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# A Rhetorical Revolution: The Antithesis of the First Amendment

*Eimi Priddis Yildirim\**

## I. INTRODUCTION

“Congress shall make no law respecting an establishment of religion . . . .”<sup>1</sup> Through the years, these words have been the focal point of intense controversy. A variety of interpretations of the constitutionally mandated church-state relationship they describe have emerged, each purporting to be the most accurate version of what they require. However, none of these interpretations has proven entirely satisfactory. Even the Supreme Court has been unable to settle the issue.<sup>2</sup> Instead, Establishment Clause jurisprudence has gained a reputation for being “inconsistent and at times incomprehensible,”<sup>3</sup> “historically counterfactual” and “haphazard.”<sup>4</sup> Andrew Koppelman summed it up like this: “[There is] a [large] consensus that the American law of religious liberty makes no sense. It has been called ‘unprincipled, incoherent, and unworkable,’ ‘a disaster,’ ‘in serious disarray,’ ‘chaotic, controversial, and unpredictable,’ ‘in shambles,’ ‘schizoid,’ and ‘a complete hash.’”<sup>5</sup>

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

2. See *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 565 U.S. 994 (2011) (dissenting from denial of certiorari and describing Establishment Clause jurisprudence as “in shambles,” “nebulous,” and “anyone’s guess”).

3. William P. Marshall, *Unprecedented Analysis and Original Intent*, 27 WM. & MARY L. REV. 925, 928 (1986).

4. Frank Guliuzza III, *The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church-State Test Case*, 42 DRAKE L. REV. 343, 357 (1993).

5. ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 4 (2013). See also MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* 2 (2013) (“[S]cholars of religious liberty have criticized both the direction and coherence of the law. . . .

Due to this state of affairs, some have begun to argue that there is “no grand unified theory for deciding [church and state] cases.”<sup>6</sup> However, more careful attention and fidelity to the text of the Establishment Clause reveals that there is a clearer solution. Careful attention to the text reveals that one possible interpretation of the Establishment Clause has until now been entirely overlooked. This interpretation—an alternative syntactic interpretation of the Establishment Clause in which *respecting* is viewed as a verb instead of a preposition—has the ability to solve many of the contradictions and problems that beset Establishment Clause jurisprudence today.

The purpose of this article is to explain and defend this alternative syntactic interpretation. To that end, Part II will first review the previously proposed Establishment Clause interpretations and the difficulties with each. Part III will introduce the alternative interpretation—a new syntactic paradigm—through linguistic analysis. It will also include a discussion of the evidence in favor of adopting this particular interpretation. Part IV will examine the implications of the interpretation and demonstrate how the interpretation would improve and clarify the law of religious freedom. Part V will summarize and conclude the discussion.

## II. INTERPRETING THE ESTABLISHMENT CLAUSE

Scholars, judges, lawyers, and laymen have tried for years to elucidate the meaning of the Establishment Clause. The result has been the advancement of numerous theories regarding the proper interpretation of the Clause. The prevailing theories of interpretation can, however, be divided roughly into three camps: non-preferentialism, separationism, and neutrality.<sup>7</sup> Each has its own set of principles, and its own set of problems, which will be discussed briefly below.

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Disaffection for their own field, one might say, is unique in uniting them.”). In addition, a quick perusal of religion clause cases on Lexisnexis.com will quickly betray that nearly every case indicates possible negative treatment.

6. Associated Press, *Retired Supreme Court Justice O'Connor Visits Charleston*, LIVE 5 NEWS (June 30, 2013, 2:40 PM), <http://www.live5news.com/story/21984911/retired-supreme-court-justice-oconnor-visits-charleston/>. See also DEGIROLAMI, *supra* note 5 at 1-2; Nelson Tebbe, *Religion and Social Coherentism*, 91 NOTRE DAME L. REV. 363, 372-76 (2015).

7. Another potential category that was considered is termed “accommodationism.” However, the author considers that, fundamentally, accommodationism is another variety of non-preferentialism. See Carl H. Esbeck, *The Lemon Test: Should It Be Retained, Reformulated or Rejected?*, 4 NOTRE DAME J.L. ETHICS & PUB. POL’Y 513, 548 (1990).

*A. Non-preferentialism*

One early interpretation of the Establishment Clause, non-preferentialism, can be summed up like this: "government may not prefer one religion over others, but it may aid all religions evenhandedly."<sup>8</sup> A more specific derivative of this view is that the Establishment Clause was intended only to prevent the establishment of one national church, a national church being the quintessential expression of preferring one religion over another. Regardless of the specific iteration, non-preferentialism has been conclusively and repeatedly rejected by the Supreme Court.<sup>9</sup> Although a strong minority has always promoted it,<sup>10</sup> the interpretation does have flaws.

One of the flaws of non-preferentialism is that it countenances any government financial aid for religious organizations if non-preferentially distributed, and, as a result, the government can, under the doctrine, compel citizens to financially support religious creeds that violate their conscience. Such a situation seems to contradict the principles espoused by the Founders and the drafters of the First Amendment, especially James Madison and Thomas Jefferson, who, when drafting Virginia's Act for Establishing Religious Freedom, boldly declared

that 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 . . . .<sup>11</sup>

Virginia's Act for Establishing Religious Freedom was, in fact, written in opposition to a proposed non-preferential religious taxation

8. Douglas Laycock, "*Nonpreferential*" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 877 (1986).

9. See *McGowan v. Maryland*, 366 U.S. 420, 441-42 (1961) ("[T]he First Amendment . . . did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion*." (emphasis added)); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216 (1963) ("[T]his Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another.")

10. Some of the proponents include the late Chief Justice William Rehnquist and professors Robert Cord, Rodney K. Smith, and Michael Malbin.

11. "A Bill for Establishing Religious Freedom," enacted by the General Assembly of Virginia, January 19, 1786; 12 HENING'S STATUTES AT LARGE 84 (1823). See also James Madison, *Memorial and Remonstrance Against Religious Assessments* (circa June 20, 1785).

bill, which would have allowed the government in Virginia to tax its citizens in order to provide government financial support to all religious denominations on an equal basis. Clearly, Madison, the primary author of the Bill of Rights, was opposed to this kind of non-preferential aid, and it would, therefore, defy reason to think that the Establishment Clause, which in part evolved out of Virginia's Act for Establishing Religious Freedom, was meant to allow it.

Another crucial flaw of non-preferentialism is perhaps more significant—that the financial mingling between the government and religious organizations that non-preferentialism allows is detrimental to religious organizations. When religious organizations become reliant on government funds, the government can control the organizations by setting conditions for the granting of funds or by penalizing through the withdrawal of funds. Consequently, religious organizations may be forced to choose between needed funding or a compromise of religious character and principles.

The negative effect on religious organizations of permissive financial mingling with the government was seen in the widespread loss of religious character by some religious institutions of higher education in the United States during the last century. The case of *Tilton v. Richardson*<sup>12</sup> provides one example. In the case, taxpayers challenged the granting of federal funds to four Catholic universities. Though the universities eventually won the lawsuit and retained the funds, “[d]uring the three-year course of the *Tilton* litigation, the four colleges were methodically secularized to meet the challenge of the lawsuit.”<sup>13</sup> One of the universities made significant changes, like removing crucifixes from classrooms, removing religious references from school charters and corporate seals, and having the members of the university's governing board give up their religious offices.<sup>14</sup> A commentator, when analyzing the effects of the case, knowingly noted that “government frequently exacts a price for the aid that it provides.”<sup>15</sup>

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12. 403 U.S. 672 (1971).

13. Joseph Richard Preville, *Catholic Colleges and the Supreme Court: The Case of Tilton v. Richardson*, 30 J. CHURCH & ST. 291, 306 (1988).

14. *Id.*

15. CHARLES H. WILSON, JR., *TILTON V. RICHARDSON: THE SEARCH FOR SECTARIANISM IN EDUCATION*, 50 (1971).

## B. Separationism

Separationism—the view that government should be prohibited from “aiding religion in any form”<sup>16</sup>—is perhaps the most prevalent interpretation of the Establishment Clause. In 1947, as part of the ongoing incorporation of the Bill of Rights to the states through the Fourteenth Amendment, the Supreme Court heard its first significant Establishment Clause case, *Everson v. Board of Education*.<sup>17</sup> In this case, the Court authoritatively defined the meaning of the Establishment Clause for the first time, and it did so in the language of separation.<sup>18</sup> Following *Everson*, separationism became the governing principle of Establishment Clause adjudication for many years,<sup>19</sup> justifying, among other things, the removal of prayer,<sup>20</sup> Bible reading,<sup>21</sup> and religious instruction<sup>22</sup> from schools.

