] Although the Commission wanted the church out of education, at least with government funding, it actually did not want the state out of religion. The religion the Commission proposed should be nonsectarian. In other words, schools should promote only the kind of religion that met their approval:

> In conformity with the principles of our constitution, which places all sects of religion on an equal footing . . . we have proposed no professor of divinity; and the rather, as the proofs of the being of a God, the Creator, Preserver, and Supreme Ruler of the universe, the Author of all the relations of morality, and of the laws and obligations these infer, will be within the province of the professor of ethics; to which, adding the developments of these moral obligations, of those in which all sects agree . . . a basis will be formed common to all sects.[228]

Perhaps a good bit of hypocrisy and double-mindedness, both individually and corporately, exists in all people. The result is an inconsistency between words and actions (hypocrisy) or an inconsistency in ideas professed (double-mindedness). Both of these are spectacularly on display in the life of

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[225] *Id.* at 512. ("What but education has advanced us beyond the condition of our indigenous neighbors? And what chains them to their present state of barbarism and wretchedness but a bigoted veneration for the supposed superlative wisdom of their fathers and the preposterous idea that they are to look backward for better things and not forward, longing, as it should seem, to return to the days of eating acorns and roots rather than indulge in the degeneracies of civilization.").

[226] *See id.* at 512.

[227] *Id.* at 512.

[228] 4 THE ANNALS OF AMERICA, *supra* note 217, at 514.

Thomas Jefferson. The man who penned the phrase, "We hold these truths to be self-evident, that all men are created equal"[229] in the Declaration of Independence was a slaveowner.[230] Jefferson was no doubt conscious of this inconsistency and supposedly hoped that slavery would someday end. The hypocrisy of a slave owner professing that all men are created equal and endowed with an inalienable right of liberty is apparent to everyone today. The eradication of slavery awaited only the will to end it.

Jefferson, the man who swore "eternal hostility against every form of tyranny over the mind of man,"[231] helped found an institution designed to inculcate certain ideas and opinions through means that he himself had declared to be "sinful and tyrannical."[232] While the first hypocrisy involved a bondage of the body, the second involves a bondage of the mind. It is not certain whether he recognized this inconsistency in his thinking and profession regarding the freedom of the mind any more than do the current president, trustees, and law professors at the University of Virginia. Nevertheless, Jefferson chose to memorialize this inconsistency upon his death.

The stone marker on Thomas Jefferson's burial site notes three things for which he wished to be remembered—writing the Declaration of Independence, authoring the *Virginia Statute for Establishing Religious Freedom*, and founding the University of Virginia.[233] This begs the question, "How can the *Statute for Establishing Religious Freedom* be reconciled with establishing the University of Virginia?" The Statute says that it is sinful and tyrannical to tax a people for the propagation of opinions that they don't believe, yet the University of Virginia since its inception has been dedicated to the propagation of opinions at taxpayers' expense.

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[229] THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776).

[230] *Slavery FAQS – Property*, MONTICELLO, https://www.monticello.org/slavery/slavery-faqs/property (last visited Feb. 5, 2024).

[231] RAGOSTA, *supra* note 23, at 1.

[232] STATUTE FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 8.

[233] *Jefferson's Gravesite, MONTICELLO,* https://www.monticello.org/visit/tips-for-visiting/jefferson-s-gravesite/ (last visited Feb. 5, 2024).

Built on the backs of African-Americans, Monticello is an enduring and celebrated monument to the enslavement of the body.[234] Built with forced assessments from taxpayers, the University of Virginia is an enduring and celebrated monument to the enslavement of the mind. Like the eradication of slavery before the Civil War, the eradication of the enslavement of the mind awaits only the will to end it.

B. A Fundamental Contradiction—the Supreme Court

Essentially, Madison and Jefferson adopted and articulated two contradictory principles. The first principle was that the state has no jurisdiction over the mind—God has created the mind free. The second principle is that the state *does* have jurisdiction over the mind—God has not created the mind free. The Supreme Court in various cases has espoused each of these contradictory principles in its First Amendment jurisprudence.

1. God Has Created the Mind Free

Several Supreme Court decisions reflect Madison and Jefferson's early position that God has created the mind free and that the government has no power to establish an orthodoxy of opinion or belief.[235] On numerous occasions the Court, and its individual members, have approvingly quoted or paraphrased Jefferson's Bill or the *Virginia Statute* which states "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[236] Very significantly,

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[234] *See Monticello*, HIDDEN ARCHITECTURE, https://hiddenarchitecture.net/monticello/ (last visited Mar. 3, 2024).

[235] *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 12–13 (1947); *id.* at 22 (Jackson, J., dissenting); Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 244 n.15 (1957); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 570 U.S. 205, 220–21 (2013); Wallace v. Jaffree, 472 U.S. 38, 51–52, 55 (1985); Wooley v. Maynard, 430 U.S. 705, 714 (1977); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992); Texas v. Johnson, 491 U.S. 397, 415 (1989); Lee v. Weisman, 505 U.S. 577, 638–39 (1992) (Scalia, J., dissenting); Beilan v. Bd. of Pub. Educ., 357 U.S. 399, 413 (1958) (Douglas, J., dissenting); First Unitarian Church of L.A. v. Cnty. of Los Angeles, 357 U.S. 545, 548 (1958) (Douglas, J., concurring).

[236] *See, e.g.*, *Everson*, 330 U.S. at 12–13 *id.* at 45 (Rutledge, J., dissenting); Chi. Tchrs. Union v. Hudson, 475 U.S. 292, 305 (1986); Keller v. State Bar of Cal., 496 U.S. 1, 10 (1990); McGowan v. Maryland, 366 U.S. 420, 465 (1961) (Frankfurter, J., separate opinion); Int'l Ass'n of

these Supreme Court decisions do not draw a false distinction between secular and religious.

West Virginia State Board of Education v. Barnette[237] is an often cited and quoted case involving a state law that required students to salute the American flag while saying the pledge of allegiance at the start of each school day. The Supreme Court ruled in favor of the children and their parents who challenged the law as a violation of their freedoms of religion and speech. Justice Robert Jackson eloquently and succinctly articulated the basis for the Court's ruling: "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in regard to politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."[238]

Two points must be noted. The first is that the *Barnette* Court did not make a distinction between secular and religious speech. The protection includes all matters of opinion. This tracks very closely with the reasoning in the *Virginia Statute*. The second point is that the state has no power to establish an orthodoxy of opinion. Not only is the state prohibited from restricting opinions with which it disagrees, but it is also prohibited from establishing its own opinions. Of course, the state must form opinions on which it establishes laws, but it has no power to establish institutions with the power of telling the people what to think. In a Republic, the people school their officials; the officials don't school the people. The principle of the freedom of the mind does not just protect one from being forced to say what he does not believe, it prohibits the government from setting up its own opinions for belief.[239]

In *Janus v. American Federation of State, County, and Municipal Employees*,[240] the Court ruled that a public employee could not be forced to

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Machinists v. Street., 367 U.S. 740, 791 (1961) (Black, J., dissenting); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 869–71 (1995) (Souter, J., dissenting); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 572 (2005) (Souter, J., dissenting); Zelman v. Simmons-Harris, 536 U.S. 639, 689 (2002).

237 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

238 *Id.* at 642.

239 STATUTE FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 8; BILL FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 7.

240 Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., 138 S. Ct. 2448 (2018).

contribute money to a public sector labor union for the purpose of funding any kind of speech, including political speech and speech related to collective bargaining.[241] Of special significance is the fact that Justice Alito writing for the Court quoted Jefferson's Bill: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical."[242]

As was true of the Court's opinion in *Barnette*, Justice Alito did not draw a false distinction between secular and religious. What is particularly remarkable about Justice Alito's use of the language from Jefferson's *Bill for Establishing Religious Freedom* is that the speech at issue in *Janus* would be considered by most people today to be "secular" speech. The *Janus* Court also quoted in support of its decision the famous passage from *Barnette* that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in regard to politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[243]

Consider for a moment the Court's reasoning in these cases and the disconnect between that and a system of tax-funded public schools. The whole point of public schools is to establish an orthodoxy of opinions and beliefs about many things. A public employee (a teacher for example) may not be forced to finance speech with which he or she disagrees (e.g., collective bargaining), and yet a taxpayer can be forced to pay the salary of the teacher with whose speech the taxpayer disagrees.[244]

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241 *Id.* at 2486.

242 *Id.* at 2464. Justice Alito cited Jefferson's Bill a second time stating that "Jefferson denounced compelled support for such beliefs as 'sinful and tyrannical.'" *Id.* at 2471.

243 *Id.* at 2463 (quoting *Barnette*, 319 U.S. 624) (emphasis omitted).

244 This is a classic example of straining gnats and swallowing camels.

> Woe to you, teachers of the law and Pharisees, you hypocrites! You give a tenth of your spices—mint, dill and cumin. But you have neglected the more important matters of the law—justice, mercy and faithfulness. You should have practiced the latter, without neglecting the former. You blind guides! You strain out a gnat but swallow a camel.

Matthew 23:23–24 (New Int'l).

2. God Has Not Created the Mind Free

Many other Supreme Court decisions reflect the position that Madison and Jefferson took later in life as members of the Rockfish Gap Commission that recommended the establishment of tax-funded schools in Virginia. The underlying assumption of these cases is that God has not created the mind free, that the government can establish an orthodoxy of opinion and belief, and that it is not sinful and tyrannical to tax a person for the propagation of opinions and beliefs with which he disagrees.

Although the Supreme Court has never held that people have a constitutional right to a tax-funded education that the states must provide, it has stated that the establishment of public schools is instrumental for inculcating the proper values and political beliefs in citizens. In *Brown v. Board of Education*,[245] which ruled that racially segregated schools are unconstitutional, the Court in dicta touted what it considered to be the importance of public schools:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values . . . .[246]

In *Plyler v. Doe*,[247] a decision that ruled Texas could not exclude children of illegal aliens from public schools, the Court made claims about the importance of public schools similar to those it made in *Brown*:

> We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," and as the primary vehicle for transmitting "the values on which our society rests." . . . And these historic "perceptions of the public schools as inculcating

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245 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

246 *Id.* at 493.

247 Plyler v. Doe, 457 U.S. 202 (1982).

> fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." . . . In sum, education has a fundamental role in maintaining the fabric of our society.[248]

Both *Brown* and *Plyler* contain odes to the power and importance of public schools as a means of imposing an orthodoxy of opinions, beliefs, and values on children. Even though public schools were virtually non-existent at the time of the founding and could not have been essential for creating the fabric of our society, they are apparently necessary for maintaining it.[249] Perhaps it is a different society, cut of a different cloth, and changing with the latest trends that the Court looks to accommodate.

The Court's comments in *Brown* and *Plyler* about the importance of public schools provide a sharp contrast to *Barnette* and *Janus*, but its comments in *Pleasant Grove City, Utah, et al v. Summum*[250] provide a sharper contrast still. The Court in *Pleasant Grove City* ruled that the city could refuse to erect a monument with the seven aphorisms of Summum even though it had erected several other monuments, including one of the Ten Commandments.[251] The Court reasoned that the erection of monuments is government speech that is free of First Amendment restraint.

Pleasant Grove City approvingly quoted Justice Scalia's concurring opinion from *NEA v. Finley* in which he stated that "[i]t is the very business of government to favor and disfavor points of view."[252] In other words, the state may become a participant in the supposedly free marketplace of ideas, promoting beliefs with taxes exacted from people who don't hold those beliefs. The Court then delivered the *coup de grace*, invoking the practices of

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248 *Id.* at 221 (citations omitted).

249 *See* CHAPMAN & MCCONNELL, *supra* note 172, at 146.

250 Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

251 *Id.* at 465 n.1 ("The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which 'modifies human perceptions, and transfigures the individual.'"). *See also The Teachings of Summum are the Teachings of Gnostic Christianity*, SUMMUM, http://www.summum.us/philosophy/gnosticism.shtml (last visited Feb. 5, 2024).

252 *Pleasant Grove City*, 555 U.S. at 468 (Scalia, J., concurring) (quoting Nat'l Endowment of the Arts v. Finley, 524 U.S. 569, 567, 598 (1998)).

kings and emperors to justify the erection of monuments to convey the government's message:

> Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.[253]

Do the practices of ancient despots and other tyrants through the ages, who used speech to overawe their *subjects*, really provide good precedent for controlling *citizens* of a republic?[254] The Christian West has long followed a very different jurisprudence to remind government officials, who serve as agents of the people in a constitutional republic, that they are "under God and the law."[255] The people, not the government, decide what speech to favor

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[253] *Id.* at 470.

[254] The account of King Nebuchadnezzar of Babylon provides the classic example of erecting a statue designed to "convey some thought or instill some feeling in those who see [a] structure":

> King Nebuchadnezzar made an image of gold, sixty cubits high and six cubits wide, and set it up on the plain of Dura in the province of Babylon. . . .
>
> Then the herald loudly proclaimed, "Nations and peoples of every language, this is what you are commanded to do: As soon as you hear the sound of the horn, flute, zither, lyre, harp, pipe and all kinds of music, you must fall down and worship the image of gold that King Nebuchadnezzar has set up.

Daniel 3:1, 4–5 (New Int'l).

