Freedom of Religion in the United States: *Fin de Siècle* Sketches†

MICHAEL J. PERRY*

> Converging developments in history, society, law, and philosophy reveal with ever sharper clarity the audacious gamble that underlies the American experiment. The American republic simultaneously relies on ultimate beliefs (for otherwise it has no right to the [human] rights by which it thrives), yet rejects any fixed, final, or official formulation of them (for here the First Amendment is clearest, most original, and most constructive).[1]

My aim in this Essay is not to present a detailed analysis of each issue I address. That would require not one essay but several. My aim is only to paint suggestively, with a broad brush. I hope these "sketches" contribute something of value to the ongoing conversation, among the Symposiasts and others, about freedom of religion in the United States.[2]

1

The First Amendment famously insists that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[3] Yet, according to the authoritative case law—law that is coustitutional bedrock for us in the United States[4]—it is not just "Congress" but all three branches of the national government that may not prohibit the free exercise of religion, abridge the freedom of speech, etc. Moreover, it is not just the (whole) national government but the government of every state that may not do what the First Amendment forbids. I have suggested elsewhere how we can get from the text of the First Amendment, which speaks just of Congress, to the authoritative case law.[5] But even if we were unable

---

* University Distinguished Chair in Law, Wake Forest University.

1. OS GUINNESS, THE AMERICAN HOUR: A TIME OF RECKONING AND THE ONCE AND FUTURE ROLE OF FAITH 18-19 (1993).

2. I am grateful to the other Symposiasts for their comments at the Symposium. I am especially grateful to three Symposiasts and friends—Dan Conkle, Fred Gedicks, and Steve Smith—for vigorous e-mail exchanges in the weeks after the Symposium. Those exchanges helped me better understand some of the positions I defend in this Essay. I am also grateful, for their interest and discussion, to the Wake Forest students in my winter/spring 1999 seminar, FREEDOM OF RELIGION. Finally, I am grateful to the Oxford University Press for permission to reproduce here a few passages from my book, MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997). Comments welcome: mperry@law.wfu.edu.

3. U.S. CONST. amend. I.

4. On the idea of constitutional "bedrock," see MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 20-23 (1999).

5. *See id.* at 10-12. On the controversial question whether the Fourteenth Amendment was meant to make the First Amendment's "free exercise" and "nonestablishment" norms applicable to the states, see Kurt T. Lash, *The Second Adoption of the Free Exercise Clause:*

to get from the text to the case law, it would nonetheless be constitutional bedrock in the United States that neither the national government nor state government may either prohibit the free exercise of religion or establish religion (or abridge "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").[6]

For us Americans at the end of the twentieth century, the serious practical question is no longer whether the "free exercise" and "nonestablishment" norms apply to the whole of American government, including state government. They *do* so apply. And there is no going back. The sovereignty of the free exercise and nonestablishment norms over every branch and level of American government—in particular, their sovereignty over state government as well as the national government—is now, as I said, constitutional bedrock for us in the United States. For us *fin de siècle* Americans, the serious practical inquiry is what it means, or should mean, to say that government (state as well as national) may neither prohibit the free exercise of religion nor establish religion. An important related question: Why is it a good thing, for us Americans—if indeed it is a good thing—that government may neither prohibit the free exercise of religion nor establish religion?

Religious Exemptions Under the Fourteenth Amendment, 88 NW. U. L. REV. 1106 (1994); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) [hereinafter Lash, *The Second Adoption*]. Lash argues that the Fourteenth Amendment was meant to make applicable to the states both a broad free exercise norm and a nonestablishment norm. For a recent instance of the argument that the Fourteenth Amendment was not meant to make the First Amendment's nonestablishment norm applicable to the states, see Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1 (1998). For the argument that the Fourteenth Amendment was not meant to make any First Amendment norm applicable to the states, see Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995).

6. *See* Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 690 (1992). "The government may not 'establish' religion and it may not 'prohibit' religion." *Id.* In a footnote attached to the word "establish" McConnell explains that

> [t]he text [of the First Amendment] states the 'Congress' may make no law 'respecting an establishment' of religion, which meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they then existed in the various states. After the last disestablishment in 1833 and the incorporation of the First Amendment against the states through the Fourteenth Amendment, this 'federalism' aspect of the Amendment has lost its signifieance, and the Clause can be read as forbidding the government to establish religion.

Id. at 690 n.19.

2

Let's begin with the free exercise norm: In the United States, what does it mean to say that government may not prohibit the free exercise of religion? The "exercise" of religion comprises many different though related kinds of religious practice, including: public affirmation of religious beliefs;[7] affiliation, based on shared religious beliefs, with a church or other religious group; worship and study animated by religious beliefs; the proselytizing dissemination of religious beliefs or other religious information; and moral choices, or even a whole way of life, guided by religious beliefs.[8] It is implausible to understand the free exercise norm to forbid government to prohibit any religious practice whatsoever—including, for example, human sacrifice. Indeed, by its very terms the norm forbids government to prohibit, not the exercise of religion, but the "free" exercise of religion—that is, the freedom of religious exercise. Just as government may not abridge "the freedom of speech" or "the freedom of the press," so too it may not prohibit the freedom of religious

---

7. Paradigmatic instances of "religious" belief are the belief that God exists—"God" in the sense of a transcendent reality that is the ultimate source, ground, and end (*telos*) of creation—and beliefs about the nature, activity, or will of God. (Although some Buddhist sects are theistic, Buddhism—unlike Christianity, for example—is predominantly nontheistic, in the sense that Buddhism does not affirm the meaningfulness of "God"-talk. Nonetheless, Buddhism does seem to affirm the existence of a transcendent reality that is the source, the ground, and the end of everything else. *See* THE EMPTYING GOD: A BUDDHIST-JEWISH-CHRISTIAN CONVERSATION (John B. Cobb, Jr. & Christopher Ives eds., 1990); in particular, see David Tracy, *Kenosis, Sunyata, and Trinity: A Dialogue with Masao Abe in* THE EMPTYING GOD: A BUDDHIST-JEWISH-CHRISTIAN CONVERSATION, *supra* at 135.) A belief can be "nonreligious," then, in one of two senses. The belief that God does not exist is nonreligious in the sense of "atheistic." A belief that is about something other than God's existence or nonexistence, nature, activity, or will is nonreligious in the sense of "secular."

8. For a list of typical religious practices, see Article 6 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 172, U.N. Dox. A/36/51 (1981):

> [T]he right to freedom of thought, conscience, religion or belief shall include, *inter alia*, the following freedoms:
>
> (a) To worship or assemble in counection with a religion or belief, and to establish and maintain places for these purposes;
>
> (b) To establish and maintain appropriate charitable or humanitarian institutions;
>
> (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs or a religion or belief;
>
> (d) To write, issue and disseminate relevant publications in these areas;
>
> (e) To teach a religion or belief in places suitable for these purposes;
>
> (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
>
> (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
>
> (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
>
> (i) To establish and maintain communications with individuals and communities in matters of religion or belief at the natioual and international levels.

Id. (emphasis in original).

exercise.[9] It is one thing to argue, as some do, that this freedom includes more than just freedom from discrimination against religious practice. It is another thing altogether, and insane, to suggest that the freedom of religious exercise is an unconditional right to do, on the basis of religious belief or for religious reasons, whatever one wants. One need not concoct frightening hypotheticals about human sacrifice to dramatize the point. One need only point, for example, to the refusal of Christian Science parents to seek readily available lifesaving medical care for their gravely ill child.[10] Just as the freedom of speech is not a license to say whatever one wants whenever one wants wherever and the freedom of the press is not a license to publish whatever one wants whenever one wants wherever one wants, so, too, the freedom of religious exercise is not—because it cannot be—a license to do, on the basis of religious belief or for religious reasons, whatever one wants whenever one wants wherever one wants. It is, rather, the freedom to practice—to "put into practice"—one's religion (religious beliefs) to the extent doing so does not damage any interest government may legitimately protect, such as human life. It bears mention here that the international law of human rights acknowledges that freedom of religion and conscience is not (indeed, cannot be) absolute, but only conditional. As the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* puts the point (in Article I, paragraph 3): "Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."[11]

In the United States, then, to say that government may not prohibit the free exercise of religion neither means nor should mean that government may not prohibit any religious practice whatsoever. Government may prohibit some religious

---

9. In a paper written under the supervision of my then-colleague, Steve Calabresi, Peter Braffman has discussed the likely original understanding of the word "free" in the free exercise language of the First Amendment. Peter A. Braffman The Original Understanding of the Free Exercise Clause 37-38 (May 1995) (unpublished manuscript on file with the *Indiana Law Journal*).

> The first definition provided by [Samuel] Johnson's dictionary, which was uniformly given by other contemporary dictionaries, is "liberty." The word "liberty" was understood then as it is now, as "freedom," a freedom as "opposed to slavery," a freedom as "opposed to necessity." . . . To understand "free" in this sense, is to more readily understand the place of the right of "exercise of religion" within the First Amendment. Just like the "freedom of speech" and the "freedom of the press," the "freedom" of exercise of religion can be understood as a fundamental right which precedes the social compact. . . . It is not a right "granted" or "permitted" by the sovereign, but rather an unalienable right guaranteed and protected by constitutional government. Furthermore, it would not be a right to licentiousness which is not bound by law, but rather a right to be free from unjust restraints.

Id.

10. *See, e.g.*, Lundman v. McKown, 530 N.W.2d 807 (Minn. Ct. App. 1995). *See also* Caroline Frasier, *Suffering Children and the Christian Science Church*, ATLANTIC MONTHLY, April 1995, at 105.