In spite of its early widespread acceptance, the separationist view also has problems. First, it is unworkable practically, which has been acknowledged repeatedly in Establishment Clause cases;<sup>23</sup> second, it

16. Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245, 248 (1991).

17. 330 U.S. 1 (1947). Before incorporation of the Establishment Clause in 1947, the Supreme Court had heard only two Establishment Clause cases: *Bradfield v. Roberts*, 175 U.S. 291 (1899), and *Reuben Quick Bear v. Leupp*, 210 U.S. 50 (1908).

18. *Everson*, 330 U.S. at 15-18 (“In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’”). Some have argued that *Everson*, though speaking broadly of separationism, did not actually stand for the separationist principle. After all, the holding of the case was that the government could fund public bus transportation to parochial schools. See, e.g., W. COLE DURHAM & BRETT G. SCHARFFS, *LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES* 133 (2010). See also Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 56 (1997) (arguing that what the Supreme Court has called separationism has really been a version of neutrality, and that even “[t]he Lemon test, the very symbol of strict separation, itself began as an elaboration of neutrality.”).

19. Its influence continued with the Supreme Court into the 1980s.

20. *Engel v. Vitale*, 370 U.S. 421 (1962).

21. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

22. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

23. See *Zorach v. Clauson*, 343 U.S. 306, 312 (1952) (“The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. . . . Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.”); *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 670 (1970) (“No perfect or absolute separation is really possible: the very existence of the Religion Clauses is an involvement of sorts. . . .”); *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (“[T]otal separation is not possible in an absolute sense.”); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973) (“[T]his Nation’s history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation . . . .”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation

creates hostility toward religion, contradicting the protections guaranteed in the Free Exercise Clause;<sup>24</sup> third, it is difficult to reconcile with the actions of the Founders, who openly engaged in religious practices;<sup>25</sup> and finally, it seems to represent a misinterpretation of the metaphor that gave the idea its legitimacy.

In relation to the final point, as noted in *Everson*, the “wall of separation” metaphor that led to the separationist idea was actually borrowed from Thomas Jefferson,<sup>26</sup> who used the phrase in a letter he wrote to the Danbury Baptist Association in 1802.<sup>27</sup> Thomas Jefferson was not the first to speak of the “wall of separation” however, but was likely alluding to the words of Roger Williams, a founder of the Baptist church.<sup>28</sup> Williams wrote:

[W]hen they have opened a gap in the hedge or *wall of separation* between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made his garden a wilderness, as at this day. And that there fore if He will eer please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world.<sup>29</sup>

Williams spoke of a “wall of separation” that was to surround and protect the church, which is rather different than the wall we speak of

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from all the other parts, much less from the government. . . . Nor does the Constitution require complete separation of church and state . . .”).

24. See *McCreary Cty. v. ACLU*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting); Dallin H. Oaks, *Separation, Accommodation and the Future of Church and State*, 35 DEPAUL L. REV. 1, 2 (1985) (“The prohibition against establishment seems to forbid government support for religion, but the guarantee of free exercise seems to compel the very same support.”).

25. See *Lynch*, 465 U.S. at 674–75 (enumerating numerous examples of “an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789”); *Engel v. Vitale*, 370 U.S. 421 (1962) (Douglas, J., concurring) (providing numerous additional examples).

26. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

27. *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (“Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and 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 and State.”). Note that Jefferson referred to the “wall of separation” as a function of both religion clauses, not only the Establishment Clause.

28. JOHN EIDSMOE, *CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS* 243 (1987).

29. *Id.* (emphasis added).

now: "Today the metaphor has been stood on its head, and the wall is thought to protect the state from the church."<sup>30</sup>

What is more, Roger Williams' metaphor is actually itself an allusion. It comprises an indirect reference to a biblical passage,<sup>31</sup> in which an author metaphorically relates how religion must be walled in from the secular realm to preserve its distinctiveness and protect it from corruption.<sup>32</sup> Understanding this context and history behind the metaphor reveals that Jefferson's allusion has been misconstrued under the separationist view. Even more, it reveals an interesting irony: because the very phrase "separation of church and state" is in fact an allusion to the Bible, under the separationist interpretation, the very concept of separation itself would be banned.

### C. Neutrality

For a long time, the debate about the interpretation of the Establishment Clause chiefly pitted non-preferentialists against separationists. However, in time, a third category of interpretation began to compete for recognition: neutrality. Though other more nuanced definitions have been proposed,<sup>33</sup> fundamentally, neutrality encompasses the idea that

[t]he [Free Exercise Clause and Establishment Clause] should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.<sup>34</sup>

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30. *Id.*

31. *Isaiah* 5:2, 5 ("And he fenced it, and gathered out the stones thereof, and planted it with the choicest vine, and built a tower in the midst of it, and also made a winepress therein: and he looked that it should bring forth grapes, and it brought forth wild grapes. . . . And now go to; I will tell you what I will do to my vineyard: I will take away the hedge thereof, and it shall be eaten up; and break down the wall thereof, and it shall be trodden down."). See also PHILLIP HAMBURGER, SEPARATION OF CHURCH AND STATE 44 (2004).

32. EIDSMOE, *supra* note 28, at 243 ("According to Williams, the 'wall of separation' was to protect the 'garden of the church' from the 'wilderness of the world.' Today the metaphor has been stood on its head, and the wall is thought to protect the state from the church.").

33. Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51 (2007); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

34. Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961). See also Frederick Mark Gedicks, *Undoing Neutrality? From Church-State Separation to Judeo-Christian Tolerance*, 46 WILLAMETTE L. REV. 691, 691 (2010).



Beginning in the 1980s,<sup>35</sup> when separationism began to decline in influence, the Supreme Court embraced neutrality instead.<sup>36</sup>

As with non-preferentialism and separationism, there are also problems with neutrality. First of all, neutrality is not in fact neutral. That is because the nature of neutrality<sup>37</sup> is that it can only be defined “by reference to other principles (which are not neutral).”<sup>38</sup> For example, neutrality between all religions, neutrality between all Christian religions, and neutrality between religion and nonreligion are all equally versions of neutrality—they just have different points of reference. The selection of the points of reference betrays an inevitable bias. In relation to the Establishment Clause, the neutrality spoken of “mandates governmental neutrality between . . . religion and nonreligion,”<sup>39</sup> and therefore, “[l]urking underneath the Court’s ‘formal neutrality’ doctrine is the notion that religion has no special status, and thus there is no need to differentiate between religion and nonreligion . . . .”<sup>40</sup> This is not a neutral position, nor is it a foregone conclusion in the religion clause debate.

Other problems with neutrality include that it is oftentimes impossible for the government to be perfectly neutral between religion and nonreligion.<sup>41</sup> Furthermore, the very mention of religion in the

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35. Gedicks, *supra* note 34, at 695; Laycock, *supra* note 18, at 52.

36. Gedicks, *supra* note 34, at 695. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

37. As virtues, neutrality and equality have no moral content of themselves. For example, there is no virtue in being equal if everyone is equally poor, equally hungry, or equally miserable. There is no virtue in maintaining neutrality if it means failing to support a morally superior position. These concepts derive their value only in relation to other virtues.

38. Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 499 (2004). See also Chad Flanders, *Can We Please Stop Talking About Neutrality? Koppelman Between Scalia and Rawls*, 39 PEPP. L. REV. 1139, 1141-42 (2013); STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 96-97 (1995).

39. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). See also *McCreary Cty. v. ACLU*, 545 U.S. 844, 889 (2005) (Scalia, J., dissenting).

40. Ravitch, *supra* note 38, at 501.

41. *Id.* at 496-97; Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305 (1990); Bruce Ledewitz, *Toward a Meaning-full Establishment Clause Neutrality*, 87 CHI.-KENT L. REV. 725, 736 (2012); Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 151, 164-65 (1986). See also *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). This is particularly true in the context of the courts, which are part of an adversary system, where in cases of real conflict a winner and a loser must be chosen in every instance. What kind of court declares at the end of a case that their intent is to maintain a neutral stance between the two sides? Yet is this not what the Court has tried to do with neutrality in the religious freedom realm? As King Solomon of old wisely understood, if you try to split the

First Amendment, let alone its protected status, seems to advocate a nonneutral stance towards religion.<sup>42</sup> Finally, the problems encountered with non-preferentialism and separationism—financially mingling government and religion<sup>43</sup> and contradicting the actions of the Founders regarding religious practices<sup>44</sup>—remain. In fact, it seems that neutrality, rather than striking a perfect balance between non-preferentialism and separationism, actually only perpetuates the problems of both, while also adding problems of its own.