[255] HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 479 (1983) [hereinafter LAW AND REVOLUTION I].

and what speech to disfavor.[256] Perhaps what is most remarkable is that Justice Alito authored both the *Pleasant Grove City* and *Janus* opinions. On the one hand, *Pleasant Grove City* champions the state's power to establish an orthodoxy of opinion. On the other hand, *Janus* makes a very strong argument against civil government's power to establish an orthodoxy of opinion.

C. False Bifurcation of Secular and Religious

No small amount of effort has been exerted in proving whether the Founding Fathers were products and adherents of orthodox Christianity or of the Enlightenment.[257] The difference between Madison and Jefferson's views regarding the freedom of the mind in 1786 and in 1818 suggests a conflict of two underlying and disparate worldviews. These Founders may have shifted their thinking, or they may have simply adjusted their arguments depending on their goals and the receptivity of the audiences they were addressing. The same ambivalence regarding the freedom of the mind characterizes the Supreme Court's First Amendment jurisprudence. This unresolved conflict or ambivalence is best explained by the fact that all the players—Madison, Jefferson, Supreme Court justices, lawyers, and most Americans—embrace conflicting worldviews, often without conscious awareness.

One view of the world is that of orthodox Christianity to which Madison and Jefferson appealed in 1786 and to which most Americans appeal, at least sometimes, today. For example, Americans will likely claim that our liberties come from God and that the government has no right to tell us what to think.

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[256] Of course, the government must speak in order to promulgate laws and even to give an account of its reasons for making those laws. It may also need to explain and justify the manner in which those laws are applied and enforced. Those reasons may include an acknowledgment of the law-of-nature source from which all law should proceed, and an explanation of how positive law derives from it. But speech that serves these purposes does not constitute the establishment of a state-imposed orthodoxy of belief or opinion; it simply entails the necessary use of communications incidental to the performance of lawful state functions.

[257] DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM (1988) (identifies Christian and Enlightenment influences); HECLO, *supra* note 106 (focuses on Christian influences); Mark David Hall, *Did America Have a Christian Founding?*, HERITAGE FOUND. (June 7, 2011), https://www.heritage.org/political-process/report/did-america-have-christian-founding (identifies numerous publications both popular and scholarly).

Yet it most likely never occurs to these same people—including those professing Christianity, conservative pundits, and even Supreme Court justices—that compulsory, tax-funded, curriculum-dictated public schooling is unconstitutional.

The other worldview that most Americans simultaneously hold is one that bifurcates reality by drawing a false distinction between a "secular" realm which operates independently of God and is accessed simply by reason, and a "religious" realm, governed by faith. Life is therefore compartmentalized between a public secular realm and a private religious realm. Supposedly, matters of law and government as well as most subjects taught in school belong to the public secular realm; and over this realm, the state has jurisdiction to establish an orthodoxy of belief and opinion.

Decisions in the public or secular realm, such as matters of law and government, are governed by reason, accessible to all persons regardless of religious belief. Supposedly, matters in the public realm are properly taught in the public schools. Decisions in the personal or religious realm are governed by faith, which not all people share. From this it follows that the state should not interfere with the private realm of religion, and people should not bring their religious beliefs into the public realm.

For several decades the Supreme Court had expressly made the secular-religious distinction central to its First Amendment jurisprudence, and this same mindset implicitly underlies all of its jurisprudence. The primary test that the Court formulated in its Establishment Clause opinions is the *Lemon* test.[258] To survive the three-pronged *Lemon* test, a challenged government action must: (1) have a secular purpose, (2) have a primary effect "that neither advances nor inhibits religion," and (3) avoid excessive entanglement of the state with religion.[259] But just as the Court has provided no meaningful definition of "religion," the Court has provided no meaningful definition of "secular," despite the fact that all of reality apparently fits into one of those two categories. [260]

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[258] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[259] *Id.* at 612–13.

[260] The secular-religious dichotomy is easy to see in the context of the Court's formulation in applying the *Lemon* test; it is less obvious that it *forms the basis for the Court's general*

Implicitly, the Court has redefined the historical meaning of the term *secular* to make it consistent with a falsely bifurcated secular-religious worldview. The historical definition of secular is "of or pertaining to the temporal realm."[261] The truth of Christianity historically was viewed as governing the temporal realm as surely as it governs the non-temporal or heavenly realm.[262] Thus, one class of clergy in the Roman Catholic Church is called the "temporal" or "secular" priesthood.[263] The secular priest is the parish priest who is intimately involved with parish life, ministering among the laity.[264] The spiritual clergy, by contrast, includes those who have withdrawn from the world into monasteries and cloisters.[265] The secular clergy's duties include serving as pastors in parishes, delivering homilies, and administering the sacraments.[266] Most of the Bible, Christian literature, and sermons address what we are to believe and how we are to live in this world. They direct our lives in the secular realm. To remove the influence of the Bible and Christianity from education and public life leaves us impoverished and, worse yet, lost.

Because of the untenability of holding to the bifurcation of reality between the secular and religious, the Court's corresponding formulation of the *Lemon* test in its Establishment Clause jurisprudence has been extremely unstable.[267] The *Lemon* test has long been under attack and the Court in recent opinions has suggested that it is no longer applicable without expressly overruling it.[268] Those recent opinions strongly suggest that the Court will

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jurisprudence. The dichotomy is fundamental to the Court's reasoning in every case in which it applies the rational basis or minimal scrutiny test or some other higher standard of review. The government must have a conceivably legitimate interest to justify any action that it takes, but legitimacy may not be based simply on morals and by implication religious belief. *See e.g.*, Lawrence v. Texas, 539 U.S. 558, 571, 577 (2003).

261 *See* LAW AND REVOLUTION I, *supra* note 255, at 109–10.

262 *Id.* 109–10

263 *Id.* at 110.

264 *Id.*

265 *Id.*

266 *Id.* at 109–12.

267 CHAPMAN & MCCONNELL, *supra* note 172, at 2–3.

268 *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

replace *Lemon* with a history-and-tradition test championed by originalists.[269] Whatever substitute test, or tests, that the Court uses will prove equally problematic if the justices continue to view the world through a false secular-religious bifurcation.

It is beyond the scope of this Article to offer a comprehensive assessment of a history and tradition test for constitutional interpretation, but a few problems must be noted. Justice Scalia, quoting Holmes, wrote that "a page of history is worth a volume of logic."[270] Memorable? Yes! Helpful? Not particularly. Without logic it is impossible to do history. One problem is that there are likely hundreds of thousands of pages of history that are potentially relevant to any given issue. That data is often conflicting and most likely incomplete.[271] A historian, for example, must discern whether a particular historical practice is evidence of a constitutional right or of something a constitutional right is designed to protect against.

The lawyer turned historian is unlikely to find particular historical practices that are "on all fours" with contemporary problems. The historian must derive general principles from those particulars (by induction) and then apply those general principles to particular contemporary problems (by deduction). This is not possible without logic. Even if these complex questions could be resolved by the formal rules of logic, the validity of the conclusions depend on establishing the truth of the premises, which is a greater and much more difficult task of logic.[272] Without logic, it is impossible to exclude non-normative historical practices, to extract general principles from particulars, or to apply general principles to particular

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[269] *Am. Legion*, 139 S. Ct. at 2079–81, 2087 (plurality opinion); *Bremerton*, 142 S. Ct. at 2427–28.

[270] Lee v. Weisman, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

[271] CHAPMAN & MCCONNELL, *supra* note 172, at 11–32, 118–28. *See generally* SOURCES OF OUR LIBERTIES, *supra* note 13, which contains histories and documents covering religious liberty in the colonies and early republic through the adoption of the U.S. Constitution and Bill of Rights.

[272] Logic is used here as referring to the rational ordering of the Universe, not simply the formal rules of logic. A rational ordering is dependent on the biblical doctrines of the creation and providential ordering of the God of orthodox Christianity.

problems. The judgments that the lawyer-historian makes in resolving each of these problems will be determined by his or her worldview.

Here is the good news! This widely acknowledged dysfunction in the Court's Establishment Clause jurisprudence, like the dysfunction in public education, provides an opportunity to construct the proper ideological and institutional foundations of American society. The one element of the *Lemon* test that cannot be totally replaced, though it must be reconstructed, is the "purpose" prong. Every law has a purpose, and understanding its purpose is necessary for understanding and applying that law, be it a statue or a provision of the Constitution. As Chief Justice Marshall wrote in *McCulloch v. Maryland,* "let the end be legitimate."[273] Similarly, in the parlance of the rational basis test or minimal scrutiny standard of review, in order to survive constitutional challenge, the state must have a *legitimate* interest in enacting that law.[274]

This begs the question: by what standard is the legitimacy of a law judged and where is that standard found? In other words, borrowing from Madison's *Memorial and Remonstrance*, what laws does the state have the jurisdiction to implement by the use of "force or violence?"[275] Madison made his appeal to the only source that provides an objective standard for answering that question—the law of nature and nature's God as revealed in the created order, our consciences, and the Bible. This source of authority and consequent jurisprudence reflected in Madison's *Memorial and Remonstrance* governs not only our interpretation of the religion clauses of the First Amendment, but rather it also comprehends the sum total of law and jurisprudence.

D. Contemporary Approaches to Interpreting the Establishment Clause

Before comparing and contrasting an orthodox Christian worldview with two variations of a worldview that falsely bifurcates reality between the

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[273] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

[274] *See* CALVIN MASSEY & BRANNON P. DENNING, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 48–50 (6th ed. 2019) for a summary of the three levels of scrutiny that the Court applies. Classic cases applying minimal scrutiny or rational basis test are *Railway Express Agency v. New York*, 336 U.S. 106 (1949) and *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980).

[275] MADISON, *supra* note 9.

secular and the religious, it is important to give more particularity to the ways in which this bifurcation manifests itself in Supreme Court decisions interpreting the religions clauses. Often the Court uses the terms *religion* and *non-religion* rather than *religion* and *secular*, but the significance of the bifurcation is the same.

Ever since its 1947 decision in *Everson v. Board of Education*,[276] justices on the Supreme Court have generally aligned under one of two basic approaches to interpreting the Establishment Clause—the *separationist* approach and the *non-preferentialist* approach. Compare and contrast these two approaches with the *jurisdictionalist* approach that emerged from the Virginia establishment controversy in 1786. While there are significant differences between the separationist and non-preferentialist approaches, they hold certain fundamentals in common that set them apart from the jurisdictionalist approach.

Separationists tend to be identified as the more liberal justices on the Court and are perceived as less friendly toward the influence of religion in the schools and public square. Generally, they oppose any government support for private religious schools.[277] Non-preferentialists tend to be identified as the more conservative justices on the Court and as more friendly toward the influence of religion in the schools and public square.[278] Generally, non-preferentialists believe that the government may provide the same aid to religious and non-religious private schools that it provides for public schools, but they don't believe that aid is required.[279] Jurisdictionalists oppose funding for public and private education of any kind as an unconstitutional religious establishment.

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[276] Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[277] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 684–86 (2002) (Stevens, J., dissenting); *id.* at 686–717 (Souter, J., dissenting); *id.* at 717–29 (Breyer, J., dissenting).

[278] Justice Rehnquist advanced the non-preferentialist view in *Wallace v. Jaffree*, 472 U.S. 38, 92–98, 106 (1985) (Rehnquist J., dissenting). Rehnquist minimized the importance of the Virginia establishment controversy for understanding the religion clauses. *Id.* Justice Souter countered the non-preferentialist view in his concurring opinion in *Lee v. Weisman*, 505 U.S. at 609–16 (1992) (Souter, J., concurring). Souter reached his conclusion based in part on a review of the drafting history of the First Amendment in Congress. *Id.*

[279] *See, e.g.*, *Zelman*, 536 U.S. at 645–48, 662–63; Espinoza v. Mont. Dep't. of Revenue, 140 S. Ct. 2246, 2261 (2020).

A separationist approach often appeals to the 'wall of separation' metaphor that Jefferson used in his letter of January 1, 1802, to the Danbury Baptists. In his letter Jefferson wrote:

> Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.[280]

Although the letter can easily be understood as consistent with the jurisdictionalist approach, others have given it a very different meaning, one that accords with the false distinction between secular and religious. Supposedly, the "wall" is designed to ensure that the state maintains a distinction between the realms of reason and faith.

The fundamentals that separationists and non-preferentialists hold in common are far more significant for present purposes than their differences. First, neither approach has found it necessary to define religion, yet they have ruled in many cases that the government has or has not violated one or the other of the religion clauses. Second, both approaches operate upon the assumption that all of reality is ordered according to a bifurcation of secular and religious. But just as they have failed to define "religion," they have also failed to define "secular." Third, they both tacitly believe that the mind is not free and that the state has the power to establish an orthodoxy of secular belief

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[280] Thomas Jefferson, *Jefferson's Letter to the Danbury Baptists*, LIBR. CONG. (June 1998), http://www.loc.gov/loc/lcib/9806/danpre.html. The Supreme Court quoted Jefferson's letter in *Reynolds v. United States*, 98 U.S. 145 (1878), a free exercise case, as evidence of the original meaning of the religion clauses.

and opinion funded by taxes. This of course is contrary to the most basic principle recognized at the consummation of the Virginia establishment controversy—that God has created the mind free. In sum, they fail to acknowledge that education is not within the jurisdiction of the state, but rather, it is within the jurisdiction of religion.