11. *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, *supra* note 8, at 171.

practices—practices that threaten one or more interests that government may legitimately protect. In banning, or in otherwise impeding, by regulating, a religious practice, however, government may not discriminate against religion—either against one or more religions or, at the limit, against all religion. It is one thing to leave government free to protect those interests any just government would want to protect (e.g., human life); it is another thing altogether to leave government free to discriminate against religion in the guise of protecting such an interest. Government is not free, under the free exercise norm, to do the latter. Government may not discriminate against religion in the guise of protecting an interest it may legitimately protect. I am not ready to join, in this Essay, the debate about whether the free exercise norm is more than an antidiscrimination norm.[12] Whether or not it is more than an antidiscrimination norm, the free exercise norm is an antidiscrimination norm.[13]

But what precisely does it mean to say that the free exercise norm is an antidiscrimination norm? What does it mean to say that government may not discriminate agaiust religion? What sorts of actious does the free exercise norm, *qua* antidiscrimination norm, forbid government to take? Although the Supreme Court has nowhere articulated the substantive content of the free exercise norm *qua* antidiscrimination norm in precisely the terms I am about to use here, those terms best eapture, in my judgment, what a majority of the Court has been trying to say in recent years.[14] In any event, my aim, in this Part, is less to describe the Court's understanding of the free exercise norm[15] than to delineate what seems to me to be the most sensible understanding of the norm (*qua* antidiscrimination norm). In my judgment, the most sensible understanding of the norm—the substantive content of the norm—is twofold.

First. Imagine one or another kind of human conduct that is a religious practice for at least some (and perhaps for all) who engage in the conduct—for example, slaughtering an animal. Government violates the free exercise norm *qua* antidiscrimination norm by banning (or otherwise impeding) such conduct if the legislators or other officials who imposed the ban would not have done so but for, *first*, the fact that the conduct is, for some, a religious practice—a practice embedded in and expressive of one or more religious beliefs—and, *second*, their judgment that the underlying religious belief or beliefs are false or otherwise problematic (e.g., un-American). (Perhaps the officials think that all religious beliefs are false or otherwise problematic, or perhaps they think that just some are.) It is one thing for government to oppose one or another kind of conduct—for example, refusing to seek readily

---

12. I regret this gap in my Essay. I am inclined to believe that the free exercise norm is more than an antidiscrimination norm.

13. As Stanley Fish's presentation of John Locke's understanding of religious tolerance illustrates, the antidiscrimination understanding of religious liberty is a classic understanding. *See* Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2265-66 (1997).

14. *See infra* text accompanying notes 17-20.

15. Does "the Court" have an understanding of the free exercise norm? If there is a dominant understanding among the Justices of the Court, is that understanding coherent? For a masterful critique of the Court's free exercise jurisprudence, see Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519 (1994).

available lifesaving medical care for one's gravely ill child—without regard to whether or not the conduct is (for some) a religious practice. This the free exercise norm (*qua* antidiscrimination norm) permits government to do.[16] It is another thing altogether, however, for government to oppose one or another kind of conduct because, or in part because, the conduct is, for some who engage in it, (a) a religious practice (b) animated by a religious belief or beliefs thought to be false (or otherwise problematic). The latter opposition, because it is directed not at the conduct itself but at the religion behind the conduct (religion thought to be false), discriminates against, it is hostile to, the religion behind the conduct. This the free exercise norms forbids government to do. To oppose the conduct itself is to oppose the intentional physical acts of which the conduct consists no matter what beliefs or ideas animate the acts; in particular, it is to oppose the acts whether or not any religious beliefs or ideas animate them—and, so, even if no religious beliefs or ideas animate them. For an example of a law directed not at the conduct itself but at the religion behind the conduct, listen to Justice Scalia, speaking for the Supreme Court in 1990:

> Government would be "prohibiting the free exercise [of religion]" if it sought to ban [acts or refusals to act] only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.[17]

Second. Government also violates the free exercise norm *qua* antidiscrimination norm by banning (or otherwise impeding) conduct that is a religious practice for some who engage in it if government would not have banned the conduct but for its hostility or indifference to the religious group (or groups) for whom the conduct is a religious practice—that is, but for its failure to include the group within the circle of religious groups that government normally treats with active respect and concern. (Just as a racial group might be a victim of government's racially selective sympathy and indifference, so too a religious group might be a victim of government's religiously selective sympathy and indifference.[18]) Legislators and other officials will sometimes have less respect and concern for one religious group than for another. This is inevitable, given the strangeness, to many officials, of some religious groups; indeed, this is understandable, given the questionable morality of some religious

---

16. *But cf. infra* text accompanying notes 23-37 (discussing the question of required exemptions).

17. Employment Div. v. Smith, 494 U.S. 872, 877-78 (1990). Note that it would make no sense, it would be naive and even foolish, to forbid government to ban "the casting of 'statues that are to be used for worship purposes'" while leaving government free to deny to persons, because they cast such statues, a benefit it would otherwise give to them.

The so-called "symbolic speech" cases have yielded an analogous approach. Imagine one or another kind of human conduct that is an act of communication for at least some who engage in the conduct—for example, burning an American flag. Government violates the core of the free speech norm by banning (or otherwise impeding) such conduct if government would not have done so but for its hostility to the conduct as an act of communication. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968); Texas v. Johnson, 491 U.S. 397 (1989).

18. On "racially selective sympathy and indifference," see Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

groups (e.g., Christian white supremacists). Nonetheless, if government wants to ban conduct that is a religious practice for some who engage in it, the free exercise norm requires that government do so for some reason other than diminished respect and concern for, much less outright hostility to, the religious group for whom the conduct is a religious practice. By "diminished" respect and concern, I mean less respect and concern than government shows other, more familiar and popular religious groups—or less respect and concern than government would show such a group if one of the group's practices (e.g., the sacramental use of wine at Mass)[19] would otherwise be snared in a legislative or regulatory ban. In 1993, in a case whose facts illustrate the problem addressed in this paragraph, the Supreme Court referred to the requirement sketched here as a "nonpersecution principle."[20]

More precisely, the Court referred to that part of the requirement concerned with *hostility* to religious minorities as a nonpersecution principle. As I have sketched it, however, the requirement does not distinguish between "hostility" and "indifference" to a religious minority. Should the requirement make that distinction—and target only "hostility?"

Imagine three different attitudes, conjoined with corresponding behavioral choices:

(1) I dislike them (a religious minority) so much, because of their offensive beliefs about the nature of God, that I will, at an opportune moment, go out of my way to harm them.

(2) I dislike them, not enough to go out of my way to harm them, but enough not to go out of my way to help them if/when they are in trouble.

(3) I don't dislike them. But I don't like them either. I'm indifferent to them. So I certainly won't go out of my way to help them if/when they are in trouble.

Attitude (1) is fairly described as "hostility"; attitude (2) is fairly described as "hostility" too, albeit of a weaker sort than attitude (1); and attitude (3) is fairly described as "indifference." Now, I don't think that there's much moral difference between attitude (2) and attitude (3). (Do you?) But let's put that point aside. The more important point, in this context, is that there is no reason to think that judges can excavate the relevant facts so thoroughly that they can confidently identify which legislative restrictions on a religious practice—in particular, which legislative refusals to exempt a religious practice from an otherwise applicable restriction—are animated by attitude (2) rather than by attitude (3) and which are animated by attitude (3) rather than by attitude (2).[21] The most sensible specification of the free

---

19. *See infra* text accompanying notes 58-60.

20. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1993).

21. In particular, there is no reason to think that judges can excavate the relevant facts so thoroughly that they can confidently identify *which legislative refusals to exempt a religious practice from otherwise applicable restrictions* are animated by attitude (2) and which are animated by attitude (3). *See infra* text accompanying notes 23-38 (discussing exemptions).

exercise norm *qua* antidiscrimination norm, therefore, is one that does not put any weight on—that does not require judges to play with—the distiuction between "hostility" and "indifference."

* * * * *

What does it mean to say that government may not discriminate against religion—or, equivalently, that the free exercise norm is an antidiscrimination norm? The answer is twofold. Government may not oppose one or another kind of conduct either

(1) because, or in part because, the couduct is, for some, (a) a religious practice (b) animated by a religious belief or beliefs thought to be false or otherwise objectionable, or

(2) because, or in part because, of hostility/indifference to the religious group (or groups) for whom the conduct is a religious practice—because of a failure to include the group within the circle of religious groups that government normally treats with active respect and concern.

3

Although it is widely accepted that the free exercise norm is an antidiscrimination norm, it *is* controversial whether the free exercise norm is more than an antidiscrimination norm. There is disagreement, both on the Supreme Court and off, about whether the norm forbids government to do anything other than discriminate against religious beliefs or religious groups. According to the Supreme Court, the free exercise norm forbids government only to discriminate against religions beliefs or religious groups.[22] As Professors Eisgruber and Sager have observed (approvingly), the Court is

> best understood as emphasizing a deep point about the *conceptual structure* of religious liberty, not simply a view about *how much* religious liberty is desirable or how it competes with other constitutional and political values. The point is this: the only sound conception of religious liberty is founded upon protecting religious exercise against persecution, discrimination, insensitivity, or hostility.[23]

However, the Supreme Court misconceives the import of the proposition that the free exercise norm is only an antidiscrimination norm.

Recall that one way government can violate the free exercise norm *qua* antidiscrimination norm is by banning (or otherwise impeding) conduct (i.e., conduct that is a religious practice for at least some who engage in it) that government would not have banned but for its hostility/indifference to the religious

---

22. *See* City of Boerne v. Flores, 521 U.S. 507 (1997); Employment Div. v. Smith, 494 U.S. 872 (1990).

23. Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty after* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, 104 (emphasis in original).

group whose conduct is banned, but for its failure to include the group within the circle of religious groups that government normally treats with active respect and concern. However, even if government action banning a religious practice—that is, even if government's refusal to exempt a religious practice from a ban to which the practice is subject—is in fact based on diminished respect and concern for the religious group whose practice is banned, it can be difficult to the point of impossible for a litigant to establish that fact directly—or for a court to discern that fact directly.[24] A sensible judicial response to this problem of proof is to allow for the possibility of establishing and discerning *indirectly* that the challenged government action is based on, that it presupposes, diminished respect and concern for the religious group whose practice is banned. How to do that? By means of this rule: If government could exempt a religious practice from a ban to which the practice is subject without seriously compromising either the objective the ban is designed to serve or any other important governmental objective,[25] but government nonetheless refuses to do so, it shall be presumed that the refusal is based on diminished respect and concern for the religious group whose practice is banned.[26] Note that this rule does not compete with, it does not go beyond, the antidiscrimination understanding of the free exercise norm. Rather, the rule is simply a practical way of implementing the antidiscrimination understandiug of the frce exercise norm; it is a way of implementing the antidiscrimination understanding in the context of adjudication, where problems of proof are a central concern. The proposed rule presupposes that what is reasonable to suspect—here, the possibility that a legislative refusal to exempt a religious practice is animated by diminished respect and concern for the religious group whose practice it is—is not always easy to establish/discern directly.

The Supreme Court, in *Employment Division v. Smith*,[27] refused to follow the rule—the approach—sketched here: After observing that Oregon's criminal ban on the use of peyote was not meant to discriminate against Native American religious practice or against members of the Native American Church, the Court refused to inquire whether Oregon had adequate reason not to exempt from its ban the

---

24. For an informed, thoughtful discussion of this problem of proof, see Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 771-80 (1998).

25. By "important" governmental objective, I mean principally the protection of "the public safety, order, health, and morals" or of "fundamental rights and freedoms." According to Article 18 of the *International Covenant on Civil and Political Rights*, *in* BASIC DOCUMENTS ON HUMAN RIGHTS 125 (Ian Brownlie ed., 1992), which the United States ratified in 1992, "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." Article 18 then states: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." *Id.*

26. *Cf.* Laycock, *supra* note 24, at 747. "[The Religious Freedom Restoration Act of 1993] excused the plaintiff from the obligation to prove bad motives or overt discrimination, and instead required the state to justify the burdens placed on religion by facially neutral laws." *Id.* Laycock was one of the principal drafters of the Religious Freedom Restoration Act.

27. 494 U.S. 872 (1990).

sacramental use of peyote by members of the Native American Church. (The Court did not always refuse to follow the approach sketched here; eighteen years earlier, in *Wisconsin v. Yoder*,[28] the Court *did* follow it: The Court concluded that, although Wisconsin's compulsory school-attendance law was not meant to discriminate against Amish practice or against the Amish themselves, Wisconsin nonetheless did not have adequate reason to refuse to exempt Amish children who had completed the eighth grade from the law's requirement that they attend school until they reached the age of sixteen.) In the Court's view,[29] and in the view of some scholars,[30] the approach recommended here competes with the position that the free exercise norm is only an antidiscrimination norm—the position that the norm does not do more than forbid government to discriminate against religions beliefs or religious groups. But the Court, and the scholars, are mistaken: again, the approach at issue here does not compete with, but indeed implements, and thereby protects, the free exercise norm *qua* antidiscrimination norm.

Michael McConnell and Justice O'Connor have each argued that there is support in the historical record ("originalist" support) for interpreting the free exercise norm to require government to exempt a religious practice from an otherwise applicable legal ban, or other legal impediment, unless there is a sufficiently good reason not to do so.[31] Others, however, including Justice Scalia, have disputed this reading of the historical record.[32] But even if McConnell and O'Counor[33] are wrong, all that follows is that the historical record does not support the proposition that government should exempt a religious practice unless there is a sufficiently good reason not to do so. However, this conclusion does not challenge my point that a sensible judicial response to the problem of proof identified above is to permit litigants to establish indirectly, and courts to discern indirectly, that the challenged government action is based on, that it presupposes, diminished respect and concern for the religious group whose practice is banned—and to do this by means of the rule that if government

---

28. 406 U.S. 205 (1972).

29. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (Scalia, J., joined by Stevens, J., concurring); *Smith*, 494 U.S. 872.

30. *See* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1268 (1994) [hereinafter Eisgruber & Sager, *The Vulnerability of Conscience*]; Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1995); Eisgruber & Sager, *supra* note 23.

31. McConnell and O'Connor have focused on the record of the founding period of the United States. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (O'Connor, J., joined in part by Breyer, J., dissenting); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1309 (1993). Kurt Lash has argued that even if the record of the founding period does not offer the support that McConnell and O'Connor think it offers, the record of the period leading up to the Civil War and beyond to the adoption of the Fourteenth Amendment—Section 1 of which makes the free exercise norm of the First Amendment applicable to the states—does offer support for the exemption interpretation of the free exercise norm. *See* Lash, *The Second Adoption*, *supra* note 5.

32. *See, e.g.*, *City of Boerne*, 521 U.S. at 537-44 (Scalia, J., joined by Stevens, J., concurring in part); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

33. And Lash. *See* Lash, *The Second Adoption*, *supra* note 5.

could exempt a religious practice from a ban to which the practice is subject without seriously compromising either the objective the ban is designed to serve or any other important governmental objective but nonetheless refuses to do so, it shall be presumed that the refusal is based on diminished respect and concern for the religious group whose practice is banned. As I said, this rule does not compete with, it does not go beyond, the antidiscrimination understanding of the free exercise norm but rather implements that understanding. If the proposed rule is in fact a sensible way for the judiciary to protect the free exercise norm from some violations that would otherwise be too difficult (or too costly) to detect, then no constitutional-theoretical consideration stands in the way of the Supreme Court adopting the rule.[34]

But *is* the proposed rule as sensible as I suggest? Consider the following hypothetical. The legislature of the State of Appalachia is deliberating about whether to ban the ingestion of all alcoholic beverages. It has not yet decided whether to do so, but it *has* decided that *if* it does so, it will exempt the sacramental ingestion of wine at Mass. On another front, the legislature has just banned the ingestion of all hallucinogenic substances, including peyote. Moreover, despite pleas to do so, the legislature has refused to exempt the sacramental ingestion of peyote by members of the Native American Church. Is the legislature's refusal animated by hostility/indifference? Assume that it is open to serious question whether granting the exemption would seriously compromise either the objective the ban is designed to serve or any other important governmental objective. Which is more sensible, as a practical matter: (1) an approach that would require a litigant to establish directly, and a court to discern directly, the presence of such hostility/indifference? Or (2) an approach that would test the reasonable suspicion of such hostility/indifference by

---

34. Indeed, one would have thought that Congress, too, which is charged under Section 5 of the Fourteenth Amendment with protecting (among other things) the free exercise norm, was free to codify such a rule. And, indeed, Congress, with the support of President Clinton, did codify a strong version of the rule (perhaps too strong a version) in the Religious Freedom Restoration Act of 1993 ("RFRA"). 42 U.S.C. § 2000bb (1994). According to subsection 1(a) of RFRA: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)...." *Id.* According to subsection 3(b): "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* In 1997, however, the Supreme Court ruled that RFRA was unconstitutional because in excess of Congress's power under Section 5 of the Fourteenth Amendment. *See City of Boerne*, 521 U.S. 507. That is, RFRA is unconstitutional, as applied to state government. For a decision that RFRA is not unconstitutional as applied to the federal government, see Young v. Crystal Evangelical Free Church, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 43 (1998). In my judgment, the Court was wrong. I concur in the judgment of the two most formidable religious liberty scholars of their generation, Douglas Laycock and Michael McConnell, that RFRA is not unconstitutional. *See* Laycock, *supra* note 24; Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997); *see also* Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589 (1996). The scholarly literature on RFRA—and, in particular, on the constitutionality *vel non* of RFRA—is enormous. *See, e.g.*, Symposium: *Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 601-960 (1998).

having the court inquire whether granting the exemption would seriously compromise either the objective the ban is designed to serve or any other important governmental objective?

The fundamental question here, I think, is twofold: How skeptical of ordinary politics, how distrustful, ought we to be when it comes to the protection of religious minorities? And how vigorously ought we to want the judiciary to protect, against discrimination, religious minorities and their religious practice? My answer to the first question: very skeptically. My answer to the second: very vigorously. Not that I hold out much hope that the judiciary—including Supreme Court justices—would often act vigorously in protecting religious minorities even if they followed the approach I recommend here. Our historal experience suggests that they would not.[35] Nonetheless, the approach I recommend here would open a doctrinal space for the judiciary to protect one or another religious minority more vigorously at least once in a (long?) while. Something Doug Laycock said comes to mind: "Some of the time, judicial review will do some good. Judges did nothing for the Mormous, but they may have saved the Jehovah's Witnesses and the Amish. If judges can save one religious minority a century, I consider that ample justification for judicial review in religious liberty cases."[36]

I conclude, therefore, that even if the Supreme Court is right that the free exercise norm is ouly an antidiscrimination norm, the Court is wrong to refuse to follow the practical approach proposed here, according to which government must exempt a religious practice from a ban if it can do so without seriously compromising either the objective the ban is designed to serve or any other important governmental objective. That approach—that rule—does not compete with, but indeed implements, and thereby protects, with appropriate vigor, the free exercise norm *qua* antidiscrimination norm.