### III. A NEW SYNTACTIC PARADIGM

The theoretical and practical problems inherent in each of the prevailing Establishment Clause interpretations have made most judges unwilling to pursue any one theory to its logical extreme, leading instead to the confusing web of contradictions, exceptions, and irregularities that presently plagues religion clause jurisprudence. However, the situation is not irredeemable. A return to the text of the Establishment Clause, and a more careful analysis of the words, reveals that there is a solution. The solution is an alternative syntactic interpretation of the Establishment Clause that has, until now, been entirely overlooked. This alternative interpretation resolves the problems inherent in each of the current prevailing interpretations. This section introduces, through linguistic analysis, this alternative interpretation of the Establishment Clause, as well as the abundance of evidence in support of its theoretical soundness and its historical accuracy.

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baby, nobody is happy.

42. McConnell, *supra* note 41, at 148 (“Protections for religious liberty are no more ‘neutral’ toward religion than freedom of the press is ‘neutral’ toward the press.”). *See also* Oaks, *supra* note 24, at 8; Flanders, *supra* note 38, at 1147.

43. Religious organizations can receive funding if on an equal basis with nonreligious organizations. *See, e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (approving the use of government scholarships in private religious schools); Mitchell v. Helms, 530 U.S. 793 (2000) (allowing the loan of educational materials to private religious schools); Agostini v. Felton, 521 U.S. 203 (1997) (allowing public school teachers to teach in private religious schools).

44. Religious symbols are tolerated only if balanced by nonreligious symbols. *See, e.g.,* Lynch v. Donnelly, 465 U.S. 668 (1984). An exception to separationism, ceremonial deism, allowed religious symbols to remain based on the theory that they had lost religious significance through time, although retaining historical and cultural value. A second rationale based in neutrality, sometimes called “the reindeer rule,” grants amnesty to symbols understood to be religious if balanced out by an adequate number of secular symbols. *See* Gedicks, *supra* note 34, at 697-99.

*A. Semantic Ambiguity: Textual Justifications for the Establishment Clause Interpretations*

It is a wonder, but advocates of non-preferentialism, separationism, and neutrality all find support for their positions in the text of the Establishment Clause. The fact that the Establishment Clause has been interpreted in so many different ways is mostly due to a semantic ambiguity<sup>45</sup> within the text. More specifically, proponents of each of the interpretations have found different ways of interpreting the phrase *an establishment of religion*. The difference in their interpretations has led to the divergence of their doctrines.

Non-preferentialists interpret *an establishment of religion* to mean something akin to “an officially recognized and supported church . . . .”<sup>46</sup> This interpretation grew out of the pervasiveness of what Steven Smith calls the “civil peace rationale” for religious freedom—that “the Framers opted for religious freedom as a way of avoiding the civil turmoil [caused] by the religious wars in Europe and by the civil wars that divided England”<sup>47</sup>—a rationale that is still “probably the most commonly articulated justification for religious freedom in modern legal discourse.”<sup>48</sup> If, as this rationale suggests, the Founders were primarily concerned with preventing the tyranny of established churches like those of Europe,<sup>49</sup> then *an establishment of religion* would naturally refer to the European model of an “officially recognized and supported church . . . .”<sup>50</sup> This is the interpretation of *an establishment of religion* that the non-preferentialists have

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45. The semantic ambiguity could, in fact, more accurately be characterized as a syntactic ambiguity. “An establishment of religion” is an ambiguous phrase due to the dual syntax of the word “establishment.” “Establishment” can be a verbal noun, leading to the paraphrase “establishing religion,” or a deverbal, leading to the paraphrases “established religion” or “religious establishment.” However, because the ambiguity involves two alternative meanings of a phrase, I have characterized it here as a semantic ambiguity for simplicity in explaining.

46. Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. REV. 120, 121 (2008) [hereinafter Smith, *Our Agnostic Constitution*]. There is evidence that “officially recognized and supported church[es]” were commonly called “establishments” at the time. *Id.* at 121. See Madison, *supra* note 11 (“[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.”).

47. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 163 (1991) [hereinafter Smith, *The Rise and Fall of Religious Freedom*].

48. *Id.*

49. The early American colonies and states also had established churches. See, e.g., Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2107 (2003).

50. Smith, *Our Agnostic Constitution*, *supra* note 46, at 121.

adopted. Because, in their view, a prohibition against *an establishment of religion* prevents only a state established church, there is nothing wrong with supporting religions impartially.

On the other hand, those supporting either separationism or neutrality usually interpret *an establishment of religion* differently.<sup>51</sup> Generally, they interpret *establishment*, not in its nominal sense, but in its verbal sense, meaning “giving official recognition and support.”<sup>52</sup> In addition, *religion* is not understood to be a “church” or any other specific organized group of believers, but is interpreted literally, as Justice Souter has explained:

What is remarkable is that, unlike the earliest House drafts or the final Senate proposal, the prevailing language is not limited to laws respecting an establishment of “a religion,” “a national religion,” “one religious sect,” or specific “articles of faith.” The Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for “religion” in general.<sup>53</sup>

In other words, proponents of separationism or neutrality interpret the word *religion* in *an establishment of religion* broadly so as to include any and all religion. Thus, they interpret the Establishment Clause to mean that the government cannot “officially recognize or support” religion in general—not just a religion,<sup>54</sup> but all religion.<sup>55</sup>

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51. There are those who adhere to separationism or neutrality who do also interpret *an establishment of religion* to mean “an officially recognized and supported church.” These, then, come to separationism or neutrality based on a broad interpretation of the word *respecting*. By interpreting *respecting* loosely as “having anything to do with,” such that the Religion Clauses prevent any law “having anything to do with an officially recognized and supported church,” they reach a separationist or neutrality conclusion, based upon the logic that even the smallest intimation of support for any religion is the first step on a slippery slope to an established church. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be ‘no law *respecting* an establishment of religion.’ A law may be one ‘respecting’ the forbidden objective while falling short of its total realization. . . . A given law might not *establish* a state religion but nevertheless be one ‘respecting’ that end in the sense of being a step that could lead to such establishment . . . .”) (emphasis added).

52. See Smith, *Our Agnostic Constitution*, *supra* note 46, at 121.

53. *Lee v. Weisman*, 505 U.S. 577, 614–15 (1992) (Souter, J., concurring).

54. There are in fact those who speak of the Establishment Clause as forbidding “establishing a religion.” See, e.g., *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (“The Establishment Clause . . . is violated by the enactment of laws which establish an official religion . . . .”); *Wallace v. Jaffree*, 472 U.S. 38, 89 (1985) (“[O]ur duty is to determine whether the statute or practice at issue is a step toward establishing a state religion.”). But this is not a viable syntactic in-

Though the proponents of the different church and state theories disagree about the correct resolution of this *semantic* ambiguity in the Establishment Clause, they do share a similar *syntactic* understanding of the Establishment Clause. For example, in the clause *Congress shall make no law respecting an establishment of religion*, each side views *Congress* as the subject, *shall make* as the verb, *no law* as the direct object, and *respecting an establishment of religion* as a prepositional phrase modifying *law*. What is most significant about the unified understanding of the syntax is that all sides have interpreted the word *respecting* as a preposition. This is demonstrated in the following two quotes, taken from proponents of non-preferentialism and separationism. The proponent of non-preferentialism has stated: “The word ‘respecting,’ which is synonymous with ‘concerning, regarding, about, anent,’ indicates that the First Amendment did not prohibit an establishment of religion; rather it prohibited Congress from making any law about, concerning, or regarding an establishment of religion.”<sup>56</sup>

If *respecting* is understood to mean “concerning, regarding, about, anent”—all synonymous prepositions—it can easily be seen that *respecting* has been interpreted in its prepositional sense. This is further apparent in the description of the function of the word *respecting* in the argument of the proponent of separationism:

A law may be one “respecting” the forbidden objective while falling short of its total realization. A law “respecting” the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one “respecting” that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.<sup>57</sup>

Interpreting *respecting* as “potentially leading to” is, again, interpreting *respecting* according to its prepositional definition.

In other words, the two semantic interpretations of the Establishment Clause advocated now, both acknowledging *respecting* as a

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terpretation of the Establishment Clause, given that there is no *a* before the word *religion* in the text.

55. For separationists, that means that the government cannot be entangled with religion in any way; for those supporting neutrality, it means that religion and irreligion must be treated equally.

56. ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 9 (1982).

57. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (emphasis added).

preposition, but disagreeing about the semantic meaning of *an establishment of religion*, could be paraphrased like this: (1) Congress shall make no law *with regards to* an officially recognized or supported church; or (2) Congress shall make no law *with regards to* officially recognizing or supporting religion.

*B. Syntactic Ambiguity: An Alternative Syntactic Interpretation*

Looking closely at the language of the Establishment Clause reveals that there is not only semantic ambiguity in the words, but that, in spite of the unified syntactic understanding forwarded by those on all sides of the debate, there is in fact a syntactic ambiguity as well. Though there have been endless debates about the proper semantic understanding of the clause, the syntactic ambiguity has been entirely overlooked. Recognizing the syntactic ambiguity, however, leads to a completely new way of understanding the Establishment Clause.

The syntactic ambiguity in the Establishment Clause revolves around the word *respecting*. As discussed in the previous section, proponents of every side in the Establishment Clause debate assume that *respecting* is a preposition. Nevertheless, *respecting* is not always necessarily a preposition. It actually has a number of possible syntactic functions. According to the Oxford English Dictionary, at the time that the Establishment Clause was written, there were various definitions of the word *respecting* in use (as there are now). *Respecting* could be at least a noun, an adjective, a preposition, or a verb in the present participial form.<sup>58</sup> A careful analysis of the Establishment Clause text reveals, accordingly, that in this particular syntactical context, *respecting* could actually be interpreted as a verb.

If *respecting* were understood to be a verb, rather than meaning “concerning, about, with regards to,”<sup>59</sup> it would mean something more along the lines of “to take cognizance of,” or “to regard with deference.”<sup>60</sup> Furthermore, if *respecting* were understood in its verbal sense, the syntax and meaning of the Establishment Clause would change. Although *Congress* would still be the subject, *shall make* would still be the verb, and *no law* would still be the direct object, *respecting an establishment of religion* would be, not a prepositional phrase, but a participial phrase modifying the word *law*. This subtle

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58. *Respecting*, OXFORD ENGLISH DICTIONARY ONLINE (2016).

59. *Id.*

60. *Id.*

syntactic shift from prepositional to participial phrase is significant. If *respecting* is a participial verb within a participial phrase, it follows that *an establishment of religion* is not the object of a preposition, but rather the recipient of the action of the participial verb *respecting*. Consequently, *an establishment* could not be a *verbal* noun, meaning “to establish,” but it would instead necessarily and unambiguously be a *deverbal* noun,<sup>61</sup> meaning a thing in “the state of being established.”<sup>62</sup> As a result, *an establishment of religion* would no longer be semantically ambiguous. Rather, *an establishment of religion*<sup>63</sup> would be revealed to mean clearly “a religion that is established,”<sup>64</sup> or, more simply, “a religious organization or a religious group.”<sup>65</sup>

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61. Deverbal nouns are nouns that are formed from verbs, but that behave grammatically purely as nouns. “Establishment” can generally be a verbal noun, paraphrased as “the act of establishing,” or a deverbal noun, paraphrased as “the state of being established.” Compare with the phrase, “collection of stamps,” which could mean either “collecting of stamps” or “stamp collection.” However, in this context, if “respecting” is a verb, “establishment” cannot be a verbal noun. It would create a nonsensical phrase with no clear meaning (especially because there would be two verbs in sequence). Therefore, viewing “respecting” as a verb clears up the ambiguity in the phrase “an establishment of religion.”

62. *Establishment* MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/establishment> (last visited Mar. 18, 2019).

63. One concern some might suggest with adopting the syntax of the Establishment Clause proposed here involves the historical meaning of the word *establishment*. It is clear that at the time of the drafting that the term *establishment* was at times used to refer to a state religion. See e.g., *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 668 (1970). It therefore might seem likely that when the Founders wrote the Establishment Clause, the word *establishment* was selected as a term of art, referring to this particular meaning. However, the evidence shows that *establishment* was also commonly used in other senses as well. In fact, within James Madison’s famous *Memorial and Remonstrance Against Religious Assessments*, other meanings of *establishment* were used. For example, the document argues against “A Bill establishing a provision for Teachers of the Christian Religion.” When Madison said that “the establishment proposed by the Bill is not requisite for the support of the Christian Religion,” what did *establishment* refer to? A state church? No, it refers to the established provision for Teachers of the Christian Religion. When he used *establishment* to refer to a state church, it was usually preceded by a modifier, such as *ecclesiastical*. See Madison, *supra* note 11. Furthermore, Madison, when vetoing as President, “An act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia,” said that the bill “violates, in particular, the article of the Constitution . . . which declares, that ‘Congress shall make no law respecting a religious establishment’” and because “[t]he bill affects into, and establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated,” that “[t]his particular church therefore, would so far be a religious establishment by law.” Notice that he paraphrased *an establishment of religion* with the structure *a religious establishment*. Notice as well that, in saying that the church would be “a religious establishment by law,” he did not speak of being a state church, but rather of being a legal entity with religious tenants controlled by law. See *The Debates and Proceedings of the Congress of the United States*. Eleventh Congress, Third Session. Printed and Published by Gales and Seaton, pp. 982-983 (1853).

64. The prohibition of the Establishment Clause has been paraphrased in the past with phrases like “the establishment of religion” or “establishing a religion.” These paraphrases are

In other words, if *respecting* were a verb, the Establishment Clause would not be paraphrased as *Congress shall make no law with regards to* (1) *an officially recognized or supported church*, or (2) *officially recognizing or supporting religion*. Instead, it would be paraphrased more like this: (3) *Congress shall make no law showing regard for a religious organization*.

### C. Support for the Alternative Syntactic Interpretation

Adopting this alternative syntactic reading of the Establishment Clause, where *respecting* is understood to be a participial verb, will require a significant paradigm shift. However, there is a great deal of evidence in support of accepting this proposed interpretation. In fact, even though the more traditional syntactic interpretation of the Establishment Clause has been entrenched in the law, the evidence shows that the interpretation proposed here must certainly have been what the Founders originally intended.

#### 1. The Late Modern English Period

To understand the evidence in favor of this alternative interpretation, it is first helpful to consider the time period during which the Establishment Clause was written. The Constitution and Bill of Rights were written near the beginning of the Late Modern English (LME) period, which started in roughly 1700 A.D. The LME period followed upon the heels of the Early Modern English (EME) period, which extended from 1500-1700 A.D.<sup>66</sup> During the EME period, which is characterized by the works of Shakespeare and the King James Version of the Bible,<sup>67</sup> English was transforming from a “bar-

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inaccurate and grammatically impossible. Furthermore, in the case that *respecting* is a verb, “establishing religion” would also be inaccurate. A paraphrase like “respecting a religious establishment” would be more appropriate in the case that *respecting* is a verb.

65. *An establishment of religion*, even when *establishment* must be understood to be a deverbal noun, still has two ambiguous meanings. In the deverbal sense, *an establishment of religion* may be paraphrased as “a religious establishment” or “an established religion.” This could mean either “an officially recognized or supported church” or “a religious organization.” However, it is redundant and nonsensical to speak of respecting an officially recognized or supported church. Therefore, there is only one other plausible meaning: respecting a religious organization. Therefore, understanding *respecting* as a verb clarifies any potential ambiguities.

66. CHARLES BARBER, *EARLY MODERN ENGLISH* 1 (2d ed. 1997). These dates are rough estimations. Some argue that Early Modern English extended until 1750 or 1800 A.D. See, e.g., ROB PENHALLURICK, *STUDYING THE ENGLISH LANGUAGE* 29 (2d ed. 2010).

67. MARIO PEI, *THE STORY OF ENGLISH* 66-70 (1952).



barous” or “vulgar” language to an “eloquent” language.<sup>68</sup> A language was considered eloquent if it was, among other things, adorned with the devices of classical rhetoric.<sup>69</sup> Therefore, rhetoric was studied dutifully.<sup>70</sup>

The eighteenth century, or the beginning of the LME period, was characterized by “attempt[s] to regulate the [English] language.”<sup>71</sup> There was “a growing feeling that English needed to be ‘ruled,’”<sup>72</sup> a ruled language being “one in which acceptable usage is explicitly laid down, for example by grammars and dictionaries . . . .”<sup>73</sup> Therefore, “[t]he eighteenth century brought the first really comprehensive dictionaries of English, and an enormous number of English grammars, especially in the second half of the century.”<sup>74</sup> Famous works of the eighteenth century include the grammar written by Robert Lowth<sup>75</sup> and the dictionary by Samuel Johnson.<sup>76</sup> Noah Webster’s dictionary followed very soon thereafter in the beginning of the nineteenth century.<sup>77</sup> In other words, the time during which the Founders wrote the Constitution and Bill of Rights was a time during which people were preoccupied with grammar and rhetoric. A middle class was rising, and one way to distinguish oneself as ranked among the higher and educated class was through eloquent language—through proper speaking and etiquette.<sup>78</sup>

The Founders were among the most educated men in America when they drafted the Establishment Clause. They were, therefore, certainly influenced by the linguistic atmosphere of the times. The experience of James Madison, the primary author of the Bill of Rights, for example, shows this to be true. Madison attended the Col-

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68. BARBER, *supra* note 67, at 1, 52.