Additionally, both separationists and non-preferentialists often assert that the state must remain neutral as between religions and as between religion and non-religion, but they seldom abide by this assertion. Separationists, for example, insist that no aid be given to religious schools, even though massive amounts of funding go to non-religious schools.[281] The non-preferentialists have typically allowed equal funding to go to religion, but they don't require it.[282] In recent years, however, the Court has required states that provide funding of private non-religious education to provide equal funding for private religious education.[283]

By contrast, the jurisdictionalist approach, as championed by Madison and Jefferson during the Virginia establishment controversy, recognizes that the state has no jurisdiction over the mind, that it is sinful and tyrannical to tax people in order to propagate opinions they don't believe, and that our rights in relation to others and to the state are predicated upon the duties that we owe to God.[284] Because jurisdictionalists have an objective standard for determining what is within the jurisdiction of civil government, they alone are neutral as between religion and non-religion in any meaningful sense.

E. Divergent Worldviews

The distinction that the Supreme Court tries to make between secular and religious can only be sustained by a worldview that is at odds with that which is identified below as the Augustinian-Reformed worldview. Two philosophical-theological systems of thought offering an alternative, competing, worldview have arguably been the most influential in the United

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[281] *See, e.g.*, *Everson*, 330 U.S. at 18–28 (Jackson, J., dissenting); *id.* at 28–63 (Rutledge, J., dissenting).

[282] *See, e.g.*, *Zelman*, 536 U.S. at 652–53.

[283] *See, e.g.*, *Espinoza*, 140 S. Ct. at 2261, 2263–64 (Thomas, J., concurring); Carson v. Makin, 596 U.S. 767, 788–789 (2022).

[284] *See supra* Section II.

States and in the Christian West. The first is the philosophy of Thomas Aquinas, and the second is that of Immanuel Kant. At the risk of oversimplification, the heart of the differences in worldview is how they relate reason and faith. Each of these systems of thought—Augustinian, Thomist, and Kantian—are summarized below.

1. Augustine—Creation, Fall, and Redemption

Although a diversity of denominations marked eighteenth century America, most of them held to a Reformed or Calvinistic theology.[285] This was true of Congregationalists, Anglicans, Presbyterians, Baptists, Dutch Reformed, and French Huguenots. Calvinism as well as Lutheranism arose out of the sixteenth century Protestant Reformation in Europe, and both have been considered a revival of the theology of Augustine (A.D. 354–430).[286]

Whether Jefferson and Madison actually shared the Augustinian view of the world may be questionable. However, the apology they offered for the defense of religious freedom and liberty of conscience formally reflects the Augustinian-Reformed view. This is seen in their reliance on the Creator-creature distinction, the sovereignty of God, limited jurisdiction of political sovereigns, and reliance on biblical truth.[287] More importantly, the people of Virginia would have understood the documents generated as part of the establishment controversy through the lens of the Reformed faith.

The Creator-creature distinction is foundational.[288] God is absolutely independent and self-sufficient.[289] As Creator, no aspect of reality is independent of, or unknown to, Him or outside His providential ordering.[290] He has revealed Himself and His law directly into our consciences.[291] He also reveals Himself through the rest of the created order and in His spoken and

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285 LUTZ, *supra* note 257, at 24–25.

286 *See* MASTERPIECES OF WORLD PHILOSOPHY 142 (Frank N. Magill, ed., 1990).

287 *See* THE DEFENSE OF THE FAITH, *supra* note 121, at 49–50; *id.* at 30–34 (sovereignty); *id.* at 166–70 (biblical authority); HERMAN DOOYEWEERD, THE ROOTS OF WESTERN CULTURE: PAGAN, SECULAR, AND CHRISTIAN OPTIONS 40–60 (1979) (limited jurisdiction of civil government).

288 *See* THE DEFENSE OF THE FAITH, *supra* note 121, at 66–67.

289 *Id.* at 30.

290 *See id.* at 30–31.

291 *See id.* at 58.

written word as recorded in the Bible. Because God, who is omniscient, reveals Himself to us, we can have true knowledge without having comprehensive knowledge of the world.[292]

In all aspects of His being—intellect, will, and affections—God created Adam perfect. As federal head of the human race, Adam's sin affected all mankind. We are thus corrupted by his original sin, which affects all aspects of our being—intellect, will, and affections. This corruption is referred to as total depravity, and it is only by grace through faith in Jesus Christ and His vicarious atoning death on the cross that we can be redeemed from the penalty of sin and corruption of our nature.[293]

The shared worldview of eighteenth-century Americans did not bifurcate reality between a secular realm governed by reason and a religious realm governed by faith. Faith, which in itself is a gift of God, is the base from which Christians must reason in every area of life. Ethically, we must reason from faith because everything not done in faith is sin.[294] Furthermore, the Bible assures us that "all the treasures of wisdom and knowledge" are hidden in Christ,[295] which includes matters of law and government. The false distinction between secular and religious is obliterated. This faith-based starting point is captured in Augustine's famous maxim, "'I believe in order to understand,' or even better, theology is 'faith seeking understanding.'"[296]

An objection to the Christian worldview is that it can't be proved true. Of course, no other worldview can be proved true either. All reasoning begins from certain premises that are unprovable and accepted on the basis of authority. The Christian worldview, with its doctrines of God and revelation, furnishes the premises from which one can reason with assurance that the physical and moral world are rationally ordered. At bottom, the Christian worldview is held on the authority of Scripture as it bears witness in the heart of individuals through the work of the Holy Spirit.[297]

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[292] *Id.* at 35, 65–69.

[293] *Id.* at 76–78

[294] *Romans* 14:23 (New Int'l).

[295] *Colossians* 2:3 (New Int'l).

[296] MASTERPIECES OF WORLD PHILOSOPHY, *supra* note 286, at 143.

[297] CORNELIUS VAN TIL, THE REFORMED PASTOR AND MODERN THOUGHT 1–72 (1974) [hereinafter THE REFORMED PASTOR].

A major implication of the Augustinian-Reformed worldview as seen in the resolution to the Virginia establishment controversy is that the jurisdiction of government is limited. The key distinction is not between "secular" and "religious," but rather between the *jurisdictions* of civil government and religion. As Madison wrote, our rights in regard to our relationship to others and to civil government derive from our duties to God.[298] The state has no jurisdiction over the mind because we are to make every thought captive to Christ.[299]

2. Thomas Aquinas—Nature and Grace

The philosophical-theological system of Thomas Aquinas (1225–1274), or "Thomism," forms the heart of Roman Catholicism. Aquinas attempted to synthesize the pagan Greek philosophy of Aristotle with Christianity.[300] As a result, Catholicism developed a dialectical system of thought drawing a distinction between the realms of "nature" and "grace."[301] Truths that Aristotle could discern by reason are sufficient for operating in the realm of nature. Truths that Catholics can know only by faith are indispensable for operating in the realm of grace.[302] Supreme Court jurisprudence reflects this, as the realm of nature roughly corresponds to what it calls the "secular," and the realm of grace roughly corresponds to what it calls the "religious."[303]

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[298] MADISON, *supra* note 9, at ¶ 1.

[299] 2 *Corinthians* 10:5 (New Int'l).

[300] BROWN, *supra* note 126, at 24, 34–36; CORNELIUS VAN TIL, A CHRISTIAN THEORY OF KNOWLEDGE 160 (1969) [hereinafter A CHRISTIAN THEORY].

[301] RALPH MCINERNY, ETHICA THOMISTICA: THE MORAL PHILOSOPHY OF THOMAS AQUINAS 31, 68 (Revised ed. 1997); JOHN M. FRAME, A HISTORY OF WESTERN PHILOSOPHY AND THEOLOGY 144–46 (2015) [hereinafter A HISTORY OF WESTERN PHILOSOPHY].

[302] MCINERNY, *supra* note 301, at 114–22; A HISTORY OF WESTERN PHILOSOPHY, *supra* note 301, at 144–46; THE DEFENSE OF THE FAITH, *supra* note 121, at 131, 154.

[303] FRAME, *supra* note 138, at 248, 298–301. Although it may be counter-intuitive, many (perhaps most) evangelical Protestants and fundamentalists basically share in this worldview. For a variety of reasons, theological and historical, they find themselves making a distinction between the personal realm of religion and the public realm of law and government. A major difference, however, is that these Protestants do not tend to have as clearly a worked-out philosophy to govern the realm of law and government.

a. The realm of nature known by reason

Operating in the realm of nature, people can purportedly attain true knowledge of God's existence and the natural law by the use of autonomous reason—operating without dependence on God or His revelation.[304] The realm of nature includes the subject matters of law and government.[305] Aquinas believed that God implanted reason in man but not an innate knowledge of God's existence or the natural law.[306] Knowledge in the realm of nature comes through sense perceptions. Reason, reflecting on what it experiences through sense perceptions, infers certain truths—including God's existence and basic precepts of natural law.[307]

Aquinas believed that matters in the realm of nature are equally accessible to all men through autonomous reason—regardless of religious faith or lack of it. This holds the promise that Christians and people of all other faiths, or of no faith, can cooperate in reasoning to common conclusions about the natural order based on "neutral" principles equally accessible to all without divine revelation.[308]

The intellect, discerning the fundamental precepts and the object of natural law, sets before the individual's will the precepts designed to attain

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The majority of conservative Protestants are probably Baptist with strong leanings toward fundamentalism and dispensationalist theology. Historically, they have been dissenters from Puritanism, Anglicanism, and liberal Protestantism. Their focus has been on protecting religious freedom and freedom of conscience narrowly defined. This retreat from the public realm could be attributed to their dispensationalist tendencies. TIMOTHY L. HALL, *"Incendiaries of Commonwealths": Baptists and Law*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 340–41 (Michael W. McConnell et al. eds., 2001). Dispensationalism focuses on evangelism and the imminent return of Christ, not on changing the culture or society. If Christ's return is imminent, "why polish brass" on the current world order which is "a sinking ship?" Scott Aniol, *Polishing Brass on a Sinking Ship: Toward a Traditional Dispensational Philosophy of the Church and Cultural Engagement*, 30 MASTER'S SEMINARY J. 129, 129–33 (2019) (discussing dispensationalism's relationship with the culture).

304 MCINERNY, *supra* note 301, at 117.

305 *Id.* at 31, 114–15, 116; FRAME, *supra* note 138, at 605.

306 MCINERNY, *supra* note 301, at 109, 115; THE DEFENSE OF THE FAITH, *supra* note 121, at 184–85.

307 MCINERNY, *supra* note 301, at 47, 105, 115.

308 *See id.* at 115–16.

the object of the common good.[309] Aquinas believed that the will is naturally inclined to the good.[310] In short, the intellect is able to infer truth by reflecting upon sense experience and then presents it to the will, which gives it effect. Error regarding decisions made by practical reason comes from two sources.[311] The first is that reason may err if it operates on incomplete or erroneous information. This is particularly true when trying to apply general precepts to particular situations.[312] The second potential source of error comes into the picture when the mind comes under the influence of vices, i.e., negative affections or appetites.[313]

Aquinas's understanding of sin's effect on man's ability to reason differed from that of Augustine and the Reformers. The Catholic view is that Adam—*as created by God*—had perfectly functioning intellect and will so that he could have remained sinless; however, his appetites or affections naturally disposed him to sin. To counter this concreated disposition, God gave Adam an additional measure of grace (*donum superadditum*).[314] The effect of Adam's sin was a loss of this additional measure of grace that God had given Adam to restrain his negative appetites and affections.[315] Without that added grace, Adam, and we as his descendants, are even more disposed to sin than before the Fall. But we are still able to reason correctly, and therefore will the good, although with more difficulty.[316]

Cultivating Aristotle's four cardinal virtues—prudence, courage, temperance, and justice—is necessary to counter the influence of the vices or

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309 *See id.* at 103, 106, 119–20.

310 *See id.* at 100, 103.

311 *See id.* at 95–98, 121–22.

312 *See id.* at 68, 101, 104–05, 120.

313 MCINERNY, *supra* note 301, at 68, 98, 100, 102, 106, 107, 108, 112.

314 *See id.* at 68; A CHRISTIAN THEORY, *supra* note 300, at 163; THE REFORMED PASTOR, *supra* note 297, at 91–93.

315 *See* THE REFORMED PASTOR, *supra* note 297, at 91–93, 111–12; FRAME, *supra* note 138, at 301.

316 *See* MCINERNY, *supra* note 301, at 117–18; THE DEFENSE OF THE FAITH, *supra* note 121, at 95–101.

negative appetites and affections.[317] These virtues may be developed independently of faith by the natural means of education and habituation, i.e., character development. Because faith is not necessary to perfect the cardinal virtues, civil government is competent to the task. Because intellectual and moral virtues can be inculcated without divine revelation or religious instruction, believers and non-believers alike can cooperate in educational ventures.[318]

b. The realm of grace known by faith

For Aquinas, grace presupposes and builds upon the realm of nature.[319] The Catholic apologist uses reason to first convince nonbelievers of God's existence.[320] The nonbeliever, being convinced of God's "existence" (basically the god of Aristotle), is then prepared to know God's "essence" (the God of the Bible) by faith.[321] Aquinas believed that faith is indispensable for knowing truths in the realm of grace. For example, he wrote that we know the truths of the Trinity and Incarnation only by divine revelation accepted on the basis of faith. Similarly, the theological virtues of faith, hope, and charity are imparted by grace and cannot be attained by natural means, but the cardinal

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[317] *See* MCINERNY, *supra* note 301, at 47, 80. Van Til notes that many evangelicals reason in the same way as Aquinas regarding the cardinal virtues, including C.S. Lewis. THE DEFENSE OF THE FAITH, *supra* note 121, at 80–83.