A final point. An unfortunate cost attends the Court's refusal to follow the proposed approach: in refusing to follow that approach—an approach that does not require a direct showing of discrimination (hostility, prejudice, indifference) but ouly a showing that government could have exempted without incurring serious costs—the Court is constrained to follow instead, as Steve Smith has aptly characterized it, "a doctrinal path that leads to a constitutional discourse in which contending parties accuse each other of hostility, persecution, and bad faith. . . . [T]his sort of demonizing debate is precisely what a doctrinal emphasis on motive as a dispositive factor is calculated to elicit."[37] Smith's wise recommendation, elegantly defended in a masterful essay: "[I]f one is searching for alternatives, then . . . the discourse of humility and tolerance exemplified in [*Wisconsin v. Yoder*] invites renewed consideration."[38] Again, in *Yoder* the Court *did* follow the approach recommended here.[39]

---

35. *See* John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567 (1992).

36. Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 376 (1992).

37. Smith, *supra* note 15, at 575-76.

38. *Id.* Smith discusses, and applauds, the Court's performance in *Wisconsin v. Yoder* at various points in his essay.

39. Does the approach recommended here—the approach the Court followed in *Yoder*—privilege religion over nonreligion in violation of the nonestablishment norm? I turn

4

The question whether we Americans should want the free exercise norm to be part of our constitutional law is not controversial. It is widely agreed that it is a good thing that the free exercise norm—that is, the prohibition on government discriminating against either unpopular religious beliefs or unpopular religious minorities—is part of our constitutional law. The principal general reason why it is a good thing derives from our historical experience: the possible costs of leaving government free—of leaving the politically powerful free—to target unpopular religious beliefs/minorities as such, we have learned from history, are terrible. As our historical experience discloses, political acts of discrimination against religion, in the United States as elsewhere, have been bigoted in inspiration, repressive in aim, and cruel in practice.[40] Moreover, a politics free to attack religion is a politics free to try to secure favors from one or more religions—including the favor of genuflecting before the politically powerful—in return for the promise of not attacking the religions. What an ugly state of affairs that would be: some religions savaged and some other religions bought off.

Why, then, leave government free to discriminate against religion? There is no good reason. There is simply no need for government in the United States to be free to discriminate against religion. It is entirely sufficient that government may regulate conduct without regard to whether or not the conduct is (for some) a religious practice. It is utterly unnecessary to the achievement of any goal proper to government that it be free to disfavor religious beliefs/minorities as such. We Americans now understand that nothing of real value is lost—but something of real value is gained—by forbidding government to discriminate against religion.

Of course, every particular reason for affirming the free exercise norm as part of our constitutional law is only one of many possible reasons. The reason (or reasons) that one person, with his experience and beliefs, will feature will be different from the reason that another person, with her experience and beliefs, will feature. (What is practically important is that the different reasons converge on the same political arrangement: a constitutional commitment to the ideal of free exercise.) Some people will feature a religious or theological rationale for the free exercise norm.[41] One such rationale, toward which I can only gesture here, is this: It is a profoundly good thing for human beings to achieve religious truth (i.e., to come as close as they can to achieving it), a truth that is existential as well as intellectual; and, given all that we have learned to this point about human beings and their societies and rulers, it now seems clear that political conditions of religious authoritarianism and coercion are much inferior to political conditions of religious freedom as a path to religious truth. (That no path to religious truth is easy or sure does not entail that no path is better

---

to that question below, *see infra* text accompanying notes 57-67.

40. *See, e.g.*, JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM ch. 2 (1998) (entitled "To Kill a Quaker, to Beat a Baptist—Religious Liberty Before the Revolution").

41. *See, e.g.*, John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275 (1996). For a discussion of the Catholic Church's post-Vatican II answer to the question, see NOONAN, *supra* note 40, ch. 13 (entitled "The Light of Revelation and the Lustre of America").

than another.) In our religiously pluralistic society, however, the nonreligious/nontheological rationale sketched in the preceding paragraph has the obvious virtue of being relatively nonsectarian—a rationale that unites many religious believers and nonbelievers alike. Although I myself embrace, in addition to the nonsectarian rationale, the religious/theological rationale toward which I have gestured in this paragraph, I also agree with Doug Laycock—as against, for example, John Garvey—that "[r]eligious liberty does not presuppose that religion is a good thing."[42] The nonsectarian rationale for the free exercise norm does not presuppose that religion is a good thing—or that it is a bad thing or an indifferent thing.

5

Let's now turn to the other constituent of the American constitutional law of religious freedom: the nonestablishment norm. In the United States, what does it mean to say that government may not establish religion? Whereas the free exercise norm forbids government to discriminate *against* religion, the nonestablishment norm forbids government to discriminate *in favor* of religion.[43] In particular, the nonestablishment norm forbids government to discriminate in favor of membership in one or more churches or other religious communities or in favor of the practices or tenets of one or more churches. No matter how much some persons might prefer one or more religions, government may not take any action based on the view that the preferred religion or religions are better along one or another dimension of value than one or more other religions or than no religion at all. (For present purposes, government takes action "based on" a view if it would not have taken the action but for that view.) So, for example, government may not take any action based on the view that Christianity, or Roman Catholicism, or the Fifth Street Baptist Church, is closer to the truth than one or more other religions or churches or than no religion at all—or, if not necessarily closer to the truth, at least a more authentic reflection of the religious history and culture of the American people. (One might believe that by reflecting the religious history and culture of a people, laws and other political choices achieve a moral authority they would otherwise lack and help to maintain a useful sense of moral solidarity among the people.)

Similarly, no matter how much some persons might prefer one or more religious practices, government may not take any action based on the view that because the

---

42. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 313 (1996). Laycock offers what he calls a "religion-neutral case for religious liberty." *Id.* at 316-19. *Cf.* KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 128 ("[O]ne must present grounds for the [proposed principle of restraint] that have appeal to persons of religious and ethical views different from one's own.").

43. Government is disabled, as well, from discriminating in favor of atheism or anti-religious ideologies. *See* School Dist. v. Schempp, 374 U.S. 203, 225 (1963) ("We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion to those who do believe.'") *Cf.* GREENAWALT, *supra* note 42, at 63 (stating it "assum[es] that a principle of restraint against reliance on religious grounds would also bar reliance on antireligious grounds").

preferred practice or practices are religious, or because of the particular religion they embody, they are better—truer or more efficacious spiritually, for example, or more authentically American—than one or more other religious or nonreligious practices or than no religious practice at all. Government may not take any action based on the view that the Lord's Prayer is better than one or more other prayers or than no prayer at all. Nor (to give another example) may government subsidize the casting of "statues that are to be used for worship purposes" or give to persons, because they cast such statues, a benefit it would otherwise deny to them.

Finally, no matter how much some persons might prefer one or more religious tenets—one or more tenets about the existence, nature, activity, or will of God—government may not take any action based on the view that the preferred tenet or tenets are truer or more autheutically American or otherwise better than one or more competing religious or nonreligious tenets. For example, government may not take any action based on the view that the Roman Catholic doctrine of apostolic succession (which is, whatever else it is, a doctrine that presupposes that God exists and makes a claim about God's activity and/or will) is closer to the truth than one or more competing theological or nontheological doctrines.[44]

The general answer I have just given, to the question what (in the United States) it means to say that government may not establish religion, requires immediate modification. We can imagine two versions of the nonestablishment norm: a radical version and a moderate version. According to the radical version, government may not take any action based on the view that one or another religious belief is truer (or otherwise better) than one or another other competing religions or nonreligious belief. It is inconsistent with the radical version of the nonestablishment norm that "under God" is part of the Pledge of Allegiance, that "In God We Trust" appears on our money, and that proceedings of the Supreme Court begin with "God save the United States and this Honorable Court."[45] The radical version is not the American version of the nonestablishment norm, because it is widely accepted in the United States—and, indeed, there is no constitutional case law to the contrary—that it is not unconstitutional that that "under God" is part of the Pledge, that "In God We Trust" appears on our money, or that proceedings of the Supreme Court begin with "God save the United States and this Honorable Court."[46] Indeed, as the Supreme Court

---

44. My reference in the preceding two sentences is principally to religious tenets other than religiously based tenets about the morality of human conduct. Should religiously based tenets about the morality of human conduct be treated differently under the nonestablishment norm? *See infra* note 52.

45. Marsh v. Chambers, 463 U.S. 783, 786 (1983) ("In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, 'God save the United States and this Honorable Court.' The same invocation occurs at all sessions of this Court.").

46. *See* Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 603-04 & n.82 (1995). In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), Justice Scalia derided

> the bold but unsupportable assertion (given such realities as the text of the Declaration of Independence, the national Thanskgiving Day proclaimed by every President since Lincoln, the inscriptions on our coins, the words of our Pledge of Allegiance, the invocation with which sessions of our Court are opened

observed in 1952, "We are a religious people whose institutions presuppose a Supreme Being."[47]

Unlike the radical version, the moderate version of the nonestablishment norm contains an exception. According to the moderate version, government *may* affirm a certain few very basic religious beliefs, but government may do so *only* noncoercively. In affirming the beliefs—and, in that sense and to that extent, in discriminating in favor of religion—government may not coerce any person to affirm the beliefs, nor may it coerce any person to attend a religious service in which the beliefs are affirmed or otherwise to lend support to the beliefs (e.g., financial support in the form of tax dollars). "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . ."[48] (More about all that later.) The excepted beliefs are these: there is a God, who created us and who both loves us and judges us;[49] and because God created us and loves us, we are all sacred (inviolable, ends in ourselves, etc.). This is not to say that government does not violate the nonestablishment norm unless it acts coercively;[50] according to the moderate version of the nonestablishment norm, government violates the norm, whether or not it acts coercively, if it affirms any religious beliefs beyond the excepted beliefs. The point, rather, is that government may not affirm even the excepted beliefs unless it does so noncoercively.[51]

As it happens, the moderate version, not the radical version, is the American version of the nonestablishment norm. The moderate version, but not the radical version, accounts for the fact that "under God" in the Pledge, "In God We Trust" on our money, and "God save . . . this Honorable Court" at the beginning of proceedings of the Supreme Court are all widely accepted to be constitutional. As this fact reflects, no generation of "We the People" ever established, as part of our constitutional law, the radical version of the nonestablishment norm; nor did the

---

. . .) that government may not "convey a message of endorsement of religion." *Id.* at 29-30 (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting).

47. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

48. Lee v. Weisman, 505 U.S. 577, 587 (1992).

49. The "us" is all human beings and not, for example, just us Americans.

50. Coercion is not an essential element of a nonestablishment violation. *See* School Dist. v. Schempp, 374 U.S. 203, 223 (1963).

> [I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Id.

51. It is a good thing that coercion is not an essential element of a nonestablishment violation. *See* Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463 (1994); *see also* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 157-65 (1992). According to McConnell, "an emphasis on coercion *could* tend toward acquiescence in more subtle forms of governmental power. . . . If interpreted strictly, the coercion test would increase the power and discretion of majoritarian institutions over matters of religion." *Id.* at 159 (emphasis in original).

radical version ever become part of our constitutional bedrock.[52] At the beginning of this Essay, I noted that it is constitutional bedrock for ns that government may not establish religion. But it is not self-evident what it means to say that "government may not establish religion." There is, as I said, a moderate version and a radical version of the nonestablishment norm. It is the moderate version of the nonestablishment norm, not the radical version, that seems to be part of our constitutional bedrock.

6

Recall the approach I recommended earlier in this Essay, an approach that does not compete with, but rather implements, the antidiscrimination understanding of the free exercise norm: Government must exempt a religious practice from a ban to which the practice is subject if government can do so without incurring serions costs—that is, without seriously compromising either the objective the ban is designed to serve or any other important governmental objective.[53] Although, as I reported earlier, the present Supreme Court has chosen not to follow this approach, the Court has ruled that government, in a generous effort to create more rather than less space for religious practice, *may* exempt a religious practice from a ban to which the practice would otherwise be subject.[54] (Presumably government would not opt to exempt a religious practice from a ban unless it thought it could do so without incurring serious costs.) Of course, one will not agree that government *must* exempt a religious practice from a ban to which the practice is subject if government can do so without incurring serious costs, unless one agrees that government *may* exempt a religious practice from a ban to which the practice is subject if government can do so without incurring serious costs. The claim that government must exempt, if it can do so without incurring serious costs, presupposes that government may exempt; the claim is that government's failure to exempt in a particular instance, if it can do so

---

52. The first part of the constitutional text—the Preamble—declares:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. Preamble. In American constitutional culture, few if any persons—even, remarkably, few if any constitutional theorists—disagree that the Constitution comprises at least some directives issued by—that is, some norms "ordained and established" by—"We the People." More to the point, few disagree that the Constitution comprises some such norms partly because the norms were "ordained and established" by "We the People." It is now a convention—an axiom—of American constitutional culture that "We the People of the United States" not only "do ordain and establish this Constitution for the United States of America" but *may* ordain and establish it. This is not to say that *only* "We the People" may establish norms as constitutional. Nor is it to deny that a norm never established as constitutional by "We the People" can become constitutional bedrock for us. For a discussion of all this, see PERRY, *supra* note 4, at 15-23.

53. *See supra* text accompanying notes 24-25.

54. *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

without incurring serious costs, is discriminatory. But if one rejects the presupposition—if one believes that government may not exempt, even if it can do so without incurring serious costs—then one will understand government's failure to exempt in a particular instance not as discriminatory, but as compliant with the rule that government may not exempt. As it happens, some constitutional scholars do reject the presupposition; they argue that government may *not* exempt a religious practice from a ban to which the practice is subject even if government can do so without incurring serious costs; in their view, such an exemption privileges religion over nonreligion—it privileges religiously based practice over practice that is not religiously based—in violation of the nonestablishment norm.[55] (Among sitting Supreme Court jnstices, only Justice Stevens has embraced this position.[56]) We can all agree that some governmental exemptions of a religious practice violate the nonestablishment norm.[57] The serious question is whether each and every governmental exemption of a religious practice *qua* religious practice necessarily

---

55. *See* Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998); Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 30.

56. *See* City of Boerne v. Flores, 521 U.S. 507 (Stevens, J., concurring). Justice Stevens is not alone among modern Justices in embracing the position. *See* Welsh v. United States, 398 U.S. 333, 356 (1970) (Harlan, J., concurring in result) ("[H]aving chosen to [provide for conscientious objection for religious objectors, Congress] cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment."). The prevailing judicial view is that, within limits, see *supra* text accompanying notes 31-34, government *may* exempt a religious practice from a ban to which it is subject. *See, e.g.*, Young v. Crystal Evangelical Free Church, 141 F.3d 854 (8th Cir.), *cert. denied*, 119 S. Ct. 43 (1998); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987). As Doug Laycock has observed, "the Supreme Court has unanimously rejected the claim that regulatory exemptions for religion violate the Establishment Clause." Laycock, *supra* note 42, at 332 (citing *Corporation of the Presiding Bishop*).

57. Government's discretion to exempt is not unlimited. In *Texas Monthly, Inc. v. Bullock*, for example, the challenged statute exempted from sales and use taxes "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teachings of the faith and books that consist wholly of writings sacred to a religious faith." 489 U.S. 1, 5 (1989). A plurality of the Court reasoned that the exemption lacked

> sufficient breadth to pass scrutiny under the Establishment Clause. Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become "indirect and vicarious 'donors.'"... [W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either *burdens nonbeneficiaries markedly* or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . ., it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community.

Id. at 14-15 (emphasis added) (quoting *Corporation of Presiding Bishop*, 483 U.S. at 348 (1987) (O'Connor, J., concurring) (alteration in original)). For a helpful articulation of criteria for the "permissible" accommodation of religious practice, see McConnell, *supra* note 6, at 698-708.

violates the nonestablishment norm—for example, the statutory exemption, during Prohibition, of the sacramental use of wine at Mass,[58] or the Department of Defense's exemption of the sacramental ingestion of peyote by members of the military who belong to the Native American Church.[59]

The argument that such an exemption—exemption of a religious practice *as such*, exemption of the practice because it is a *religious* practice—necessarily violates the nonestablishment norm begins with this proposition: the nonestablishment norm forbids government to take any action privileging a religious practice on the ground that the practice, because it is religious, is better along one or more dimeusions of value than another, nonreligious practice. An exemption of a religious practice as such necessarily violates the proposition: to exempt a religious practice as such—to exempt the practice because it is religious—is to privilege the practice on the ground that the practice, because it is religious, is better (i.e., more worthy of the exemption) than any nonreligious practice subject to the ban. For example, to exempt the sacramental use of wine at Mass because the practice is religious is to privilege the practice based on the ground that because it is religious, the sacramental use of wine at Mass is more worthy of the exemption than, for example, the nonsacramental use of wine at the evening meal.

The problem with this argument is that it mistakenly assumes that the radical version of the nonestablishment norm, rather than the moderate version, is part of our constitutional law. Reeall that according to the moderate version of the norm, government *may* affirm a certain few very basic religious beliefs (but only noncoercively): there is a God, who created us and who both loves us and judges us; and because God created us and loves us, we are all sacred (inviolable). Thus, the moderate version of the nonestablishment norm, unlike the radical version, permits government to privilege, by exempting, a religious practice on the ground that because the practice affirms, whatever else it affirms, that there is a God who created us and judges us (and becanse exempting the practice will not seriously compromise any important governmental objective), the practice merits an exemption from the ban. (There is nothing *necessarily* coercive about such an exemption.[60]) The point can be articulated in more ecumenical terms: the moderate version of the nonestablishment norm permits government to privilege, by exempting, a religious

58. The Volstead Act provided that "wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed." Ch.1, 41 Stat. 308-09 (1921).

59. *See* James Brooke, *Military Ends Conflict of Career and Religion: American Indians Win Ritual Peyote Use*, N.Y. TIMES, May 7, 1997, at A16.

60. Nonetheless, one or another exemption can be coercive. Imagine, for example, that government is conscripting persons to serve in the military but that it exempts religious pacifists from such service. Depending on government's manpower needs, it is possible that in consequence of exempting one or more religious pacifists, one or more others who would not be conscripted to serve in the military must now be conscripted. This seems a good reason for concluding that in some imaginable circumstances, if government wants to exempt religious pacifists, it must exempt pacifists without regard to whether they are religious or not. Otherwise government will be coercing some persons to support—with their bodies and lives—religion as such, rather than coercing some persons to support conscientious objection whether or not it is religious.

practice on the ground that because the practice affirms that there is a transcendent reality that is our alpha and our omega—our ultimate origin and our ultimate end—the practice merits an exemption. Because the moderate version of the nonestablishment norm, not the radical version, is part of our constitutional law, it is not surprising that the Supreme Court rejects—every sitting Justice except Justice Stevens rejects—the position that government may never exempt religious practice as such.