69. *Id.*

70. *Id.* at 71 (“The first three subjects of the traditional [school] curriculum were grammar, rhetoric, and logic . . .”).

71. CHARLES BARBER, JOAN C. BEAL & PHILIP A. SHAW, *THE ENGLISH LANGUAGE: A HISTORICAL INTRODUCTION* 215 (2d ed. 2012).

72. *Id.*

73. *Id.*

74. *Id.*

75. ROBERT LOWTH, *A SHORT INTRODUCTION TO ENGLISH GRAMMAR* (1762).

76. SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (1755).

77. Webster’s first dictionary was published in 1806.

78. RAYMOND HICKEY, *ATTITUDES AND CONCERNS IN EIGHTEENTH-CENTURY ENGLISH*, in *EIGHTEENTH-CENTURY ENGLISH: IDEOLOGY AND CHANGE* 1, 160 (Raymond Hickey ed. 2010). *See also* DENNIS FREEBORN, *FROM OLD ENGLISH TO STANDARD ENGLISH: A COURSE BOOK IN LANGUAGE VARIATION ACROSS TIME* 389 (2d ed. 1998).

lege of New Jersey (later Princeton). While there, he came under the tutelage of John Witherspoon, who was a signer of the Declaration of Independence, the president of the college,<sup>79</sup> and—a rhetorician.

At the time, Witherspoon wrote and delivered a series of lectures entitled the *Lectures on Eloquence*,<sup>80</sup> after the manner of which Madison would have been educated.<sup>81</sup> Built upon the principle that “[e]loquence is undoubtedly a very noble art, and when possessed in a high degree, has been . . . one of the most admired and envied talents,”<sup>82</sup> the lectures proceeded to discuss “the arts of writing and speaking . . . attempt[ing] to describe the various kinds of composition, their characters, distinctions, beauties, blemishes, the means of attaining skill in them, and the uses to which they should be applied.”<sup>83</sup> In the course of sixteen lectures, Witherspoon addressed topics such as the arrangement of clauses within a sentence,<sup>84</sup> rhetorical figures,<sup>85</sup> organization,<sup>86</sup> and rhetorical styles.<sup>87</sup> Furthermore, the lectures admonished,

Be careful to acquaint yourselves well, and to be as perfect as possible in the branches that are subordinate to the study of eloquence . . . the grammar, orthography, and punctuation of the English language. It is not uncommon to find orators of considerable name, both in the pulpit and at the bar, far from being accurate in point of grammar. This is evidently a very great blemish.<sup>88</sup>

Exposed to such lessons, Madison would have learned to take a deliberate approach toward the use of proper grammar and rhetoric. The other Founders would have been similarly educated.

Understanding this background adds something to the Establishment Clause debate. It is certain, given the linguistic atmosphere of the time, that Madison and the other drafters of the Constitution and Bill of Rights would have taken pains to ensure that their most

79. S. Michael Halloran, *John Witherspoon on Eloquence*, RHETORIC SOC'Y Q., Spring 1987, at 177.

80. JOHN WITHERSPOON & JOHN RODGERS, THE WORKS OF THE REV. JOHN WITHERSPOON 475-592 (William W. Woodward, 2d ed. 1802).

81. Halloran, *supra* note 79.

82. WITHERSPOON, *supra* note 80, at 475.

83. *Id.* at 381.

84. *Id.* at 551.

85. *Id.* at 503, 522-28.

86. *Id.* at 542-49.

87. *Id.* at 511.

88. *Id.* at 489.

important of texts would be grammatically proper and rhetorically powerful. Incidentally, as will be demonstrated, the alternative syntactic interpretation suggested here—interpreting the word *respecting* as a verb—is the most grammatically accurate and rhetorically appealing interpretation of the Establishment Clause.

## 2. *Grammatical articles*

As discussed previously, non-preferentialists, separationists, and supporters of neutrality dispute the proper resolution of a semantic ambiguity in the Establishment Clause. In fact, one important cause of the ambiguity is actually a grammatical question concerning articles. Specifically, both sides have commented, in support of their respective positions, on the seemingly peculiar use (or non-use) of the articles in the phrase *an establishment of religion*. Proponents of non-preferentialism have pointed out the oddity of interpreting the Establishment Clause as banning support for all religion because of the choice of the article *an* rather than the article *the* proceeding the word *establishment*:

Had the framers prohibited “*the* establishment of religion,” which would have emphasized the generic word “religion,” there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing “an establishment” over “the establishment,” they were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect.<sup>89</sup>

A proponent of separationism, Justice Souter, on the other hand, has recognized the oddity of interpreting the Establishment Clause as prohibiting only the establishment of a national church because of the lack of the article *a* before the word *religion*. As he explained in a previously cited quotation, “the prevailing language is not limited to laws respecting an establishment of ‘a religion,’ ‘a national religion,’ ‘one religious sect,’ or specific ‘articles of faith.’ The Framers . . . instead extended their prohibition to state support for ‘religion’ in general.”<sup>90</sup>

Both sides make valid points, which seem irreconcilable. However, interpreting *respecting* as a verb properly resolves this grammati-

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89. MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT, 14-15 (1978) cited in CORD, *supra* note 56, at 11.

90. *Lee v. Weisman*, 505 U.S. 577, 614-15 (1992) (Souter, J., concurring).

cal conundrum. If *respecting* is a verb, the use of the article *an* before *establishment* makes sense, as does the lack of an article before *religion*. The use of the article *an*, not *the*, before *establishment* would properly indicate that no particular religious institution—no one of many—should be respected. The lack of the article *a* before *religion* would also properly indicate the inclusion of all religions in that group of many. In other words, *an establishment* is indeed specific as non-preferentialists say, and *religion* is also generic as Justice Souter proposes, but this is not a contradiction. Rather, the whole phrase, *an establishment of religion*, addresses any one specific establishment, organization, or institution of any and all religion.

Interpreting *respecting* as a verb, therefore, resolves what would otherwise seem like a clumsy ambiguity and establishes the kind of grammatical accuracy that would be expected, especially of a text written in this time period. It also shows that the Founders were not “extraordinarily bad drafters,”<sup>91</sup> as Justice Souter maintained that they would be if the non-preferentialist approach to the Establishment Clause had been intended. It shows, rather, that they were extraordinarily good drafters, fully capable of drafting a nuanced, grammatically accurate text.

### 3. *Grammatical parallelism*

Besides resolving the issue concerning the appropriate use of grammatical articles, interpreting *respecting* as a verb also improves the grammatical accuracy of the First Amendment by revealing a more precise parallel structure. Good writers are taught the importance of parallelism. Parallelism is “using the same pattern of words to show that two or more ideas have the same level of importance . . . at the word, phrase, or clause level.”<sup>92</sup> Usually, “[w]ords or phrases joined by coordinating conjunctions should have the same structure,”<sup>93</sup> or be parallel. The religion clause of the First Amendment contains two phrases that are joined by the coordinating conjunction *or*; therefore, the most grammatically accurate version of the clause would balance the phrases on each side of the coordinating conjunction through the use of a parallel structure.

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91. *Id.* at 615.

92. Dana Lynn Driscoll, *Parallel Structure*, OWL PURDUE ONLINE WRITING LAB (Jan. 7, 2012), [https://owl.purdue.edu/owl/general\\_writing/mechanics/parallel\\_structure.html](https://owl.purdue.edu/owl/general_writing/mechanics/parallel_structure.html).