[318] *See* MCINERNY, *supra* note , at 96–101, 122.

[319] *Id.* at 68. For Aquinas it might be said that "I reason in order that I might believe." This is the reverse of Augustine who wrote that "I believe in order that I may understand." LAW AND REVOLUTION I, *supra* note 255, at 175.

[320] *See* MCINERNY, *supra* note 301, at 116; A CHRISTIAN THEORY, *supra* note 300, at 169; THE REFORMED PASTOR, *supra* note 297, at 95–98. The implication is that Adam, when created, was not epistemologically in contact with God. His intellect, reflecting on his sense perceptions had to infer God's existence. Then God would reveal His essence through revelation as apprehended by faith.

[321] *See* MCINERNY, *supra* note 301, at 115; A CHRISTIAN THEORY, *supra* note 300, at 169; THE REFORMED PASTOR, *supra* note 297, at 99; THE DEFENSE OF THE FAITH, *supra* note 121, at 155.

virtues of prudence, temperance, courage, and justice are attainable by natural means.[322]

Under Aquinas's view, the realm of nature is not sealed off from faith, and the realm of grace is not sealed off from reason. He believed that reason has a role to play in the realm of grace, enabling the believer to more fully appreciate the significance of truths known only by faith.[323] Conversely, much of what can be known purely by autonomous reason in the realm of nature is also revealed in the Bible. Therefore, revelation serves as a check on the reliability of autonomous reason.[324] Aquinas also believed that the Bible provides knowledge of God's existence and natural law for those who do not have the time or ability to reason autonomously to those truths.[325] Likewise, the theological virtues imparted by grace may also aid in developing the cardinal virtues that may be developed by the natural means of education and habituation.[326] Because conclusions reached in the realm of nature may not contradict the Catholic Church's teaching, the Church has the authority to pronounce as erroneous conclusions reached through reason.[327]

c. Some practical implications

In the nineteenth and twentieth centuries, the Catholic Church built an impressive parochial school system in the United States. The problem it had with public schools was not that they were non-religious but that they were Protestant. Reading the Protestant Bible introduced an objectionable form of

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322 MCINERNY, *supra* note 301, at 98, 107 (cardinal virtues), 118–22 (theological virtues). Through the impartation of the theological virtues, Catholics participate more fully in the divine nature, though never attaining the fullness of divine essence. Conversely, sin results in a descension on the "continuum of being." The continuum of being compromises the distinction between the Creator and creature, minimizing the importance of the doctrine of creation that is fundamental to the Augustinian-Reformed understanding of Christianity.

323 *Id.* at 117; A CHRISTIAN THEORY, *supra* note 300, at 158.

324 *See* MCINERNY, *supra* note 301, at 117, 119; A CHRISTIAN THEORY, *supra* note 300, at 158.

325 *See* MCINERNY, *supra* note 301, at 117, 119.

326 *See id.* at 67–68, 90–96.

327 *Id.* at 115.

authority—the authority of the Bible speaking directly to the individual conscience.[328]

The exclusion of religion from the public schools in the 1950s and 1960s, in principle, removed a major incentive for attending parochial schools. A secular education based simply on autonomous reason that prepares students for life in the realm of nature is not necessarily objectionable. Catholic children can receive a quality secular education in the public schools governed by reason, and they can supplement it with catechism classes after school for instruction in religion governed by faith. Aquinas believed that civil government was competent to educate children because the cardinal virtues are developed through the natural means of education and habituation.[329]

Although many Protestants protested the removal of Bible reading and prayer from public schools, most made peace with the new status quo because their beliefs regarding the relationship of faith and reason did not differ appreciably from Catholicism.[330] Protestants could send their children to public schools during the week for a secular education and to Sunday School for religious instruction.

The attitude of evangelical Protestants began to change in the 1970s, however, resulting in the rise of the Christian school and home school movements.[331] Evangelicals began to realize that the false distinctions

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[328] RUSHDOONY, *supra* note 171, at 45. *See generally* David Mislin, *Bible Reading in Public Schools Has Been a Divisive Issue – and Could Be Again*, CHRISTIAN HEADLINES (Feb. 5, 2019), https://www.christianheadlines.com/columnists/guest-commentary/bible-reading-in-public-schools-has-been-a-divisive-issue-and-could-be-again.html.

[329] In principle it would seem that tax-funded schools are not unconstitutional so long as they limit instruction to secular subjects that are not contrary to reason or the Catholic faith. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Pt. I-II, question 92, art. 1. However, POPE PIUS IX, THE SYLLABUS OF ERRORS (1846), Error 48, seems to condemn education "unconnected with Catholic faith and the power of the Church."

[330] *See* THE DEFENSE OF THE FAITH, *supra* note 121, at 80–83, 101–03, 114–16, 181–83.

[331] As Protestants sought to reengage with culture in the 1970s, they needed theological and philosophical grounding. In some ways, the movement looked like the single-issue sorts of crusades in earlier history, but instead of slavery it was abortion and instead of prohibition it was Christian schools. However, if Christian schools are to be more than safe places for secular instruction with Sunday School and prayer added on five days a week, they must

between secular and religious, between public reason and private faith, and between science and faith are untenable. This realization was fueled in part by the recognition that not all Americans and belief systems share a common morality, that the Bible does speak to all areas of life, and that faith and science do not operate in separate epistemological realms. In other words, evangelicals became increasingly Augustinian-Reformed in their instincts, even if not in a comprehensively formulated theology.[332]

Catholic Supreme Court justices have been criticized for the abortion decisions they have written or joined. One criticism is that justices have allowed their faith to dictate their jurisprudence. Justice Scalia responded to these accusations by stating that his faith had nothing to do with his judicial opinions.[333] The claim that his faith had no bearing on his judicial reasoning makes perfect sense, assuming that he held to the Catholic view of the relation of reason and faith. Reason governs the realm of nature, and law and government operate in the realm of nature. An Augustinian-Reformed justice could not claim that his faith has no bearing on his job because everything, including reasoning about law in general and abortion in

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develop a comprehensive worldview. The Christian school and homeschool movements continue to grow. Daniel M. Gleason, A Study of the Christian School Movement, (Dec. 1, 1980) (Ed.D. dissertation, University of North Dakota) (on file with the University of North Dakota's Scholarly Commons), https://commons.und.edu/theses/2523; *A Brief History of Home Schooling*, COAL. FOR RESPONSIBLE HOME EDUC., https://responsiblehomeschooling.org/research/summaries/a-brief-history-of-homeschooling/ (last visited Jan. 28, 2024); Martha Lopez Coleman, *Left, Right and Online: A Historic View of Homeschooling*, NAT'L HOME EDUC. RES. INST. (June 10, 2014), https://www.nheri.org/home-school-researcher-left-right-and-online-a-historic-view-of-homeschooling/; Walter F. Fremont & Stephanie Ludlum, *Holding Fast: Christian Education Across the Centuries*, BJU PRESS, https://www.bjupress.com/articles/christian-education-across-centuries.php.

[332] Many Reformed churches established Christian schools even before the 1970s. These churches remained faithful to their Augustinian-Reformed worldview. *See generally* LOUIS BERKHOF & CORNELIUS VAN TIL, FOUNDATIONS OF CHRISTIAN EDUCATION: ADDRESSES TO CHRISTIAN TEACHERS (Dennis E. Johnson ed., 1989). Two other influential books written from a Reformed perspective by Rousas John Rushdoony are THE MESSIANIC CHARACTER OF AMERICAN EDUCATION (1963) and THE PHILOSOPHY OF THE CHRISTIAN CURRICULUM (1985).

[333] Justice Scalia stated: "I have religious views on the subject. But they have nothing whatsoever to do with my job." JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 191 (2009).

particular, must be done in faith—"everything that does not come from faith is sin."[334]

3. Immanuel Kant—Phenomenal and Noumenal

In his writings, the German philosopher Immanuel Kant (1724–1804), developed a dialectical system distinguishing between the "phenomenal" and "noumenal" realms that provides a prop for tax-funded education similar to Aquinas's distinction between "nature" and "grace." A major point that Kant and Aquinas have in common is that they both believed that man is able to reason to the truth, at least for some purposes, independently of God and His revelation. A main difference between them, at least for present purposes, is that Aquinas did not believe that the authoritative voice of God is necessary when operating in the realm of nature, but Kant believed it must be excluded when operating in both the phenomenal and noumenal realms.

a. Kant's influence and importance

Immanuel Kant, through his philosophical and theological descendants, has most likely had a greater impact than Thomas Aquinas on modern philosophy, theology, and law. Oliver Wendell Holmes, Jr., writing in 1897, noted the immense influence Kant had already had on law and views of the world. According to Holmes, it was not Napoleonic force of arms that was the locus of power ruling Europe and America, rather it was Kant's philosophy.[335] For two centuries, liberal and neo-orthodox Protestant

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334 *Romans* 14:23 (New Int'l).

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> To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. . . . Read the works of the great German jurists and see how much more the world is governed today by Kant than by Bonaparte. We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and

theologians have also drawn heavily upon Kant for inspiration. Arguably, even modernist Catholic thought is more Kantian than Thomist.[336] The Supreme Court's First Amendment jurisprudence that maintains a radical distinction between secular and religious reflects Kant's philosophy.

Kant's primary objective was to offer a satisfactory alternative to the main contending philosophies of his day: rationalism and empiricism.[337] In doing so, he found it necessary to resolve the fundamental paradox of determinism and free will that has challenged philosophers from time immemorial.[338]

As part of the solution, Kant posited two separate realms—the "phenomenal" and the "noumenal." The determinism of material cause-effect relationships governs the phenomenal realm, the realm of science. The free will of the individual self operates in the noumenal realm, the realm of morals, aesthetics, and religion. The philosophical alternative that Kant offered may best be described as a form of radical subjectivism.[339]

b. Phenomenal and noumenal

Both Kant and Aquinas provide support for Supreme Court jurisprudence that makes a distinction between secular and religious. Kant's bifurcation of reality into the phenomenal-noumenal is analogous to Aquinas's nature-grace, but there are great differences between them.

> catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

OLIVER WENDELL HOLMES, JR., *The Path of the Law*, 10 HARV. L. REV. 478 (1897).

336 THE REFORMED PASTOR, *supra* note 297, at 106, 119–21. The religious movements that began in the nineteenth century included the widespread apostasy of New England Congregationalists to Unitarianism, and the eventual triumph first of liberalism and then of neo-orthodox theology in mainline Protestant denominations. A confluence of diverse religious movements in the nineteenth and twentieth centuries, however, produced an American public quite receptive to a Kantian reimaging. The Christian worldview of the Founders differs from the worldview of most twenty-first century American Christians, who share a worldview that is quite compatible with Kantianism. Kant's major works, written in the late eighteenth century, likely had little impact in America at the time of the founding.

337 THE REFORMED PASTOR, *supra* note 297, at 107–09, 113–14; A HISTORY OF WESTERN PHILOSOPHY, *supra* note 301, at 254.

338 THE REFORMED PASTOR, *supra* note 297, at 106–07.

339 *See* THE DEFENSE OF THE FAITH, *supra* note 121, at 145–47.

The *phenomenal* is the realm of determinism or mechanistic cause-effect relationships. By science, we can have knowledge of the phenomenal realm, but this is not the science of classic empiricism.[340] We don't simply observe phenomena; we order the phenomenal world through *a priori* categories of space, time, and causation. According to Kant, the knowledge transaction is mediated through *a priori* categories that preexist in the mind; therefore, he introduced a radical subjectivism even into the realm of science.[341]

The *noumenal* is the realm of morals, religion, and aesthetics. Free will, rather than mechanical cause-effect relationships, operates in the noumenal realm.[342] To establish the existence of free will, Kant started by acknowledging his sense of "the moral law within."[343] The moral law produces in us a sense that we should obey it—a sense of "oughtness." From this sense of oughtness, Kant deduced the freedom of the will. If we ought to do something, we surely must have the ability to do it.[344] Kant called the moral law that prescribes our duty to obey the "categorical imperative." For example, "tell the truth" is a categorical imperative. A person should tell the truth because it is his duty regardless of the consequences. The most general formulation of the categorical imperative is: "Act according to a maxim which can be adopted at the same time as a universal law."[345]

For a person's act to be truly moral, he must obey a categorical imperative for no other motive than duty. The free will wills itself to obey the duty set before it. Free will can't be proved, but it must be assumed in order to make

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340 *See* A HISTORY OF WESTERN PHILOSOPHY, *supra* note 301, at 253; BROWN, *supra* note 126, at 96. Unlike the empiricists and rationalists, Kant did not believe that we can know things in themselves.

341 *See* EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 61 (revised ed. 1974); GORDON H. CLARK, THALES TO DEWEY 423 (1957).