This is not to deny the possibility that such an exemption might be grounded on a religious belief more sectarian than any the moderate version of the nonestablishment norm permits government to affirm—for example, the belief that the sacramental use of wine at Mass is theologically sound. But this possibility is not a reason for disallowing each and every exemption of religious practice as such. It is instead a reason for insisting that government be careful not to discriminate against one or more religions in deciding whether to grant such an exemption—so that, for example, if government exempts, or would exempt, the sacramental use of wine at Mass, it must also exempt, absent a persuasive explanation for declining to do so, the sacramental ingestion of peyote in Native American religions ritual. To exempt the sacramental use of wine, while refusing to exempt the sacramental ingestion of peyote when to do so would not seriously compromise any important governmental objective,[61] is not plausibly understood as exempting a religious practice merely on the ground that the practice affirms (whatever else it affirms) that there is a God who created us and judges us. But to exempt both the sacramental use of wine and the sacramental ingestion of peyote *is* plausibly understood in just those terms. In any event, the moderate version of the nonestablishment norm, unlike the radical version, permits government to privilege, by exempting, a religious practice on the ground that because the practice affirms (whatever else it affirms) that there is a God who created us and judges us—or, more ecumenically, on the ground that there is a transcendent reality that is our ultimate origin and our ultimate end—the practice merits an exemption from the ban.

Nonetheless, I concur in the judgment of Doug Laycock[62] and Fred Gedicks[63] (among others) that there is simply no good reason for government to distinguish between, on the one side, acts of conscience that are understood in religious terms by those who engage in the acts and, on the other, acts of conscience that are understood in nonreligious terms by those who engage in the acts. There is no relevant difference—no difference relevant to legitimate public policy concerns—between acts of conscience self-understood in religious terms and acts of conscience self-understood in nonreligious terms. Moreover, if we agree that for purposes of the free exercise and nonestablishment norms, there is no relevant difference between a theistic religion, like Christianity, and a nontheistic religion, like some forms of Buddhism, then there is at best a gossamer distinction between acts of conscience that are self-understood in nontheistic—religious terms and those that are self-understood in terms of nonreligious but nonetheless bedrock moral

61. *See supra* text accompanying note 25.

62. *See supra* text accompanying note 42.

63. *See* Gedicks, *supra* note 55, at 574.

convictions.[64] There is no certainly no relevant difference—no difference relevant *either* to legitimate public policy concerns *or* to the constitutional protection of free exercise—between acts of conscience self-understood in nontheistic-religious terms and such acts self-understood in terms of nonreligious but nonetheless bedrock moral convictions.[65] Doug Laycock has discussed all this at leugth in his wonderful essay, *Religious Liberty as Liberty*.[66] Here is Laycock's rigorously defended conclusion:

> [T]he law should protect nontheists' deeply held conscientious objection to compliance with civil law to the same extent that it protects the theistically motivated conscientious objection of traditional believers. *United States v. Seeger* and *Welsh v. United States* were rightly decided; they implement policies at the core of religious liberty. The law cannot protect the pursuit of all personal commitments or obligations, or all disagreements with the policy or prudence of political decisions. Unlike religious disagreements, political disagreements are committed to the political process . . . . What the law can do is protect those moral obligations of nontheists that are functionally equivalent to the protected moral obligations of theists.[67]

---

64. I invite any reader inclined to do so to try to think of a counterexample to this claim.

65. *Cf.* Welsh v. United States, 398 U.S. 333, 341 (1970) ("We think this attempt to distinguish [*United States v. Seeger*, 380 U.S. 163 (1965)] fails for the reason that it places undue emphasis on the registrant's interpretation of his own beliefs.").

66. *See* Laycock, *supra* note 42, at 331-37; *see also* Gedicks, *supra* note 55, at 574.

67. Laycock, *supra* note 42, at 331 (footnotes omitted). Of course, the protection Laycock recommends—the protection he says that law can provide—is conditional, not unconditional; it is presumptive protection, not absolute protection. Thus, it would have made sense for the courts to have interpreted RFRA in the ecumenical way Laycock's comment suggests—just as a generation earlier § 6(j) of the Universal Military Training and Service Act was interpreted ecumenically. *See supra* text accompanying note 59. (Laycock was a principal drafter of RFRA.) Such an interpretation would have gone a long way—perhaps the whole way—toward meeting a principal objection to RFRA. Professors Eisgruber and Sager have allowed for "the possibility that a constitutional privilege for religion could be rehabilitated if it were generalized to include a wider range of human commitments and thus avoid the complaints of sectarianism or partisanship. The idea would be to privilege all acts of conscience, not merely those that are rooted in a conventionally religious system of belief." Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 30, at 1268.

For a thoughtful argument that constitutional doctrine regarding religious freedom should be reoriented to "focus . . . on the protection of individual conscience" without regard to whether the conscience is "religious" in any conventional sense—and for a suggestion of what the reoriented constitutional doctrine might look like—see Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 961 (1995). *See also* Laura Underkuffler-Freund, Yoder *and the Question of Equality*, 25 CAP. U. L. REV. 789 (1986). Underkuffler's proposal is hardly utopian. Neither the *International Covenant on Civil and Political Rights*, *see supra* note 25, which the United States ratified in 1992, nor the more elaborate *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, *see supra* note 8, distinguishes between acts of religious conscience and acts of nonreligious conscience.

7

The nonestablishment norm has been at the center of several political controversies in the modern period of American constitutional law—the period roughly since the end of World War II. (It wasn't until 1947 that the nonestablishment norm was held to apply to the states.[68]) I want to mention three such controversies, the most famous of which concerns prayer in public schools. Although hugely and persistently controversial in some quarters, the Supreme Court's rulings on this matter are sound.[69] For a state legislature, a city/county school board, a public school principal, or a public school teacher to make a religious practice, like Bible reading or saying the Lord's Prayer,[70] part of the school day is for government to violate the nonestablishment norm, because it is for government to take action based on the view that the religious practice is better—truer or more efficacious spiritually, or more authentically American—than one or more other religious or nonreligious practices or than no religious practice at all. But what if the religious practice consists only of a prayer to the effect that God created us and loves us and that we are therefore grateful and give thanks to God? Although the content of that hypothetical prayer affirms no more than the moderate version of the nonestablishment norm permits government to affirm, for government to make saying that prayer part of the school day is to violate the nonestablishment norm, because, as a practical matter, it is to coerce young students to attend a religious service in which the beliefs are affirmed.[71] Recall that even according to the

---

68. *See* Everson v. Board of Educ., 330 U.S. 1 (1947).

69. This is not to say that the Court's reasons for its rulings are invariably sound. Rulings are one thing, reasons another. But the Court's rulings are sound. For the most important of the Court's rulings, see Lee v. Weisman, 505 U.S. 577 (1992); School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

70. *See Schempp*, 374 U.S. 203.

71. For the Supreme Court's development of the as-a-practical-matter-coercion point, see *Lee*, 505 U.S. at 586-99. If one's reasons for wanting not to be present at a religious service are religious reasons, there might be a free exercise problem as well as a nonestablishment one. But whether or not there is a free exercise problem, there is a (fatal) nonestablishment problem.

I should note that in *Lee v. Weisman*, the question was the constitutionality of government making prayer—prayer that affirmed no more than the moderate version of the nonestablishment norm permits government to affirm—not part of the school day, but part of a public school graduation ceremony. Unlike a majority of the Court, Justice Scalia (joined by Chief Justice Rehnquist and Justices White and Thomas) thought that there were relevant differences between government making such prayer part of the school day and its making such prayer part of a graduation ceremony—differences that justified the conclusion that government did not violate the nonestablishment norm by making such prayer part of a public school graduation ceremony. In particular, Justice Scalia derided the majority's argument that for government to make such prayer part of a public school graduation ceremony was for government to act coercively. *See id.* at 631-32 (Scalia, J., dissenting). In my judgment, the majority's argument easily survived Justice Scalia's derision. (For a contrary judgment, see Ann E. Stockman, Comment, ACLU v. Black Horse Pike Regional Board of Education: *The Black Sheep of Graduation Prayer Cases*, 83 MINN. L. REV. 1805, 1831-35 (1999).) Justice Scalia no doubt smiled on the court's decision in *Tanford v. Brand*, 104 F.3d 982 (7th Cir.

1997), *cert. denied*, 522 U.S. 814 (1997), where the court ruled that for government to make a "nonsectarian" religious prayer, delivered each year by a member of a different religious faith, part of a public university graduation ceremony was not for government to act coercively. The court concluded (sensibly, in my view) that "[u]nlike in [*Lee v. Weisman*], here there was no coercion—real or otherwise—to participate [in the prayer]." *Id.* at 985. Several cases involving prayer in public high school settings have been decided by the lower federal courts, with varying results, since the Supreme Court decided *Lee v. Weisman*. *See, e.g.*, Chandler v. James, 180 F.3d 1254 (11th Cir. 1999); Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 (9th Cir. 1998), *reh'g granted and opinion withdrawn*, No. 97-35642, 1999 U.S. App. LEXIS 5051 (9th Cir. Mar. 19, 1999), *vacated as moot*, 177 F.3d 789 (9th Cir. 1999) (en banc); Doe v. Santa Fe Indep. Sch. Dist., 171 F.3d 1013 (5th Cir. 1999); ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993). With respect to the *Santa Fe* case, see *[Governor George W.] Bush Asks Court to Reconsider Its Ruling Against Prayer at [Public High School] Football Games*, N.Y. TIMES, Mar. 27, 1999, at A10.

As I said, the Court's rulings on the matter of prayer in the public schools are sound. But the Court's ruling in *Marsh v. Chambers*, 463 U.S. 783 (1983), upholding the constitutionality of the chaplaincy at issue there, is extremely problematic: public funds were used to pay the chaplain. *See id.* at 784-85.

> The Nebraska Legislature begins each of its sessions with a prayer offered by a chaplain who is chosen biennially by the Executive Board of the Legislative Council and paid out of public funds. Robert E. Palmer, a Presbyterian minister, has served as chaplain since 1965 at a salary of $319.75 per month for each month the legislature is in session.