93. *Id.*

The Free Exercise Clause of the First Amendment is, without question, intended to be a participial phrase. The word *prohibiting* in the phrase *or prohibiting the free exercise thereof* cannot be anything other than a verb in the present participial form. It is interesting, therefore, that the word *respecting* in the phrase *respecting an establishment of religion* has been interpreted to be a preposition, rather than as a present participial verb as well. Interpreting *respecting* as a preposition, resulting in a prepositional phrase Establishment Clause, creates an instance of faulty parallelism. A prepositional phrase Establishment Clause is not grammatically parallel to a participial phrase Free Exercise Clause. On the other hand, if *respecting* is interpreted as a participial verb, the religion clauses become perfectly parallel—two present participles, *prohibiting* and *respecting*, both introducing participial phrases, joined by the conjunction *or*, equal in importance, and working together to prohibit two equal but opposite infringements of religious liberty. It is likely that this more grammatically accurate interpretation of the Establishment Clause is the interpretation that was actually intended.<sup>94</sup>

#### 4. *Rhetorical antithesis*

Interpreting *respecting* as a verb improves not only the grammatical accuracy of the First Amendment, but also the rhetorical appeal as well. If the Free Exercise Clause and the Establishment Clause are parallel participial phrases, then they constitute a beautiful example of a rhetorical figure called antithesis. Antithesis is “the rhetorical contrast of ideas by means of parallel arrangements of words, clauses, or sentences.”<sup>95</sup>

Texts written in the EME period and into the LME period are filled with instances of antithesis.<sup>96</sup> Numerous examples can be found in the Bible, including the following: “A soft answer turneth away wrath: but grievous words stir up anger.”<sup>97</sup> The first clause includes a

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94. At least one other scholar has suggested that the two “religion phrases” are in fact “two participial phrases”; however, he did not perhaps even realize the import of the statement and definitely did not discuss it. See Oaks, *supra* note 24, at 3.

95. *Antithesis*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/antithesis> (last visited Apr. 13, 2019).

96. ROLAND MEYNET, RHETORICAL ANALYSIS: AN INTRODUCTION TO BIBLICAL RHETORIC, 44-53 (Andrew Mein & Claudia V. Camp eds., 1998). See also FREEBORN, *supra* note 78, at 390.

97. *Proverbs* 15:1 (King James).

noun with a modifier, a phrasal verb, and an object. The second clause has exactly the same grammatical structure. Finally, the meanings of the two clauses stand in direct contrast to each other. Taken together, these things create rhetorical antithesis.

If both phrases of the First Amendment are understood to be participial phrases, the First Amendment is also revealed to be a beautiful instance of antithesis. The grammatical structure of the two phrases is identical. Furthermore, the rhetorical appeal of the parallel structure is enhanced by the fact that both participial phrases are equal in importance, but opposite in meaning, each working together to prohibit a separate but equal type of infringement of religious liberty. In other words, the antithetical means of infringing religious freedom—granting particular favors to a religion and imposing particular disabilities on a religion<sup>98</sup>—would be beautifully juxtaposed in identical grammatical structures. This skillful rhetoric can be seen more clearly when displayed like this:

Congress shall make no law

*Res'pecting* an establishment of religion  
or *pro'hibiting* the free exercise thereof.<sup>99</sup>

It would be difficult to believe that such a skillful instance of rhetorical antithesis in the First Amendment was accidental, especially given the time period during which the text was written. It is much more likely that the Founders intended *respecting* to be a present participial verb all along.

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98. W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1 (Johan D. van der Vyver & John Witte, eds., 1996).

99. The accent marks are intended to make the concept clearer. If *respecting* were a preposition, it would be only a functional grammar word, lacking content value. For that reason, it would take no emphasis when pronounced in the clause. Accordingly, per the current syntactic understanding of the Establishment Clause, all emphasis is placed on the word *establishment*. *Respecting* takes no inflection, as it must if it were regarded as a content-bearing verb. If *respecting* is a verb, however, *respecting* would be pronounced with an emphasis equal to the emphasis on the word *prohibiting*, and *establishment* would have only secondary emphasis in the clause, as displayed here.

### 5. *Drafting of the First Amendment*

There is good reason to believe that the Founders would have made such an effort to draft a grammatically accurate and rhetorically powerful text. The written history of the drafting of the religion clause reveals that the Founders carefully considered each word of their text. They deliberated as well over several seemingly similar drafts before finally settling on the final version with which we are acquainted today.

According to the record, on Monday, June 8, 1789, James Madison brought forward for debate drafts of proposed amendments that he had beforehand “drawn up.”<sup>100</sup> His fourth proposed amendment included the following:

That in article 1st, section 9, between clauses 3 and 4,<sup>101</sup> be inserted these clauses, to wit: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.<sup>102</sup>

After several weeks, on July 21, the amendments were referred to a Select Committee, which consisted of eleven people, one member from each state, including James Madison.<sup>103</sup> The Select Committee reviewed Madison’s proposed amendments, and the religious amendment was changed to read: “No religion shall be established by law, nor shall the equal rights of conscience be infringed.”<sup>104</sup> On August 14, the revised amendments were brought again before a House committee of the whole for further debate, where they considered alternative wordings. Madison proposed adding the word “national” before “religion.”<sup>105</sup> Another delegate was opposed to this idea, because of the connotations the word “national” carried for the antifederalists.<sup>106</sup> Then, Delegate Livermore proposed another reading: “Congress shall make no laws touching religion, or infringing the

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100. 1 ANNALS OF CONG. 446 (1789) (Joseph Gales ed., 1834).

101. The Annals indicate that after long debate, the delegates at last decided to amend the Constitution at the end, rather than to replace or add words within the text of the document.

102. 1 ANNALS OF CONG. at 451. The proposed amendment included other text as well, including the text of most of the other amendments that became our modern Bill of Rights.

103. *Id.* at 690.

104. *Id.* at 757.

105. *Id.*

106. *Id.* at 759.

rights of conscience.”<sup>107</sup> A move for a vote was made, and the delegates adopted this version of the amendment.<sup>108</sup> However, one week later, the amendment was again changed, for reasons not indicated, to read: “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.”

<sup>109</sup> This version of the amendment was sent to the Senate for consideration and further revision.

The debates before the Senate were not recorded, but the delegates considered at least three new versions of the amendment.<sup>110</sup> First, they considered “Congress shall make no law establishing one religious sect or society in preference to others, or to infringe on the rights of conscience.”<sup>111</sup> Then, “Congress shall make no law establishing religion, or prohibiting the free exercise thereof.”<sup>112</sup> Finally, the version agreed upon by the Senate and sent back to the House read “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.”<sup>113</sup> When the House rejected this version, a conference committee with members from both houses of Congress was formed;<sup>114</sup> Madison was a member of this committee as well.<sup>115</sup> The committee was able to adopt a version of the amendment that was approved by the House and the Senate, the version that we know today.

From this short history, it is clear that drafting the First Amendment was no casual exercise. Because there were no records kept by the Senate concerning the reasons the changes were made that left us with the current version of the Establishment Clause, it is not possible to know for certain the motivations for choosing the final words. However, it is clear that the members of the drafting committee carefully considered each word of the amendment, and it is certain that they would have given careful attention to grammatical and rhetorical choices,<sup>116</sup> as demonstrated in each of their numerous attempts to re-

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107. *Id.*

108. 1 ANNALS OF CONG. at 759.

109. *Id.* at 796.

110. CORD, *supra* note 56, at 8-9.

111. *Id.*

112. *Id.*

113. *Id.*

114. DEREK DAVIS, ORIGINAL INTENT 52, 101 (1991).

115. CORD, *supra* note 56, at 9.

116. This assertion is also supported by the fact that, although before the Bill of Rights was drafted, during the Constitutional Convention, a Committee of Style and Arrangement was created to edit and polish the Constitution before it was presented in final form. *See* John R.



vise the words so as to more perfectly convey an intention that would not be misconstrued.<sup>117</sup>

### 6. *Mistaken understandings*

If the fact that *respecting* should be regarded as a verb is so obvious, some will certainly wonder why nobody has ever noticed the ambiguity in over 200 years. The answer is simple: given the frequency with which religion clause cases come before the courts today,<sup>118</sup> it is easy to forget that between the adoption of the First Amendment and the early twentieth century, issues involving the Establishment Clause came before the Supreme Court only twice.<sup>119</sup> The first substantive Establishment Clause case came before the Supreme Court only seventy-two years ago, in 1947.<sup>120</sup> By 1963, just fifty-six years ago, the Supreme Court had still only heard a total of eight Establishment Clause cases.<sup>121</sup> In other words, the Establishment Clause was really interpreted for the first time more than 150 years after it was written.

Following that amount of time, the original syntactic understanding of the clause could easily have been lost, especially given the changes that took place in the language and in society during that time. Therefore, when the Supreme Court justices confronted the words for the first time in 1947, they were free to interpret the amendment according to nearly any semantic or syntactic interpretation that they found most reasonable. Unfortunately, their initial instinct was faulty, and the less-appealing syntax has been perpetuated under their influence for the past few decades, as each subsequent case has built upon the flawed analysis of the last.

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Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 147, 171 (2006).