342 A CHRISTIAN THEORY, *supra* note 300, at 57.

343 *Kant's Philosophical Development*, STAN. ENCYCLOPEDIA PHIL. (Nov. 03, 2009), https://plato.stanford.edu/entries/kant-development/; *see also* IMMANUEL KANT, THE PHILOSOPHY OF LAW (1797), *reprinted in* GEORGE C. CHRISTIE ET AL., JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 348 (4th ed. 2020). Kant wrote that "Two things fill the mind with ever new and increasing admiration and awe, the more often and steadily we reflect on them: the starry heavens above me and the moral law within me." *Kant's Philosophical Development*, *supra*.

344 *See* CLARK, *supra* note 341, at 424.

345 KANT, *supra* note 343, at 348.

sense of the world. The motive that causes us to obey must come from within and not from any other source.[346] Those other sources include natural affections, promises of rewards and threats of punishment, and any other influence arising from the phenomenal realm.[347] To be truly free, moral choices cannot be determined or motivated by any cause or authority outside the will itself. Any imperatives to which conditions are attached are called "conditional imperatives" or "hypothetical imperatives."[348] For example, "tell the truth or you will be charged and punished for perjury" is a conditional imperative.[349]

c. Christianity cordoned off within the noumenal realm

Kant claimed that he wanted to save science and make room for religion.[350] In order to save science, he had to exclude the voice of orthodox Christianity from speaking in the phenomenal realm.[351] In making room for religion without compromising man's freedom, Kant had to banish orthodox Christianity to a separate place in the noumenal realm so that Christ's voice could not speak authoritatively regarding matters of morals.[352] Kant supposedly saved religion by claiming that God's existence and many

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346 3 CORNEILUS VAN TIL, IN DEFENSE OF THE FAITH: CHRISTIAN THEISTIC ETHICS 224–36 (1980) [hereinafter CHRISTIAN THEISTIC ETHICS].

347 KANT, *supra* note 343, at 341.

348 BROWN, *supra* note 126, at 100–01.

349 The phenomenal and noumenal realms are not completely sealed off from one another. We make use of mechanical laws to accomplish purposes that we freely choose, and yet the phenomenal realm places restrictions on what we might choose to do. Moral decisions made in the noumenal realm are usually judged by the effects they have in the phenomenal realm.

Much more complex is trying to identify the basis for an overarching unity of the two realms. Kant believed that the human will operating in the noumenal can triumph over and determine matters in the phenomenal. CHRISTIAN THEISTIC ETHICS, *supra* note 346, at 228–29. Freedom is thus not simply the ability to comply with the categorical imperative solely from the sense of duty; it extends to the ability to determine necessity in nature. *See id.* at 233. This thinking may support the claim that a biological man can claim to be a woman and vice versa.

350 THE REFORMED PASTOR, *supra* note 297, at 114.

351 *See id.* at 122–24.

352 *See id.* at 115, 119.

doctrines of the Christian faith cannot be proved or disproved.[353] Therefore, Christianity must remain solely a matter of personal concern.

For Kant, the Bible can't speak authoritatively to the realm of the phenomenal. It is discredited because its accounts of miracles and the resurrection of Christ are incompatible with science. Likewise, the doctrine of Divine Providence is incompatible with a mechanical cause-effect explanation of physical phenomena. By excluding miracles and Divine Providence, Kant saved science from encroachment by religion in the phenomenal realm.[354]

To ensure that moral choices are truly free, Kant had to exclude the voice of Christ because moral choices are not free if dictated by external authority. The Augustinian-Reformed view of God as Creator is that He is absolutely independent and totally self-sufficient and that man as a creature is dependent upon God. Kant replaced self-sufficient God with ethically autonomous and self-sufficient man.[355]

Without question, ethical decisions are made concerning public morality (including matters of civil law and government), not just private morality. But for Kant, because religion is a matter of personal faith, it must be excluded from the public realm. Furthermore, for Kant, the motivation backing Christian morality is morally deficient because conditions for receiving blessings and curses are appended as a motive for keeping the law.[356] In other words, with orthodox Christianity, obedience is driven by conditional imperatives rather than categorical imperatives of pure duty.

d. Radical subjectivism; triumph of the collective will

For Kant, the moral law originates within each person, but it is not the voice of God speaking. In effect, every individual wills a universal law applicable to all. Again, Kant's most general categorical imperative is, "[a]ct

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353 *See id.* at 117.

354 *See id.* at 116–17, 123, 125. Liberal religionists are relieved because they can still teach miracles and the resurrection not as actual events in time and space but in some other realm not subject to verification.

355 *See id.* at 119, 122, 129.

356 *See, e.g.*, *Genesis* 2:15–17; *Deuteronomy* 28; *Revelation* 21:8.

according to a maxim which can be adopted at the same time as a universal law."[357]

Two obvious problems arise. The first is that some people simply will not act in compliance with the categorical imperative and will want to make exceptions for themselves.[358] The second problem that arises, especially when moving from the general categorical imperative to more specific ones, is that there will be differences of opinion as to what laws should be adopted.[359]

How are decisions to be made if there is no other source of law than the individual moral self? Take for example an imperative regarding education. One person wills purely private education without state involvement as the universal law. Another person might will compulsory school attendance as the universal law. The only source of authority for determining the universally applicable law, other than looking to God, is the decision of the collective, rather than the individual, backed by force.

Kant was an admirer of Rousseau, who wrote that "the general will is always right and ever tends to the public advantage."[360] Ideally the people would speak with one voice to express the general will, but, in reality, it is the voice of the most powerful that gets heard. We might posit as a maxim, "When conflicts of opinion arise, we have a duty to follow the will of the majority as expressed through the state." Kant recognized that duty may sometimes be legislated by the state.[361] Individuals who might obey the state purely from a sense of duty act morally. However, conditional imperatives will often be necessary to motivate others.

If the state decides that all persons must send their children to public schools to study under a state-prescribed curriculum taught by licensed teachers, that becomes everyone's duty. Those who comply purely out of a sense of duty would be acting morally. The state could impose sanctions on those who are not sufficiently motivated by duty, thus imposing a conditional

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357 KANT, *supra* note 343, at 348; *see also id.* at 352.

358 *See id.* at 344, 347–48, 350.

359 *See id.*

360 *See* ROUSAS JOHN RUSHDOONY, THE ONE AND THE MANY 315 (2007) [hereinafter THE ONE AND THE MANY].

361 The legislature's determination of "Mine and Thine is irreproachable, for it is the joint will of all, and this will cannot do wrong to an individual citizen." BODENHEIMER, *supra* note 341, at 63.

imperative: "do it or else." A further imperative might order state officials to enforce every law. That would be the officials' moral duty, and they would have a sense of acting morally if they did so out of a sense of duty, even if it means taking children from their parents or sending parents to jail for noncompliance with compulsory schooling laws. The law-enforcement official can feel good about himself because he would be acting morally: "I was just following orders."

Kant removed the authority of God the Creator, leaving nothing in His place except the autonomy of man and ultimately the authority of the state.[362] His doctrines undermine not only the principles upon which the First Amendment is based but also the very concept of inalienable rights.[363] The implications for education are that the state can force everyone to attend public schools and establish any curriculum that it wishes. Despite Kant's reputation for being a limited government, natural rights proponent,[364] his jurisprudence removes all limits on the state.[365] The result is that the subjective will of the collective defines duty.

e. A comparison of Kant to Augustine and Aquinas

For Augustine, faith forms the basis for all reasoning. Both Aquinas and Kant provide grounds for making ethical decisions about law and government without the voice of religious authority, but they have significant differences. For Aquinas, faith is not necessary for making ethical decisions about law and government in the realm of nature. Autonomous reason is

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[362] THE DEFENSE OF THE FAITH, *supra* note 121, at 66–67. If there is no Creator and therefore no objective standards of right and wrong, then the subjective will of the collective (state) will be unrestrained in imposing its will.

[363] Similar predicaments arise when one takes the existential approach of the Court in *Casey*: "At the heart of liberty is the right to define one's own concept of existence, the meaning of the universe, and of the mystery of human life." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992). When the reality you want to create conflicts with the reality the collective decides to impose, you must follow the mandate set by the state.

[364] The state should only enact and administer laws; it shouldn't interfere or be paternalistic; it should only protect the people's rights. BODENHEIMER, *supra* note 341, at 63–64.

[365] Freedom and rights are solely a grant of the legislature. There is no right of rebellion. The state has only rights, not duties toward its subjects. The state alone is the obligatory source in positive law. *Id.* at 64; *see* KANT, *supra* note 343, at 344, 353, 357.

sufficient, but the Bible also speaks to such matters and can serve as a corrective to conclusions reached by reason. Kant on the other hand, excludes religion as a basis for making ethical decisions about law and government.

The secular-religious dichotomy of Kant and Aquinas is so ingrained in modern thought that we are not likely to question the origin of that dichotomy or its implications and legitimacy. The failure of the Court to develop a coherent doctrine for deciding Establishment and Free Exercise Clause cases should prompt it to carefully consider its own underlying theological and philosophical views of the world.

Chief Justice Roberts needled legal academics when he commented:

> Pick up a copy of any law review that you see . . . and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.[366]

Perhaps Kant did not have much influence on eighteenth-century Bulgarian law that is helpful for American lawyers. But Kant's influence on twenty-first-century American constitutional law is, as I have argued, quite significant. If the Court recognizes that fact and corrects the course of its First Amendment jurisprudence, the bar and the American people will greatly benefit. Holmes was right—power belongs to those who command ideas, and Kant's have been chief among them. Unfortunately, Kant's view of the world was mistaken, yet he holds sway today in the legal and popular culture and has infected even Christian thought.

4. Identifying Common Ground

An important question must be answered. What basis is there for cooperation in the common task of governing if there is no generally accepted worldview? The first, and most basic, answer is that God has created all people, and they bear His image. God reveals Himself and His moral standards directly into each person's conscience and in the entire created

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[366] Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. TIMES (Oct. 12, 2013), https://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html.

order, though we may try in various ways to suppress that knowledge.[367] This is often referred to as general revelation.[368] But even in the state of innocence before Adam's sin, God revealed Himself through the spoken word.[369] This is often referred to as special revelation.[370] From the beginning, general revelation was not to operate independently of special revelation.[371]

Second, after the fall, God's common grace (as distinct from His saving grace) is operative to varying degrees and in different ways in all people. In the realm of nature, common grace operates in such a way that all people experience certain blessings such as sunshine and rain. In the ethical realm, God's common grace serves the role of restraining evil so that we do not fall into total lawlessness. Another way in which common grace serves in the ethical realm is to incline us to conform to the good in the operation of our affections, intellect, and will. As a result, people to varying degrees are responsive to the assertions of certain moral imperatives and are willing to accept them as right.[372]

Third, contemporary Western culture is imbued with biblical values, concepts, and principles of justice that provide the basis for our laws and legal systems, even when the origins of those principles are forgotten or rejected. In a sense, there is a collective Christian conscience that is not easily erased.[373] Some of those principles include the belief that might does not make right, that honesty is the best policy, that we need a vantage point from which to

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[367] *Romans* 1:18–32, 2:12–16; *see* THE REFORMED PASTOR, *supra* note 297, at 172–73.

[368] The general revelation of God . . . does not come to man in the form of verbal communications, but in the facts, the forces, and the laws of nature, in the constitution and operation of the human mind, and in the facts of experience and history. LOUIS BERKHOF, A SUMMARY OF CHRISTIAN DOCTRINE 5 (1938).

[369] *See generally Genesis* 1:28–30, 2:16–18.

[370] "In addition to the revelation of God in nature we have His special revelation which is now embodied in Scripture. The Bible is preeminently the book of God's special revelation, a revelation in which facts and words go hand in hand, the words interpreting the facts and facts giving substance to the words." BERKHOF, *supra* note 368, at 6.

[371] *Genesis* 1:28–30; *see* THE DEFENSE OF THE FAITH, *supra* note 121, at 128.

[372] *See* THE DEFENSE OF THE FAITH, *supra* note 121, at 174–177.

[373] LAW AND REVOLUTION I, *supra* note 255, at 165–66, 557–89.

evaluate positive laws, and that a comprehensive source of rationality exists, which is reflected in the ideal of the *corpus juris*.[374]

V. BIBLICAL BASIS FOR THE JURISDICTIONAL APPROACH TO EDUCATION

Jefferson's Bill for Establishing Religious Freedom and Madison's *Memorial and Remonstrance* claimed that the right to freedom of conscience originates with God. Madison in particular referred to divine revelation and the truth of the Christian religion as the source of his claims for religious liberty. Although he appealed to divine authority as the basis for his arguments, he did not engage in a careful biblical exposition in support of his assertions. It is necessary to provide that support from the Bible as the authoritative source for doctrine and practice.

A. Why Education Must Be Christian—But, Even So, Not Directed by the State

This Article has made the case that tax-funded education is unconstitutional. Consequently, the primary responsibility for educating children lies with parents, churches, and voluntary associations. The first issue addressed in this part of the Article is whether education must be Christian in nature. The fact that education must be Christian incidentally bolsters the claim that education is outside of the state's lawful jurisdiction.