Id. (footnote omitted).

As I explain elsewhere in this Essay, because the nonestablishment norm forbids government to discriminate in favor of religious activities, government may not spend taxes to aid religious activities *as such*—as *religious* activities. It is irrelevant that government's discrimination affirms only one or more of those few very basic religious beliefs that the moderate version of the nonestablishment norm allows government to affirm, because government may affirm those beliefs *only noncoercively*. In affirming the beliefs—and, in that sense and to that extent, in discriminating in favor of religion—government may not coerce any person to affirm the beliefs, nor may it coerce any person to attend a religious service in which the beliefs are affirmed or otherwise to lend support to the beliefs—for example, financial support, in the form of tax dollars.

Does it violate the nonestablishment norm—should the Court rule that it violates the norm—for government to make recital of the Pledge of Allegiance, which contains the phrase "under God," part of the school day? In *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992), the court ruled that government may make voluntary recital of the Pledge part of the school day. *But cf. Lee*, 505 U.S. at 639 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting) ("Must the Pledge [of Allegiance] therefore be barred from the public schools (both from graduation ceremonies and from the classroom)? . . . Logically, that ought to be the next project for the Court's bulldozer."). Although a student is constitutionally free to refuse to recite the Pledge, *see* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), she is also constitutionally free to refuse to say the hypothetical prayer sketched in the paragraph accompanying this note, and yet for government to make saying that prayer part of the school day is nonetheless rightly understood to be practically coercive of young students.

One may plausibly conclude that whatever religious dimension routine public recital of the

moderate version of the nonestablishment norm, government may not coerce anyone to affirm any religious beliefs whatsoever or to attend a religious service in which any religious beliefs are affirmed or otherwise to lend support to any religious beliefs.

A second prominent nonestablishment controversy concerns government display of religious symbols or texts.[72] A municipality's display of a crèche in city hall at Christmastime is one example,[73] a judge's display of the Decalogue (the Ten Commandments) in his courtroom, another.[74] Such a display does not necessarily discriminate in favor of one or more religions; that is, such a display is not necessarily based on the view that the religion or religious whose symbol or text is displayed, or the religious message represented by the displayed symbol or text, is better (truer or more efficacious spiritually, or more authentically American) than one or more other religions or religions messages or than no religion or religious message at all. (Perhaps the Decalogue is merely one of several classic legal codes, secular as well as religious, on display.) But if in fact based on that view, government display of a religious symbol or text violates the nonestablishment norm. (Such display violates the norm, that is, unless what the symbol symbolizes or what the text affirms falls within the small zone of religious beliefs excepted by the moderate version of the nonestablishment norm. Neither a crèche nor the Decalogue is such a symbol or text.) One can hypothesize situations in which government display of a religious symbol or text undeniably discriminates in favor of one or more religions or religious messages. Imagine, for example, crucifixes, but no other religious symbols, hung in the classrooms of a public elementary school. In the real world, however, government display of a religious symbol or text may well be

---

Pledge retains is so slight, so marginal, as to be legally *de minimis*—that notwithstanding the phrase "under God," routine public recital of the Pledge is so much less a religious exercise than a quintessentially civic one: a collective public expression of "allegiance" (loyalty, fidelity) to "the republic for which [the flag] stands." Indeed, Justice Brennan once went so far as to suggest that routine public recital of the Pledge no longer retained "any true religious significance." *Marsh*, 463 U.S. at 818. In his dissenting opinion in *Marsh v. Chambers*, Justice Brennan (joined by Justice Marshall) wrote, "I frankly do not know what should be the proper disposition of features of our public life such as 'God save the United States and this Honorable Court,' 'In God We Trust,' 'One Nation, Under God,' and the like. I might well adhere to the view . . . that such mottos are consistent with the Establishment Clause . . . because they have lost any true religious significance." *Id.* Moreover, a student, like others participating in a routine public recital of the Pledge, can seamlessly and without fanfare or even notice—and, therefore, without obloquy—omit the "under God" from her own recital of the Pledge. So it's far from clear that the Court would achieve anything of real consequence in spending its capital on a ruling that government may not make recital of the Pledge part of the school day—or that it may make recital only of an excised Pledge, the Pledge *sans* "under God," part of the school day.

72. As distinct from government permitting a private party to display a religious symbol on public property. *See infra* note 74.

73. *See* Allegheny Connty v. ACLU, 492 U.S. 573 (1989).

74. *See* Derek H. Davis, *Religion and the Abuse of Judicial Power*, 39 J. CHURCH & STATE 203 (1997); Steven Lubet, *The Ten Commandments in Alabama*, 15 CONST. COMMENTARY 471 (1998). *Cf.* Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (holding that display of Ten Commandments in public school violates nonestablishment norm).

ambiguous; as recent Supreme Court cases illustrate, there may well be room for a reasonable difference in judgment about whether the display discriminates in favor of, about whether it affirms or endorses, one or more religions or religious messages.[75]

A third nonestablishment controversy that merits mention here concerns government endorsement of a religious-fundamentalist account of the material origin of life, including human life. The notorious *Scopes* trial,[76] famously dramatized in the play *Inherit the Wind*,[77] is a memorable episode in this controversy—a controversy that persists to this day.[78] An Arkansas statute, enacted in 1928, made "it unlawful for a teacher in any state-supported school or university 'to teach the theory or doctrine that mankind ascended or descended from a lower order of animals,' or 'to adopt or use in any such institution a textbook that teaches' this theory."[79] Did the statute violate the nonestablishment norm? According to the nonestablishment norm, government may not take action based on the view that that one or more religious tenets are closer to the truth or otherwise better than one or more competing religious or nonreligious tenets. (The few basic religious beliefs excepted by the the moderate version of the nonestablishment norm do not include Christian-fundamentalist beliefs about the material origin of human life.) The Arkansas statute violated the nonestablishment norm, therefore, if it was based on the view that a particular religious tenet, about the material origin of the human species, is truer or otherwise better than the scientific theory whose teaching the statute makes unlawful. (Here "better" means something like "more reflective of, and therefore less subversive of, the dominant religious beliefs of the community.") But was the Arkansas statute based on such a tenet? The Supreme Court, in *Epperson v. Arkansas*, appears to have believed that the law was indeed so based. Emphasizing

---

75. *See Allegheny County*, 492 U.S. 573; Lynch v. Donnelly, 465 U.S. 668 (1984). *See also* Elewski v. City of Syracuse, 123 F.3d 51 (2d Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998).

My focus here has been on government display of a religious symbol (or text). A related issue concerns government permitting a private party to display a religious symbol on public property. The Supreme Court recently listed three "factors that we consider determinative . . . [:] the State did not sponsor respondents' expression, the expression was made on government property that had been opened for speech, and permission was requested through the same application process and on the same terms required of other private groups." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763 (1995). The Court's approach seems right: If (and only if) the Court's three criteria are satisfied, the inference is sound that government's grant of permission was not based on the view that one or more religions (or religious practices or tenets) are better than one or more other religions or than no religion at all. *Cf.* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981).

76. Scopes v. State, 289 S.W. 363 (Tenn. 1927).

77. JEROME LAWRENCE & ROBERT E. LEE, INHERIT THE WIND (1955). A film version of the play, directed by Stanley Kramer, was released in 1960; the screenplay was written by Nathan E. Douglas and Harold Jacob Smith.

78. *See, e.g.*, Jon Christensen, *Teachers Fight for Darwin's Place in U.S. Classrooms*, N.Y. TIMES, Nov. 24, 1998, at F3.

79. Epperson v. Arkansas, 393 U.S. 97, 98-99 (1968) (quoting Ark. Stat. Ann. § 80-1627 (1960 Repl. Vol.)).

that the statute "was a product of the upsurge of 'fundamentalist' religious fervor of the twenties,"[80] the Court reasoned:

> [T]here can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence.[81]

But can't one imagine a nonreligious basis for a law like Arkansas's? Consider this: "Teaching the theory of evolution is simply too controversial in this community at this time, so let's not do it; let's keep the subject out of the classroom." Compare this imagined rationale with this different position: "As an explanation of the material origin of human life, the account in *Genesis* (interpreted literally) is right and the scientific theory of evolution is wrong." In *Epperson*, the Court seems to have concluded that but for the latter, religious rationale, the Arkansas law would not have been enacted—and, therefore, that the law violated the nonestablishment norm.[82]

---

80. *Id.* at 98.

81. *Id.* at 107-08.

82. Did the record in *Epperson* warrant the Court's conclusion? Whatever the answer, Justice Scalia doubted—reasonably doubted, in my view—that the *undeveloped* record in a later, related case warranted the Court's conclusion in the case. A Louisiana statute, of more recent vintage than the 1928 Arkansas law, prohibited

> the teaching of the theory of evolution in public schools unless accompanied by instruction in "creation science." No school is required to teach evolution or creation science. If either is taught, however, the other must also be taught. The theories of evolution and creation science are statutorily defined as "the scientific evidences for [creation and evolution] and inferences from those scientific evidences."