117. Each previous draft of the Establishment Clause utilizes some variety of verb phrase and clear and specific language. Never is a preposition proposed, especially not to create the imprecision created by “respecting.”

118. The year 2012 alone saw about 200 state and federal religion law cases.

119. *Bradfield v. Roberts*, 175 U.S. 291 (1899); *Reuben Quick Bear v. Leupp*, 210 U.S. 50 (1908). In a concurring opinion in *Sch. Dist. of Abington Twp. v. Schempp*, Justice Brennan argued that neither of these cases actually even “raised [or] decided any constitutional issues under the First Amendment.” *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 246 (1963) (Brennan, J., concurring).

120. *See Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

121. *Schempp*, 374 U.S. at 222.

If it seems unlikely that the Supreme Court justices would make such a gross syntactic error, consider a further mistake of grammar the justices have perpetuated for the same amount of time. The truth is that the “religion clauses” are not clauses at all.<sup>122</sup> There is no subject and verb in either the “Establishment Clause” or the “Free Exercise Clause.” Together they constitute just one clause. Separately, they would more appropriately be called the “Establishment Phrase” and the “Free Exercise Phrase.” The one religion clause is made up of two phrases: either one prepositional phrase and one participial phrase, which constitutes an unappealing grammatical structure, or two participial phrases, a rhetorically powerful alternative.

#### IV. IMPLICATIONS

The question of whether *respecting* is a preposition or a participial verb might seem like merely a theoretical grammatical exercise without any important real-life application. However, in fact, interpreting *respecting* as a participial verb is not only “grammatically correct,” but it could also be instrumental in resolving many of the problems that plague religious clause jurisprudence today. That is because interpreting *respecting* as a participial verb leads to an important fundamental change in the meaning of the Establishment Clause. That change could resolve many of the contradictions and incongruencies inherent in the currently prevailing Establishment Clause interpretations.<sup>123</sup>

##### *A. Fundamental Change*

As discussed above, if *respecting* is a participial verb, the Establishment Clause would mean something similar to this: *Congress shall make no law showing regard for a religious organization*. In other words, rather than banning a preference for one religion over another, as non-preferentialists understand it,<sup>124</sup> the Establishment

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122. Oaks, *supra* note 24, at 3.

123. This is not to say that all questions in Establishment Clause cases will be immediately resolved. However, Establishment Clause cases will at least all begin with correct premises based on an internally consistent and practically workable interpretation of the Establishment Clause text.

124. The proposed interpretation could admittedly also be construed to support the non-preferentialist theory. This is the approach that Rodney K. Smith has taken, for example. Smith, *supra* note 16. However, I take the broader interpretation of the words that I have advocated here. What is clear is that the interpretation could not support separationism or neutrali-

Clause would ban respect shown toward *any* religious organization.<sup>125</sup> Furthermore, rather than banning a preference for religion over irreligion, as advocates of separationism and neutrality understand it, the Establishment Clause would ban respect shown toward any *religious organization*. In other words, the ban, clearly prohibiting only respect for any and all religious establishments, would not ban a positive regard shown toward religion generally. This fundamental shift resolves the logical problems and contradictory conclusions created by each prevailing Establishment Clause doctrine.

This is especially apparent when discussed in the context of actual cases. Although Establishment Clause cases have become increasingly common in recent decades, they can, for the most part, be loosely grouped into a couple of basic categories<sup>126</sup>: religious expression cases<sup>127</sup> and financial aid cases.<sup>128</sup> Religious expression cases involve issues ranging from legislative prayers<sup>129</sup> to religious displays on gov-

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125. Further support for the proposed interpretation derives from the organizational nature of religion. Religions lead to organizations. Religion is inherently communitarian and public. Religious believers, almost without exception, form into bodies, and most of these must acquire formal legal entity status to operate in the temporal realm. Therefore, “an establishment of religion” is not difficult to recognize. Though religions are spiritual and consist of intangible beliefs, they manifest themselves as temporal institutions. However, all religions are organized differently, and the temporal institutions manifest themselves in myriad different ways. Therefore, “an establishment of religion” should be interpreted broadly to include any organization of religious believers.

126. This division of cases is admittedly simplistic, but it suffices for the present argument. Do note, however, that there are a few notable outlier cases. *See, e.g.*, *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664 (1970); *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994). These cases also fit nicely within this new interpretational paradigm but are simply not discussed here.

127. *See, e.g.*, *Zorach v. Clauson*, 343 U.S. 306 (1952); *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Stone v. Graham*, 449 U.S. 39 (1980); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary Cty. v. ACLU*, 545 U.S. 844 (2005); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

128. *See, e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Mueller v. Allen*, 463 U.S. 388 (1983); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Locke v. Davey*, 540 U.S. 712 (2004); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

129. *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece v. Galloway*,

ernment property<sup>130</sup> to devotional expressions in schools.<sup>131</sup> Financial aid cases involve questions of providing government financial aid or other benefits to religious schools<sup>132</sup> or other religious organizations.<sup>133</sup> The prevailing interpretations—non-preferentialism, separationism, and neutrality—have each taken a different approach to these categories of cases. However, each has led to confusing inconsistencies and inherent contradictions. The fundamental shift of the Establishment Clause interpretation proposed here, however, can resolve these problems. The manner in which the problems inherent in each of the prevailing Establishment Clause interpretations are resolved in the context of both religion expression cases and financial aid cases by the important shift in meaning when *respecting* is understood to be a participial verb will be discussed below.

### *B. Non-preferentialism*

Non-preferentialism has never been adopted as a principle for adjudication by the Supreme Court. Therefore, the results that would be obtained in specific cases, were non-preferentialism to be applied, can only be discussed as a theoretical matter. Nevertheless, the outcomes of both religious expression cases and financial aid cases under the non-preferentialist theory seem clear. Given that the fundamental premise of non-preferentialism is that one religious organization cannot be favored over another, almost any religious expression—prayer, a religious display, or a devotional—would be deemed constitutional, as long as a non-preferential stance toward specific religious

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572 U.S. 565 (2014).

130. *See, e.g.*, *Stone v. Graham*, 449 U.S. 39 (1980); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary Cty. v. ACLU*, 545 U.S. 844 (2005); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

131. *See, e.g.*, *Zorach v. Clauson*, 343 U.S. 306 (1952); *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

132. *See, e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Mueller v. Allen*, 463 U.S. 388 (1983); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Locke v. Davey*, 540 U.S. 712 (2004).

133. *See, e.g.*, *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

organizations was maintained.<sup>134</sup> Likewise, in financial aid cases, non-preferentialism would likely lead to a permissive stance—financial aid would be constitutional as long as one religion was not shown favor over another.

As was discussed previously, the outcome of the non-preferentialist stance in financial aid cases is problematic. The Founders felt that one of the problems with a doctrine that allows non-preferential aid to religious establishments was that it would force citizens to support creeds that violate their conscience.<sup>135</sup> Another problem with non-preferential financial aid, as discussed earlier, is that the financial mingling of religion and government allows the government to gain control of religious organizations, eventually leading to the loss of religious character.

The interpretation proposed here would not perpetuate the same problems. Under the proposed interpretation, though positive regard could be shown for religion generally, no respect—favors, special recognition, government assistance—could be shown for any religious organization. In other words, though general religious expressions could be countenanced, aid to religious organizations, such as monetary assistance, could not. Importantly, a separation would be maintained between the institutions of religion and the institutions of government. Such an institutional separation would protect citizens from being compelled, especially in violation of conscience, to support, financially or otherwise, the creeds of any particular religious organization. Furthermore, the absence of financial aid to religious organizations would also protect religious organizations from becoming subject to government control through the granting or withdrawing of funds based upon governmental parameters. Non-preferential religious expressions, on the other hand, those that do not show respect for any religious establishment, would not be constitutionally problematic. Therefore, adopting the interpretation proposed here would resolve the issues inherent in the non-preferentialist interpretation.

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134. See, e.g., *Engel*, 370 U.S. at 430-31.

135. "A Bill for Establishing Religious Freedom," enacted by the General Assembly of Virginia, January 19, 1786; 12 HENING'S STATUTES AT LARGE 84 (1823).

*C. Separationism*

The outcome of the separationist theory, as applied in both religious expression and financial aid cases, has been demonstrated in numerous Supreme Court cases.<sup>136</sup> Though confusing exceptions have been created in cases when the judges were unwilling to take the doctrine to its extreme,<sup>137</sup> the basic outcome is that no religious expressions are tolerated. Likewise, no financial aid is permissible.