1. Creation and the Objective Source of Knowledge

It is commonly stated that the object of free inquiry in an educational setting is to discover the truth and uncover falsehood. During the nineteenth and twentieth centuries a large number of universities, both public and private, adopted some variation of the motto, "'ye shall know the truth, and the truth shall make you free.'"[375] These are words that Jesus spoke to His disciples as recorded in the Bible. But these words are misleading when torn from their context. The fuller context is "'If ye continue in my word, then are

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[374] *See id.* at 9.

[375] *John* 8:32 (King James). Interestingly, it was inscribed on the first Central Intelligence Agency building. *The CIA Headquarters Buildings,* FED'N OF AM. SCI. INTEL. RES. PROGRAM, https://irp.fas.org/cia/product/facttell/building.htm (last visited Feb. 28, 2024).

ye my disciples indeed; And ye shall know the truth, and the truth shall make you free.'"[376]

Truth, including facts in the material realm and laws of logic, is not impersonal in nature but rather rooted in a person, Jesus Christ, the son of God and second person of the Trinity. [377] In fact, "all the treasures of wisdom and knowledge" are found in Christ Jesus.[378] Knowledge of the truth is grounded in an abiding relationship between Christ and His disciples.

All wisdom and knowledge are found in Jesus Christ because He has existed throughout all eternity and "in him all things were created . . . and in him all things hold together."[379] As "the way and the truth and the life," Christ bridges the chasm between the eternal and the temporal orders.[380] Consequently, it is in Him that "we live and move and have our being. . . . We are his offspring."[381] Just as we are dependent upon God's revelation to interpret and understand the universe, we are dependent upon Him to interpret and understand ourselves.

The very notion of a *university* education is that there is a fundamental unity in which all the branches of knowledge are related in a comprehensive order of which we can make sense and, in turn, order our lives individually and collectively. The truths of the Christian faith or worldview, in particular the doctrines of creation and providence, are essential for sustaining a belief in the unity of all knowledge.[382] The Christian can study each subject, assured that there is an order in the world that he can uncover, and that his study of

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[376] *John* 8:31–32 (King James).

[377] *Matthew* 28:19 (New Int'l) ("Therefore go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit . . . .").

[378] *Colossians* 2:3 (New Int'l).

[379] *Colossians* 1:16–17 (New Int'l).

[380] *John* 1:1, 14 (New Int'l)("In the beginning was the Word, and the Word was with God, and the Word was God. . . . The Word became flesh and made his dwelling among us. We have seen his glory, the glory of the one and only Son, who came from the Father, full of grace and truth."). The incarnation resolves the paradox that frustrated the Greek philosophers in trying to resolve the relationship between "being" and "becoming." This paradox is manifest in jurisprudence that tries to account for the fact that law by nature is fixed, uniform, and universal, yet positive law can increasingly be perfected to more closely conform to that eternal standard.

[381] *Acts* 17:28 (New Int'l) (internal quotations omitted).

[382] THE DEFENSE OF THE FAITH, *supra* note 121, at 178–79, 196.

it will be fruitful because it has meaning and purpose. The paradoxes that plagued the Greek philosophical mind—the relationships between being and becoming, universals and particulars, determinism and freedom—are not ultimate mysteries but rather have their resolution in God who created the world, sustains it, and works out His eternal plan in the temporal.[383]

The Christian believer understands that because the triune God has created and sustains all things, God has perfect and comprehensive knowledge of the world,[384] which is just as true for unbelievers. Because God has communicated to us, we can have true knowledge without having comprehensive knowledge. The unbeliever, on the other hand, must hold either to the ideal of attaining comprehensive knowledge or attaining some truth without comprehensive knowledge. But he has come to realize that he really cannot gain comprehensive knowledge, and yet, without comprehensive knowledge, he can know nothing for certain.[385] In rejecting the Christian doctrines of creation, providence, and revelation, the unbeliever destroys the basis for knowledge.

The basic truths about God and His moral laws are revealed in written form in the Bible. Even without these expressly written truths revealed in the Bible (special revelation), all people know who God is[386] and what He requires.[387] The truths about God's nature are manifest in every facet of the created order,[388] and the moral duties, as well as the consequences of disobeying them, are imprinted on our consciences.[389] The Bible provides the worldview that sustains the belief in a rationally ordered universe, which is

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[383] CORNELIUS VAN TIL, A SURVEY OF CHRISTIAN EPISTEMOLOGY 59–60 (1977) [hereinafter A SURVEY].

[384] THE DEFENSE OF THE FAITH, *supra* note 121, at 61–62, 196.

[385] *See* BERKHOF & VAN TIL, *supra* note 332, at 11.

[386] *Romans* 1:19 (New Int'l) ("[W]hat may be known about God is plain to them . . . .").

[387] *Romans* 2:15 (New Int'l) ("They show that the requirements of the law are written on their hearts . . . .").

[388] *Romans* 1:20 (New Int'l) ("For since the creation of the world God's invisible qualities—his eternal power and divine nature—have been clearly seen, being understood from what has been made, so that people are without excuse.").

[389] *Romans* 2:15 (New Int'l) ("They show that the requirements of the law are written on their hearts, their consciences also bearing witness, and their thoughts sometimes accusing them and at other times even defending them.").

essential for fruitful study and work in all areas of life, not just matters of personal morality.

2. The Effects of the Fall on Human Nature

We were created to have communion with God and to worship Him as our Creator.[390] The cataclysmic event breaking this communion was Adam's fall into sin and its consequent effect on all succeeding generations.[391] This original sin works a corruption in every part of our being, including affections, will, and intellect. As a result, we worship created things rather than our Creator,[392] and we suppress the knowledge of God and the requirements of His law.[393] Instead of seeking the truth about God, we suppress that truth and engage in immoral behavior that we know is

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[390] Adam's sin that led to a breach of fellowship with one another and with God is remedied through the atonement of Christ Jesus. "We proclaim to you what we have seen and heard, so that you also may have fellowship with us. And our fellowship is with the Father and with his Son, Jesus Christ." 1 *John* 1:3 (New Int'l). The restoration of fellowship with God will be consummated in the New Jerusalem. "And I heard a loud voice from the throne saying, 'Look! God's dwelling place is now among the people, and he will dwell with them. They will be his people, and God himself will be with them and be their God.[']" *Revelation* 21:3 (New Int'l).

[391] Adam was the federal head of the human race, thus his sin affected everyone. Christ is the second Adam, whose obedience as head of the redeemed race is imputed to them. "For if, by the trespass of the one man, death reigned through that one man, how much more will those who receive God's abundant provision of grace and of the gift of righteousness reign in life through the one man, Jesus Christ!" *Romans* 5:17 (New Int'l).

[392] *Romans* 1:25.

[393] *Romans* 1:20–21 (New Int'l) ("For since the creation of the world God's invisible qualities—his eternal power and divine nature—have been clearly seen, being understood from what has been made, so that people are without excuse. For although they knew God, they neither glorified him as God nor gave thanks to him, but their thinking became futile and their foolish hearts were darkened.").

wrong.[394] When people are given over to extremely immoral behavior, they encourage and applaud others in it as well.[395]

The Bible makes it clear that the relationship between acknowledging who God is and living moral lives is inseparable.[396] As the public schools have institutionally and systematically suppressed the acknowledgment of God, the breakdown of discipline and consequent academic failure should come as no surprise.[397]

Education in the United States undermines the central doctrines of the Christian worldview that alone sustain the ideal of the unity of knowledge. Particularly noteworthy are attacks on, and ridicule of, the doctrines of creation, providence, and revelation. Among college students, rejection of these beliefs is seen as the product of superior intelligence and education. But there is another more plausible explanation for this phenomenon. Professor J. Gresham Machen of Princeton described it in testimony before Congress nearly a century ago:

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394 *Romans* 1:18–19 (New Int'l) ("The wrath of God is being revealed from heaven against all the godlessness and wickedness of people, who suppress the truth by their wickedness, since what may be known about God is plain to them, because God has made it plain to them.").

395 *Romans* 1:29–32 (New Int'l) ("They have become filled with every kind of wickedness, evil, greed and depravity. They are full of envy, murder, strife, deceit and malice. They are gossips, slanderers, God-haters, insolent, arrogant and boastful; they invent ways of doing evil; they disobey their parents; they have no understanding, no fidelity, no love, no mercy. Although they know God's righteous decree that those who do such things deserve death, they not only continue to do these very things but also approve of those who practice them.").

396 *Romans* 1:21–25 (New Int'l) ("For although they knew God, they neither glorified him as God nor gave thanks to him, but their thinking became futile and their foolish hearts were darkened. . . . Therefore God gave them over in the sinful desires of their hearts to sexual impurity for the degrading of their bodies with one another. They exchanged the truth about God for a lie, and worshiped and served created things rather than the Creator—who is forever praised. Amen.").

397 *See, e.g.*, Laura Meckler, *Public Education Is Facing a Crisis of Epic Proportions: How Politics and the Pandemic Put Schools in the Line of Fire*, WASH. POST (Jan. 30, 2022, 6:00 AM), https://www.washingtonpost.com/education/2022/01/30/public-education-crisis-enrollment-violence/; Rikki Schlott, *Teachers Are Quitting in Droves Because They're Scared of Student Violence—And a Lack of Punishment*, N.Y. POST, https://nypost.com/2023/12/06/news/teachers-are-quitting-over-fear-of-student-violence/ (Dec. 6, 2023, 2:49 PM).

> The trouble with the university students of the present day, from the point of view of evangelical Christianity, is not that they are too original, but that they are not half original enough. They go on in the same routine way, following their leaders like a flock of sheep, repeating the same stock phrases with little knowledge of what they mean, swallowing whole whatever professors choose to give them—and all the time imagining that they are bold, bad, independent young men, merely because they abuse what everybody else is abusing, namely, the religion that is founded upon Christ. It is popular today to abuse that unpopular thing that is known as supernatural Christianity, but original it is not.[398]

3. Redemption As the Remedy for the Fall

The task of educating young students is made much more difficult because of the effects of the fall into sin.[399] To provide a remedy for the futility and hopelessness that marks lives given over to sin, God the Father sent God the Son, who took on flesh to redeem us.[400] Through His life and vicarious death, the objective ground for forgiveness of sin and release from the bondage and consequences of sin can be had.[401] Christ told His followers that their situation would actually be improved when He returned to the Father because He would send the Holy Spirit, the third person of the Trinity, to give us new life and lead us into all truth.[402] Through the work of the Holy Spirit,

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398 J. GRESHAM MACHEN, EDUCATION, CHRISTIANITY, AND THE STATE 4 (1987).

399 *See* CHRISTIAN THEISTIC ETHICS, *supra* note 346, at 51.

400 *John* 3:16–17 (New Int'l) ("For God so loved the world that he gave his one and only Son, that whoever believes in him shall not perish but have eternal life. For God did not send his Son into the world to condemn the world, but to save the world through him.").

401 *Romans* 8:1–2 (New Int'l) ("Therefore, there is now no condemnation for those who are in Christ Jesus, because through Christ Jesus the law of the Spirit who gives life has set you free from the law of sin and death.").

402 *John* 16:7 (New Int'l) ("But very truly I tell you, it is for your good that I am going away. Unless I go away, the Advocate will not come to you; but if I go, I will send him to you.").

the objective way, truth, and life are made subjective realities in the lives of believers.[403]

Keep in mind that our enslavement to sin is manifest not only in the moral depravity of our actions but also in the futility of our thinking. The only way to break free of the futility of our thoughts is to trade slave masters.[404] It is by abiding in Christ's teachings that our minds are set free.[405] Becoming free from the dominion of sin, we become bondservants to Christ, and in so doing, "we take captive every thought to make it obedient to Christ."[406] Christ must be central to every educational enterprise because everything we do must be as unto the Lord. Understanding our place in the world and our moral redirection are at the heart of education. The educational enterprise must be immersed in propositional truth, and it must be ever attentive to the necessity of personal transformation. That transformation ultimately is the work of the Holy Spirit in each person's life.[407]

Worship of the Creator is an essential part of the educational process. An indissoluble connection exists between acknowledging and worshipping God

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[403] *John* 16:13–15 (New Int'l) ("But when he, the Spirit of truth, comes, he will guide you into all the truth. He will not speak on his own; he will speak only what he hears, and he will tell you what is yet to come. He will glorify me because it is from me that he will receive what he will make known to you. All that belongs to the Father is mine. That is why I said the Spirit will receive from me what he will make known to you.").

[404] *Romans* 6:6–7, 17–18 (New Int'l) ("For we know that our old self was crucified with him so that the body ruled by sin might be done away with, that we should no longer be slaves to sin— because anyone who has died has been set free from sin. . . . But thanks be to God that, though you used to be slaves to sin, you have come to obey from your heart the pattern of teaching that has now claimed your allegiance. You have been set free from sin and have become slaves to righteousness.").

[405] *John* 15:4 (New Int'l) ("Remain in me, as I also remain in you. No branch can bear fruit by itself; it must remain in the vine. Neither can you bear fruit unless you remain in me.").

[406] 2 *Corinthians* 10:5 (New Int'l) ("We demolish arguments and every pretension that sets itself up against the knowledge of God, and we take captive every thought to make it obedient to Christ."); *see Romans* 6:17–18.

[407] *Galatians* 5:16–17 (New Int'l) ("So I say, walk by the Spirit, and you will not gratify the desires of the flesh. For the flesh desires what is contrary to the Spirit, and the Spirit what is contrary to the flesh. They are in conflict with each other, so that you are not to do whatever you want.").

and keeping the moral law.[408] When people no longer think that worshiping God matters, He gives them over to moral debasement.[409] Because Christ has been given preeminence above all created things, worship must be directed toward Him. We are to worship Him with fear and trembling—the same kind of fear that is the beginning of wisdom and knowledge. The Christian worldview not only provides the formal construct on which science depends, but it also is the existential starting point. "The fear of the Lord is the beginning of knowledge."[410]

4. The Role of Faith in Education

Faith plays at least three distinct and essential roles in education. First, we often refer to the "Christian faith" as a body of doctrinal knowledge about God's person, His work, and His law.[411] These doctrines are foundational for education, but the content of an explicitly "Christian education" should be more expansive in coverage than any other education.

A second way in which the term *faith* is used refers to the motivating force that animates the life of Christian believers.[412] Not only are we saved through faith, which is a gift of God, but we are also to walk or live by faith, for what is begun in faith is perfected in faith.[413] Faith as a motivating force and

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[408] *Romans* 1:21–23 (New Int'l) ("For although they knew God, they neither glorified him as God nor gave thanks to him, but their thinking became futile and their foolish hearts were darkened. Although they claimed to be wise, they became fools and exchanged the glory of the immortal God for images made to look like a mortal human being and birds and animals and reptiles.").

[409] *Romans* 1:24–25 (New Int'l) ("Therefore God gave them over in the sinful desires of their hearts to sexual impurity for the degrading of their bodies with one another. They exchanged the truth about God for a lie, and worshiped and served created things rather than the Creator—who is forever praised. Amen.").

[410] *Proverbs* 1:7 (New Int'l) ("The fear of the LORD is the beginning of knowledge, but fools despise wisdom and instruction.").

[411] 1 *Timothy* 4:6 (New Int'l) ("If you point these things out to the brothers and sisters, you will be a good minister of Christ Jesus, nourished on the truths of the faith and of the good teaching that you have followed.").

[412] 1 *Timothy* 1:5 (New Int'l) ("The goal of this command is love, which comes from a pure heart and a good conscience and a sincere faith.").

[413] 2 *Corinthians* 5:7 (New Int'l) ("For we live by faith, not by sight."); *see also Galatians* 3:2–14.

purpose for our lives are closely related. We sometimes say that we are motivated to do something because it gives us purpose in life. The Christian student should be charged with the purpose of "glorifying God and enjoying him forever."[414] The public schools, which have become the instruments of religious cleansing, can offer students no greater purpose than to become productive tax-paying citizens of the state. The concurrent marginalization of family and church communicates to students a Greco-Roman view of society that all meaningful life is subsumed in the state.[415]

Lastly, the relationship between *faith* and *reason*, which is central to education, must be properly understood. The educational enterprise begins with faith accepted on the basis of authority, which supplies the ground from which to reason.[416] As Anselm, following in the tradition of Augustine, famously stated, "I believe in order that I may understand."[417] It is improper to think of autonomous reason as operating independently of God. It is wrong to pretend that we can reason independently of God, given that "everything that does not come from faith is sin."[418] The basic differences between Augustine's view of the relation of faith and reason and Aquinas's and Kant's respective views are discussed above in Part IV.[419]

Christian education is best—even for those who are not Christians or children of Christian parents. The first and most obvious reason is that, as students hear the truth as it is unfolded in all their studies, they may respond with saving faith. Even if they do not respond in saving faith, they will be continually and consciously confronted with the truth about God and His moral standards that they try to suppress. The influence of Christian education and Christian participation in culture are common means of grace that God uses to preserve social order by restraining actions that flow from sin and even inclining unbelievers to acts of civic virtue.

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414 WESTMINSTER SHORTER CATECHISM ¶¶ 1–2 (1647) ("[Question One.] What is the chief end of man? [Answer.] Man's chief end is to glorify God, and to enjoy him for ever.").

415 *See* THE ONE AND THE MANY, *supra* note 360, at 67–128.

416 *See* LAW AND REVOLUTION I, *supra* note 255, at 175.

417 *Id.*

418 *Romans* 14:23 (New Int'l).

419 *See* discussion *supra* Part IV.E.

B. Why the State Has No Jurisdiction Over Religion

The second issue is whether the state has the jurisdiction to establish tax-funded schools. Any jurisdiction that civil government exercises over the people depends on a delegation from God. Nowhere in the Bible is civil government given jurisdiction to establish schools or impose taxes for educational purposes. That power is within the jurisdiction of the family and the church in the New Testament era, as it was given to the family and the Levites in the Old Testament era.

1. The Old Testament

The proposition that the state has no jurisdiction over education might not be so easily proved as the proposition that education must be Christian. There are several reasons Christians might think that a properly constituted state does have jurisdiction over education. For over a century, prayer, Bible-reading, and moral instruction based on Christian teaching had a role in public education—even if, at times, they were only "forlorn little shreds of Christian truth" tacked onto an otherwise "secular" curriculum.[420] As late as 1952, the U.S. Supreme Court declared that "[w]e are a religious people whose institutions presuppose a Supreme Being."[421] God calls all kings and nations to acknowledge Him and keep His laws,[422] and those same kings and leaders are called upon to maintain peace so that the Gospel might flourish.[423] All civil authorities derive their authority from God and are called His

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[420] MACHEN, *supra* note 398, at 143.

[421] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[422] *Psalm* 72:11 (New Int'l) ("May all kings bow down to him and all nations serve him."); *Psalm* 148:11–13 (New Int'l) ("[K]ings of the earth and all nations, you princes and all rulers on earth, young men and women, old men and children. Let them praise the name of the LORD, for his name alone is exalted; his splendor is above the earth and the heavens.").

[423] 1 *Timothy* 2:1–2 (New Int'l) ("I urge, then, first of all, that petitions, prayers, intercession and thanksgiving be made for all people—for kings and all those in authority, that we may live peaceful and quiet lives in all godliness and holiness.").

ministers of justice.[424] We are to pray for them, honor them, and pay our taxes so that they may devote their time to governing for the good of all.[425]

These are all good reasons for concluding that it is proper for the state to acknowledge God and recognize the relevance of the Bible for civil law, but they do not answer the jurisdictional question. Despite the blessings that come with righteous government, the question is whether God has given civil government—even one friendly to the church and the preaching of the gospel—jurisdiction over education and the mind. A properly constituted state is not supposed to be modeled on Plato's *Republic* or Aristotle's belief that only the state should be allowed to educate children.[426] It is far more

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[424] *Romans* 13:1–4 (New Int'l) ("Let everyone be subject to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. . . . For the one in authority is God's servant for your good. But if you do wrong, be afraid, for rulers do not bear the sword for no reason. They are God's servants, agents of wrath to bring punishment on the wrongdoer.").

[425] *Romans* 13:6 (New Int'l) ("This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing.").

[426] When Crito offered to help Socrates avoid his impending death, Socrates explained why he would accept his fate at the hands of the Athenian government through a hypothetical dialogue he could expect to have with his executioners.

> "Tell us what complaint you have to make against us which justifies you in attempting to destroy us and the state? In the first place did we not bring you into existence? Your father married your mother by our aid and begat you. Say whether you have any objection to urge against those of us who regulate marriage?" None, I should reply. "Or against those of us who regulate the system of nurture and education of children in which you also were trained? Were not the laws, who have the charge of this, right in commanding your father to train you in music and gymnastic?" Right, I should reply. "Well then, since you were brought into the world and nurtured and educated by us, can you deny in the first place that you are our child and slave, as your fathers were before you? And if this is true you are not on equal terms with us; nor can you think that you have a right to do to us what we are doing to you. Would you have any right to strike or revile or do any other evil to a father or to your master, if you had one, when you have been struck or reviled by him, or received some other evil at his hands?—you would not say this? And because we think right to destroy you, do you think that you have any right to destroy us in return, and your country as far as in you lies? And will you, O professor of true

instructive to consider Old Testament Israel, commonly denominated a theocracy, to see what authority the kings and other civil authorities exercised over education and the mind.

In Israel, the duty of educating children was placed primarily on the family and was to be woven into the fabric of life.[427] The nonfamilial institution charged with educating Israelites was the tribe of Levi, whose inheritance was not a geographical territory like the other tribes but rather the Lord Himself.[428] The Levites were to be dispersed among the other twelve tribes and were charged with teaching the law and performing various services in

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> virtue, say that you are justified in this? Has a philosopher like you failed to discover that our country is more to be valued and higher and holier far than mother or father or any ancestor, and more to be regarded in the eyes of the gods and of men of understanding? also to be soothed, and gently and reverently entreated when angry, even more than a father, and if not persuaded, obeyed?

PLATO, 1 THE DIALOGUES OF PLATO: CRITO 355–56 (Benjamin Jowett trans., Charles Scribner's Sons 1901). Aristotle believed that only the state should be allowed to educate its citizens.

> Now for the exercise of any faculty or art a previous training and habituation are required; clearly therefore for the practice of virtue. And since the whole city has one end, it is manifest that education should be one and the same for all, and that it should be public, and not private—not as at present, when every one looks after his own children separately, and gives them separate instruction of the sort which he thinks best; the training in things which are of common interest should be the same for all. Neither must we suppose that any one of the citizens belongs to himself, for they all belong to the state, and are each of them a part of the state, and the care of each part is inseparable from the care of the whole. In this particular the Lacedaemonians are to be praised, for they take the greatest pains about their children, and make education the business of the state.

ARISTOTLE, ARISTOTLE'S POLITICS 300 (Benjamin Jowett trans., Oxford Clarendon Press 1908).

[427] *See, e.g.*, *Deuteronomy* 6:1–7 (New Int'l) ("These are the commands, decrees and laws the LORD your God directed me to teach you to observe in the land that you are crossing the Jordan to possess, so that you, your children and their children after them may fear the LORD your God as long as you live by keeping all his decrees and commands that I give you, and so that you may enjoy long life. . . . These commandments that I give you today are to be on your hearts. Impress them on your children. Talk about them when you sit at home and when you walk along the road, when you lie down and when you get up.").

[428] *Deuteronomy* 18:1–2.

the system of worship.[429] They were supported by the tithe, which appears to have been voluntary in that there is no evidence that the civil government collected it.[430] Even Israel's kings were to serve under the tutelage of the Levites, who instructed them in their duties under God's law.[431] The king had no instructional role to play other than instructing his own family members and government officials who served in the king's household.[432]

The Levites performed the central role in the twofold ministry of the truth. They took the lead in corporate worship, which focused on praise offerings to God and sacrificial offerings for atonement.[433] They also played the lead role of instructing the people in their moral duties under the law.[434] It is clear that education in practical wisdom—knowing and doing what is morally right—is allied with fostering the knowledge of God and worshipping Him.

Moses and the kings, in their roles as civil rulers, had a duty to teach the law in the context of deciding judicial cases and orally publishing the law at convocations of the Israelite people. The same holds true today. Even though civil rulers have no power to establish institutions with jurisdiction over the mind, they do have the duty and power to state what is true as incidental to their governmental duties.[435] In the course of publishing the law, the civil rulers acknowledged the source of the law, along with the blessings of keeping and curses for breaking the law.[436]

The office of prophet had an educational function: encouraging the people, priests, and civil rulers to follow the law and also serving as God's

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[429] *See Deuteronomy* 18:6–8.

[430] *Deuteronomy* 18:1–2.

[431] *Deuteronomy* 17:18–19 (New Int'l) ("When he takes the throne of his kingdom, he is to write for himself on a scroll a copy of this law, taken from that of the Levitical priests. It is to be with him, and he is to read it all the days of his life so that he may learn to revere the LORD his God and follow carefully all the words of this law and these decrees . . . .").

[432] The Book of *Proverbs* contains much instruction—practical, moral, and relational—to "my son." The sons are likely members of the king's family or his governmental household.

[433] *Numbers* 31:30.

[434] *See Deuteronomy* 27:9.

[435] *Exodus* 18:15–16 (New Int'l) ("Moses answered him, 'Because the people come to me to seek God's will. Whenever they have a dispute, it is brought to me, and I decide between the parties and inform them of God's decrees and instructions.'").

[436] *Deuteronomy* 28.

prosecutors in charging them for violations of the covenant.[437] They were not civil officers and were most valuable when they maintained their independence from the king. They were less useful and even harmful when the king kept false prophets in his household and on his payroll to tell the king and the people what they wanted to hear. The relationship between Ahab, the prophets of Baal, and the true prophets Elijah and Micaiah provide prime examples.[438] The two prominent examples of Israelites trained in government schools were Moses and Daniel, both as captives—one in Egypt[439] and one in Babylon.[440] Both were trained at home and in the Hebrew culture before being schooled in the "wisdom" of pagan nations.

Old Testament Israel was marked by a separation of church and state. Only Levites could serve in the church. Only descendants of David could serve as kings. The prophet Zechariah, speaking of the coming Messiah, described Him as a priest upon His throne.[441] All three offices—prophet, priest, and king—would be consummated in Christ as head over the church and state. The modern state should not be under the church, and the church should not be under the state. Rather, they should institutionally be independent of each other but equally under the authority of Christ. Regardless of whether they acknowledge His authority, all authority that they exercise is delegated from Him.