However, as discussed previously, some of the problems with a doctrine that mandates a complete separation between religion and government are that it is unworkable practically; that it creates hostility toward religion, contradicting the protections guaranteed in the Free Exercise Clause; that it is difficult to reconcile with the actions of the Founders, who openly engaged in religious practices; and that it represents a faulty interpretation of the metaphor that gave the doctrine its legitimacy. The interpretation proposed here also resolves these problems.

Under the proposed interpretation, the Establishment Clause does not prohibit all interaction between government and religion, and general religious expressions would not be problematic. The proposed interpretation instead makes it clear that separation, especially in financial matters, should be maintained between the institutions of government and the institutions of religion (given that respect cannot be shown for any religious organization), but that religion in the abstract can be promoted to the end of fostering a moral people. This understanding eliminates the impossible situation that judges encounter when trying to reconcile the purging of religion from public society with its practical impossibility.<sup>138</sup> It also resolves the contradiction created by the separationist interpretation with the principles of the Founding Fathers, who openly declared that religion was necessary for a moral people, and a moral people were necessary for a republic to function.<sup>139</sup> It reconciles the actions

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136. *See, e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

137. *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783 (1983); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

138. *See supra* note 25 and accompanying text.

139. *See, e.g.*, George Washington, Farewell (Sept. 19, 1796), <https://www.presidency.ucsb.edu/documents/farewell-address> ("Of all the dispositions and habits which lead to political

of those Founders—declaring national days of prayer, adding “so help me God” to the Presidential Oath, beginning sessions of Congress with prayer, etc.,<sup>140</sup> all of which promote religion generally but not any particular religious organization—with the words that they wrote in the Establishment Clause.

Finally, by clarifying that the promotion of religion in the abstract does not violate the Bill of Rights, the proposed interpretation erases the impetus for hostility toward religion that the separationist doctrine has created, which hostility contradicts the special favor given to religion in the Free Exercise Clause.<sup>141</sup> The proposed interpretation clarifies that religion is valued in the republic, as the Free Exercise Clause implies.<sup>142</sup> The proposed interpretation makes plain that the need for separation between the institutions of government and the institutions of religion is not due to distrust or dislike for religion, but for the need of religion to be protected from the taint of governmental influence so that it can be free to flourish—just as Thomas Jefferson implied in the metaphor that lies behind the separationist doctrine.<sup>143</sup>

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prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.”).

140. *McCreary Cty. v. ACLU*, 545 U.S. 844, 886-87 (2005) (Scalia, J., dissenting). *See also* *Lynch v. Donnelly*, 465 U.S. 668, 675-77 (1984).

141. *Oaks*, *supra* note 24, at 2 (“The prohibition against establishment seems to forbid government support for religion, but the guarantee of free exercise seems to compel the very same support.”).

142. The alternative syntax of the Establishment Clause proposed here actually leads to a possible change in the syntax of the Free Exercise Clause as well. Traditionally, the antecedent of “thereof” in the phrase “or prohibiting the free exercise thereof” has been considered to be “religion.” However, if “an establishment of religion” is an object of the participial verb “respecting,” then the antecedent of “thereof” could be, rather, “an establishment of religion.” The Free Exercise Clause would, then, prohibit limitations on the free exercise of establishments of religion, or, more broadly, religious groups or doctrines. This could be more correct given that the Oxford English Dictionary indicates that the phrase “free exercise” at the time of the Founding was short for “free exercise of religion.” Therefore, “the free exercise of religion thereof [of religion]” would be redundant, whereas “the free exercise of religion thereof [of an establishment of religion]” would not.

143. *Smith*, *The Rise and Fall of Religious Freedom*, *supra* note 47, at 183 (“[I]t is perfectly coherent to hold that the religion clauses require a formal institutional separation of church and state—or to maintain, in Jefferson’s famous phrase, that the First Amendment erects a ‘wall of separation between church and state’—without also calling for government to be sealed off from religious beliefs or prohibited from supporting religious values and symbols.”).

*D. Neutrality*

The outcome of the neutrality doctrine, as applied in both religious expression cases and financial aid cases, has also been demonstrated in actual Supreme Court cases.<sup>144</sup> Generally, religious expressions are tolerated only if balanced by non-religious expressions.<sup>145</sup> Financial aid may also be granted to religious organizations equally with secular organizations.<sup>146</sup>

However, though neutrality was intended to strike a balance between non-preferentialism, where nearly anything is permissible, and separationism, where nearly nothing is, neutrality actually just perpetuates the problems of both doctrines by allowing financial mingling between government and religious organizations while contradicting the Founders' approach to religious expressions. In fact, it may be said that neutrality creates a church-state relationship that is exactly backwards. Still other problems with the neutrality doctrine include, as discussed before, that the doctrine itself is not in fact neutral, that it is oftentimes impossible for the government to be perfectly neutral between religion and nonreligion, and that the very mention of religion in the First Amendment seems to advocate a nonneutral stance towards religion. The interpretation proposed here provides a solution to all of these problems.

Under the proposed interpretation, there is no mandate that religion and nonreligion be treated equally. Rather, the government is prohibited from respecting any religious establishment, but religion in general can be promoted and encouraged. Treating religion with favor is not a neutral stance, but, as discussed previously, neither is treating religion and nonreligion equally. The proposed interpretation, instead of rather disingenuously suggesting that the government can maintain a neutral position between religion and nonreligion,<sup>147</sup> makes no pretense of being neutral.

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144. See, e.g., *Lynch*, 465 U.S. at 675-77; *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Agostini v. Felton*, 521 U.S. 203 (1997); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

145. See, e.g., *Lynch*, 465 U.S. at 675-77; *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

146. See, e.g., *Agostini v. Felton*, 521 U.S. 203 (1997); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

147. The fact that religion was specifically singled out in the First Amendment implies that religion merits special protection as opposed to nonreligion. This must be true given that "[t]he problem with a definition of religion that includes almost everything is that the practical effect of inclusion comes to mean almost nothing. . . . When religion has no more right to free



Taking an unabashed stance towards protecting religion generally as valuable to society solves the problem of the impossibility of attempting to treat religion and nonreligion neutrally in all circumstances. It also harmonizes with the fact that the very mention of religion in the First Amendment, and the special freedom and protection afforded to all religious exercise therein, implies an inherently nonneutral stance toward religion.<sup>148</sup> Most importantly, as discussed in the previous sections, the proposed interpretation eliminates the problems created by financially mingling religious and government institutions by prohibiting particular regard for any religious organization. It also resolves the contradiction of purging religious references and symbols from the public square with the Founders' religious actions by clarifying that religion may be promoted generally.

## V. CONCLUSION

The religion clause was carefully written for the intent of protecting religious freedom. However, in spite of the care taken in drafting the religion clause, scholars and judges have struggled for decades to settle on a clear interpretation of the role of the Establishment Clause in protecting that freedom. Each prevailing interpretation of the Establishment Clause has proven to be flawed, and each has perpetuated a variety of problems. Overall, this has led to a situation in which the meaning of the Establishment Clause has remained obscured by an incoherent jurisprudence.

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exercise than irreligion or any other secular philosophy, the whole newly expanded category of 'religion' is likely to diminish in significance." Oaks, *supra* note 24, at 8. Consider in this regard the experience with the Free Exercise Clause. During the Vietnam era, Congress allowed exemptions for conscientious objectors to draft laws. However, in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970), the Court extended the exemptions to "purely ethical creed[s]," qualifying these creeds as "religions." In this way, the Court enlarged the meaning of "religion" in the Free Exercise Clause to include nearly any dearly held belief. Interestingly, if the same definition were applied to the Establishment Clause realm, which has, ironically, remained limited to traditional theism, the government would be prohibited from supporting any belief system or ethical code. This would foreclose all criminal law, certainly, and nearly all legislation. As things currently stand, though, a religious group is more likely to be unhindered in their worship by professing to be merely an ethical code, rather than a theistic doctrine.

148. See, e.g., Smith, *The Rise and Fall of Religious Freedom*, *supra* note 47, at 156-66 (explaining how the justification for the religion clause arose out of religious rather than secular reasoning).

However, a return to the Establishment Clause text, and a careful linguistic analysis of that text, reveals that an alternative syntactic interpretation of the Establishment Clause, an interpretation in which the word *respecting* is regarded as a verb, has until now been entirely overlooked. This interpretation, besides being more grammatically sound and historically accurate—and thus probably exactly what the Founders intended—has the ability to reshape, reform, and clarify religion clause jurisprudence. It is time, then, to recognize and accept this interpretation of the Establishment Clause text, time at last to understand the rhetoric that shaped the Revolution.