2. The New Testament

The most important distinction to keep in mind regarding the respective jurisdictions of the church and state in the New Testament is that God has assigned the ministry of reconciliation to the church,[442] and He has assigned

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[437] *See, e.g.*, *Jeremiah* 2:8–9.

[438] *See* 1 *Kings* 18:16–46; 1 *Kings* 22:1–38.

[439] *See Exodus* 2:1–10; Acts 7:20–22.

[440] *See Daniel* 1.

[441] *Zechariah* 6:9–13.

[442] 2 *Corinthians* 5:17–19 (New Int'l) ("Therefore, if anyone is in Christ, the new creation has come: The old has gone, the new is here! All this is from God, who reconciled us to himself through Christ and gave us the ministry of reconciliation: that God was reconciling the world to himself in Christ, not counting people's sins against them. And he has committed to us the message of reconciliation.").

the ministry of justice to the state.[443] God has equipped the church with the sword of the Spirit,[444] and He has equipped the state with the sword of steel.[445] To use Madison's language, the ministry of the Holy Spirit has its effect through reason and conviction, and the ministry of the state has its effect through force and violence. The sword of the Spirit is also referred to as the "word of God,"[446] and it alone is capable of changing the condition of the human heart and mind. The Apostle Paul makes it clear that God has established civil authorities, even pagan ones; however, the conversion of the nations through the teaching or discipling ministry is given to the church.[447]

Christ established the church for the redemption of the world. The civil magistrate's role is to enforce justice, thus ensuring an outward peace, so that the church can fulfill the Great Commission, which Madison referred to as bringing the light of revelation to those who live in darkness.[448] Members of the church, empowered by the Holy Spirit, are given various gifts, including

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[443] *Romans* 13:4 (New Int'l) ("For the one in authority is God's servant for your good. But if you do wrong, be afraid, for rulers do not bear the sword for no reason. They are God's servants, agents of wrath to bring punishment on the wrongdoer.").

[444] *John* 6:63 (New Int'l) ("The Spirit gives life; the flesh counts for nothing. The words I have spoken to you—they are full of the Spirit and life.").

[445] *Romans* 13:4 (New Int'l) ("For the one in authority is God's servant for your good. But if you do wrong, be afraid, for rulers do not bear the sword for no reason. They are God's servants, agents of wrath to bring punishment on the wrongdoer.").

[446] *Ephesians* 6:17–18 (New Int'l) ("Take the helmet of salvation and the sword of the Spirit, which is the word of God. And pray in the Spirit on all occasions with all kinds of prayers and requests. With this in mind, be alert and always keep on praying for all the Lord's people.").

[447] *Matthew* 28:18–20 (New Int'l) ("Then Jesus came to them and said, 'All authority in heaven and on earth has been given to me. Therefore go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you. And surely I am with you always, to the very end of the age.'").

[448] *Acts* 26:22–23 (New Int'l) ("But God has helped me to this very day; so I stand here and testify to small and great alike. I am saying nothing beyond what the prophets and Moses said would happen—that the Messiah would suffer and, as the first to rise from the dead, would bring the message of light to his own people and to the Gentiles."); *Matthew* 4:15–16 (New Int'l) ("Land of Zebulun and land of Naphtali, the Way of the Sea, beyond the Jordan, Galilee of the Gentiles—the people living in darkness have seen a great light; on those living in the land of the shadow of death a light has dawned.").

that of teaching, by which the church is to fulfill its calling.[449] The authorship of the New Testament was not entrusted to civil magistrates but rather to apostles and other men as moved by the Holy Spirit.[450]

Believers in the New Testament era frequently found themselves in an adversarial relationship with the civil authorities and unbelieving Jews who often acted in collaboration with the civil authorities to compromise, subjugate, or eliminate the church.[451] But even though the powers of this world are aligned against the truth, Jesus made it clear that His kingdom is not to be established by the sword, that is, by force or violence.[452] The Old Testament prophets had foretold that the nations would come to Christ[453] and that the gift of the Holy Spirit would come on the Gentile believers.[454]

As in the Old Testament, parents in the New Testament era are charged with teaching their children.[455] The New Testament has much to say about the church's educational role. The church is commissioned not only to teach its members but to train teachers who can be entrusted with the truth to teach

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[449] *See Ephesians* 4:11–13. The church was initially comprised primarily of Jewish believers whose religious and educational lives were separate from the state and centered in the synagogue. It is safe to say that this model of independence from the state continued with Jewish and Gentile believers alike.

[450] 2 *Timothy* 3:16–17 (New Int'l) ("All Scripture is God-breathed and is useful for teaching, rebuking, correcting and training in righteousness, so that the servant of God may be thoroughly equipped for every good work.").

[451] *See, e.g.*, *Acts* 12:1–19, 19:23–41.

[452] *John* 18:36–37 (New Int'l) ("Jesus said, 'My kingdom is not of this world. If it were, my servants would fight to prevent my arrest by the Jewish leaders. But now my kingdom is from another place.' 'You are a king, then!' said Pilate. Jesus answered, 'You say that I am a king. In fact, the reason I was born and came into the world is to testify to the truth. Everyone on the side of truth listens to me.'"); *see also Matthew* 26:52–56; *John* 18:10–11.

[453] *Isaiah* 60:3 (New Int'l) ("Nations will come to your light, and kings to the brightness of your dawn."). This is partial fulfillment of the promise to Abraham that "all peoples on earth will be blessed through you." *Genesis* 12:3 (New Int'l).

[454] *Acts* 10:9–48 provides an account of the vision Peter had and his visit to Cornelius's house. *Acts* 10:9–48. "While Peter was still speaking these words, the Holy Spirit came on all who heard the message. The circumcised believers who had come with Peter were astonished that the gift of the Holy Spirit had been poured out even on Gentiles." *Acts* 10:44–45 (New Int'l).

[455] *Deuteronomy* 6:1–7; *Ephesians* 6:4 (New Int'l) ("Fathers, do not exasperate your children; instead, bring them up in the training and instruction of the LORD.").

others, who do not do so for personal gain, who are faithful, and who have a gift to teach others.[456] Teachers are held especially accountable for how they handle the truth.[457] The ability to teach is also a primary qualification for serving as an officeholder in the church.[458] Because all of Scripture is identified as valuable for training in righteousness, and because Scripture addresses all facets of life, the teaching ministry is not limited to things "religious" as that term is often so narrowly identified.[459]

One of the chief attractions of Jesus's earthly ministry was that He taught as one having authority.[460] But He told His disciples that it would be better when He left and that the Holy Spirit would come who would lead them into all truth.[461] The Holy Spirit convinces men of the truth as to who Christ truly is as the Son of God and of the practical truths of keeping His commands. These two aspects of the truth are inseparable—loving Christ and keeping His commands.[462]

The biblical teachings that God took on flesh, dwelt among men, revealed Himself to them, loved them, and died in their place were pure foolishness to

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[456] 2 *Timothy* 2:2 (New Int'l) ("And the things you have heard me say in the presence of many witnesses entrust to reliable people who will also be qualified to teach others.").

[457] *James* 3:1 (New Int'l) ("Not many of you should become teachers, my fellow believers, because you know that we who teach will be judged more strictly.").

[458] *Titus* 1:9 (New Int'l) ("He must hold firmly to the trustworthy message as it has been taught, so that he can encourage others by sound doctrine and refute those who oppose it."); *see also* 1 *Timothy* 3:2; 2 *Timothy* 2:24.

[459] 2 *Timothy* 3:16–17 (New Int'l) ("All Scripture is God-breathed and is useful for teaching, rebuking, correcting and training in righteousness, so that the servant of God may be thoroughly equipped for every good work.").

[460] *Matthew* 7:28–29 (New Int'l) ("When Jesus had finished saying these things, the crowds were amazed at his teaching, because he taught as one who had authority, and not as their teachers of the law.").

[461] *John* 16:7–8, 12–15 (New Int'l) ("I have much more to say to you, more than you can now bear. But when he, the Spirit of truth, comes, he will guide you into all the truth. He will not speak on his own; he will speak only what he hears, and he will tell you what is yet to come. He will glorify me because it is from me that he will receive what he will make known to you. All that belongs to the Father is mine. That is why I said the Spirit will receive from me what he will make known to you."); *see also* 1 *Corinthians* 2:10–16.

[462] *John* 14:21 (New Int'l) ("Whoever has my commands and keeps them is the one who loves me. The one who loves me will be loved by my Father, and I too will love them and show myself to them.").

the Greeks.[463] Likewise, the Greeks would dismiss any notion that a work of the Holy Spirit in a person is necessary for a true change of character—rather than simple instruction and habituation—as mere foolishness.[464] Aristotle believed that only the state should be allowed to teach children to ensure that all citizens would think and act alike in order to be fit for service to the state.[465] The thought that mere artisans, let alone slaves, are fit for education, have the capacity to know God and His commandments, and can live virtuous lives, again, would be pure foolishness.[466] Individual, family, and religious practices were subsumed in the Greek state.[467] Happiness could only be achieved by being citizens of the state.[468] The pagan vision for society and education that animated Oregon's vision of a single, established school system is alive in some of America's revered universities and teachers' associations even today.[469] By contrast, the Bible never depicts civil government as having jurisdiction over education or the mind.

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[463] 1 *Corinthians* 1:18–21 (New Int'l) ("For the message of the cross is foolishness to those who are perishing, but to us who are being saved it is the power of God. For it is written: 'I will destroy the wisdom of the wise; the intelligence of the intelligent I will frustrate.' Where is the wise person? Where is the teacher of the law? Where is the philosopher of this age? Has not God made foolish the wisdom of the world? For since in the wisdom of God the world through its wisdom did not know him, God was pleased through the foolishness of what was preached to save those who believe.").

[464] ARISTOTLE, *supra* note 426 ("Now for the exercise of any faculty or art a previous training and habituation are required; clearly therefore for the practice of virtue.").

[465] *Id.* ("And since the whole city has one end, it is manifest that education should be one and the same for all, and that it should be public, and not private . . . .").

[466] *See id.* at 290–93.

[467] *Id.* at 300 ("Neither must we suppose that any one of the citizens belongs to himself, for they all belong to the state, and are each of them a part of the state, and the care of each part is inseparable from the care of the whole.").

[468] *See id.* at 290–93.

[469] *See, e.g.*, Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education and Protection*, 62 ARIZ. L. REV. 1 (2020) (using her status as a Harvard professor to advocate for restrictions on homeschooling); NAT'L EDUC. ASS'N, THE PROLIFERATION OF PANDEMIC PODS, MICRO-SCHOOLS, AND HOME EDUCATION (2020), https://www.nea.org/resource-library/pandemic-pods-micro-schools-home-education (stating the National Education Association's opposition to homeschooling).

VI. CONCLUSION

The Commonwealth of Virginia provided a definition of religion—"the duty we owe to our Creator and the manner of discharging it"—but the Supreme Court has never carefully considered the meaning of this definition or its implications, and the Court has never provided any other definition of its own for First Amendment purposes. Properly understood, the Virginia definition draws a jurisdictional line between matters that are to be governed by civil government and those that are properly governed only by the conscience.

The other great contribution Virginia made to religious freedom was identifying the fundamental principles that "God has created the mind free" and that it is "sinful and tyrannical" to tax persons for the propagation of opinions they do not believe. The implication of the proper, jurisdictional definition of religion and the principle that God has created the mind free is that all tax-funded education is an unconstitutional establishment of religion in violation of the First Amendment Establishment Clause.

The parallels between the various forms of church-state and school-state relations are quite striking. While America long ago moved from an established church model to a free church model, whereby no tax money goes to churches, it is still stuck primarily in the paradigm of state-established schools with mere toleration for private schools. However, there is a growing movement in the United States for state governments to fund private religious and non-religious schools through such measures as voucher systems and religious charter schools. Although these options would provide some equity for parents committed to religious education, they constitute an establishment of religion just as public schools do.

Jefferson and Madison violated the fundamental principle that God has created the mind free when they collaborated in 1818 to establish state schools in Virginia. Likewise, the Supreme Court, while professing the freedom of the mind and disclaiming the government's power to establish an orthodoxy of opinion, has not questioned the power to do exactly that through the states' school establishments.

This confusion arises out of the Court's attempt to falsely bifurcate reality between the secular and religious. This bifurcation is most obvious in religious liberty cases dealing with aid to religious schools and religion in public schools, but it underlies the Court's general jurisprudence. The

Court's approach is informed by, and finds support in, the theologies and philosophies of Thomas Aquinas and Emmanuel Kant.

The bifurcation of "secular" and "religious" is consistent with the Catholic distinction between nature and grace, but it is required by the Kantian explication of the phenomenal and noumenal. The Augustinian-Reformed view differs in that it does not bifurcate reality between the secular and the religious but rather draws a jurisdictional line between civil government and religion. This jurisdictional line is based on the truth of the Christian-biblical worldview, and it is most consistent with the principles established during the Virginia establishment controversy, which grounds the First Amendment.

The definition of religion and fundamental principles of religious liberty forged during the Virginia establishment controversy are consistent with the Bible. Education must be Christian, and the state has no proper jurisdiction to establish schools, secular or religious, public or private. Because education is within the jurisdiction of religion, any tax-funded support for education constitutes an unconstitutional establishment of religion.