Edwards v. Aguillard, 482 U.S. 578, 581 (1987) (quoting LA. REV. STAT. ANN. §§ 17.286.4A and 17.286.3(2) and (3) (West 1982)). Did this statute violate the nonstablishment norm? It did if, as a majority of the Court concluded in *Aguillard*, it was based on sectarian religious belief. But was the statute based on such belief? Justice Scalia (joined by Chief Justice Rehnquist) insisted in dissent that there was a serious question whether the Louisiana statute was in fact based on such belief rather than on the view that two competing scientific theories of creation should be taught "so that students would not be 'indoctrinated' but would instead be free to decide for themselves, based upon a fair presentation of the scientific evidence, about the origin of life." *Id.* at 631 (Scalia, J., dissenting, joined by Rehnquist, C.J.). In Justice Scalia's view, the majority acted prematurely—and therefore peremptorily—in answering the question:

> Perhaps what the Louisiana Legislature has done is uncoustitutional because there *is* no [scientific] evidence [in support of "creation science"], and the scheme they have established will amount to no more than a presentation of the Book of Genesis. But we cannot say that on the evidence before us in the summary judgment context, which includes ample uncontradicted testimony that "creation science" is a body of scientific knowledge rather than revealed belief. *Infinitely less* can we say (or should we say) that the scientific evidence for

8

Perhaps the most consequential nonestablishment controversy now engaging the courts, state as well as federal, concerns government financial aid, both direct and indirect, to religiously affiliated organizations, especially religiously affiliated primary and secondary schools.[83]

Assume that a state legislature, with the enthusiastic support of the governor, has decided to provide a financial subsidy to financially ailing private, not-for-profit primary and secondary schools in the state,[84] which, in the judgment of the legislature and governor, are making an invaluable contribution to the education of children. Assume further that although some of the schools that would be eligible to receive the subsidy are not religiously affiliated, most are. Does the nonestablishment norm require government to exclude religiously affiliated schools from the subsidy program because they are religiously affiliated? Or does the norm permit government to include schools in the program without regard to whether they are religiously affiliated or not?

A kindred hypothetical: Assume that the legislature and governor have opted to take a somewhat different path; because they want to bring within the reach of more parents of limited financial means the possibility of sending their child(ren) to a

---

> evolution is so conclusive that no one could be gullible enough to believe that there is any real scientific evidence to the contrary, so that the legislature's stated purpose must be a lie. Yet that illiberal judgment, that *Scopes*-in-reverse, is ultimately the basis on which the Court's facile rejection of the Louisiana Legislature's purpose must rest.

Id. at 634 (emphasis in original).

83. After drafting this Part of this Essay, I received and read an article that defends substantially the same position I defend here—but, happily, does so much more fully than I do here. *See* Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 342-47. (1999). Volokh's discussion of competing arguments is especially useful.

Supreme Court majorities have been fairly relaxed about government aid to religiously affiliated colleges and universities. *See, e.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736 (1976). By contrast, Court majorities have been quite agitated about government aid to religiously affiliated primary and secondary schools. The Court's opinions with respect to government aid of the latter sort are not merely agitated but, as a whole, chaotic. There is a virtual consensus among commentators that the Supreme Court's decisions about government aid to religiously affiliated schools—in particular, its decisions about aid to religiously affiliated primary and secondary schools—are an unholy mess. It is difficult to discern a nonarbitrary distinction between the situations in which the Court has invalidated government aid to religiously affiliated primary or secondary schools and the situations in which it has declined to do so. *See, e.g.*, JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 174-76 (1995). This is not to deny that some Supreme Court justices have staked out a reasonably consistent position in the cases in question. Nonetheless, the position of the Court as a whole rests on no nonarbitrary distinction between the contexts in which the Court has struck down government aid to religiously affiliated primary or secondary schools and the contexts in which it has let such aid stand.

84. Subject to certain appropriate limitations—for example, no subsidy may go to a school that discriminates on the basis of race or sex.

private, not-for-profit primary or secondary school, they have decided to establish a voucher program under which parents who meet the eligibility criteria would receive an annual check to help them defray a portion of the expense of sending their child to such a school.[85] Does the nonestablishment norm require government to exclude religiously affiliated schools from the program? Or does the norm permit government to include schools in the program without regard to whether they are religiously affiliated or not?

A final hypothetical: Assume that the legislature and governor have concluded that because many private, charitable organizations in the state that are serving the poor or the unemployed and underemployed are doing such an effective, and cost-effective, job, the state should bolster the efforts of such organizations by making some public funds available to them.[86] Does the nonestablishment norm require government to exclude religiously affiliated ("faith-based") organizations from the program? Or does the norm permit government to include organizations in the program without regard to whether they are religiously affiliated or not?

In none of the three hypotheticals is it neeessarily the case—indeed, in none does it seem even likely the case—that the proposed government aid program is based on the view that one or more religions (or religious tenets or practices) are truer or otherwise better than one or more other religions or than no religion at all. If a government aid program is not based on such a view, the program does not violate the nonestablishment norm. As a recent third-party presidential candidate was wont to say, it's just that simple.[87] Correctly understood, the nonestablishment norm does not forbid government to provide financial aid to religiously affiliated organizations, including religiously affiliated schools, so long as two criteria are met: First, the aid is provided on a religiously neutral basis; that is, the aid is provided to eligible recipients without regard to whether they are religiously affiliated or not. Second, the aid program is not a subterfuge for discriminating in favor of one or more religions in relation to one or more other religions or to no religion.

At long last, the Supreme Court, followed by some state courts—indeed, led by a few state courts—is coming around, though hesitantly, to the position articulated in the preceding paragraph.[88] This is an important story, but there is no need to

---

85. Again, subject to certain appropriate limitations—for example, no voucher may be used in connection with a school that discriminates on the basis of race or sex.

86. Subject to certain appropriate limitations.

87. This is not to deny that the issue merits more elaborate discussion than I can provide here—discussion attentive to the arguments mounted by constitutional scholars on the other side of the issue. For a recent discussion, see *Symposium on Law and Religion*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239 (1999); *Commentary on School Vouchers and the Establishment Clause*, 31 CONN. L. REV. 803 (1999).

88. *See* Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); *see also* Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) (holding, in part, that Milwaukee voucher program, which includes religiously affiliated schools, does not violate federal nonestablishment norm), *cert. denied*, 119 S. Ct. 466 (1998); Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999) (holding, in part, that state law allowing a state tax credit of up to $500 for those who donate to "school tuition organizations," including religiously affiliated school tuition organizations, does not violate federal nonestablishment norm).

rehearse it here: The story has recently been well told elsewhere.[89] One aspect of the story merits brief mention, however: the virulent anti-Catholicism that animated not only Protestant opposition to Catholic schools but also judicial opposition (in the name of the nonestablishment norm) to government aid to such schools even when the aid program was religiously neutral. The anti-Catholic bigotry is now largely spent, but one legacy of the bigotry lingers: the position, still defended by some Supreme Court justices[90] and some scholars[91] and others,[92] that a program of government aid to religiously affiliated primary and secondary schools can violate the nonestablishment norm even if the criteria for the aid are religiously neutral and the program is not a subterfuge for discriminating in favor of the schools. That position took root in the soil of anti-Catholic bigotry, as Doug Laycock has recently explained.[93] (Laycock is not a Catholic or even a religious believer.[94]) As Laycock notes, near the end of his discussion:

> Respectable anti-Catholicism faded in the 1950s and all but collapsed in the 1960s in the wake of the Kennedy presidency and Vatican II. But even at the time of *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)], some justices were influenced by residual anti-Catholicism and by a deep suspicion of Catholic schools. This appears most clearly in Justice Douglas's citation of an anti-Catholic hate tract in his concurring opinion in *Lemon*, and in Justice Black's dissenting opinion in *Board of Education v. Allen*[, 392 U.S. 236, 251 (1968)]. The Court's opinion in *Lemon* is more subtle and arguably open to more charitable interpretations, but it relied on what it considered to be inherent risks in religious schools despite the absence of a record in *Lemon* itself and despite contrary fact-finding by the district court in the companion case.[95]

To hold that government may not give financial aid to religiously affiliated schools or other religiously affiliated organizations *even if the criteria for the aid are religiously neutral and the aid program is not a subterfuge for affirming one or*

---

89. *See* Carl H. Esbeck, *A Constitutional Case for Government Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997).

90. *See Agostini*, 521 U.S. at 240-47 (Souter, J., joined by Stevens & Ginsburg & in part by Breyer, JJ., dissenting).

91. For example, see Sullivan, *infra* note 98. *See also* Recent Cases, *Establishment Clause—School Vouchers—Wisconsin Supreme Court Upholds Milwaukee Parental Choice Program*, 112 HARV. L. REV. 737 (1999) (criticizing Wisconsin Supreme Court's decision in *Jackson*).

92. For example, the editorial board of the N.Y. TIMES. *See* Editorial, *Breaching the Church-State Wall*, N.Y. TIMES, June 12, 1998, at A20 (criticizing Wisconsin Supreme Court's decision in *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), which held, in part, that Milwaukee voucher program, which includes religiously affiliated schools, does not violate federal nonestablishment norm); Editorial, *Vouchers for Parochial Schools*, N.Y. TIMES, Nov. 11, 1998, at A26 (criticizing U.S. Supreme Court's denial of certiorari in *Jackson v. Benson*, *sub nom.* Gilbert v. Moore, 119 S. Ct. 467 (1998)). For commentary that is, in my judgment, much sounder, see Eugene Volokh, *Vouched For: School Choice Is Constitutional*, NEW REPUBLIC, July 6, 1998, at 12 (defending Wisconsin Supreme Court's decision).

93. *See* Laycock, *supra* note 89, at 50-51.

94. *See* Laycock, *supra* note 42, at 352-56.

95. Laycock, *supra* note 89, at 58 (footnotes omitted).

more religions as such would be to hold that government must discriminate against religious activities. That government may not discriminate *in favor of* religious activities does not entail that government must discriminate *against* them. I cannot imagine why, as a matter of political morality, one should want to require government to discriminate against religious activities—or, therefore, why one should want to construe the nonestablishment norm to require such discrimination. The fact that some persons object to their taxes being spent in aid of religious activities no more justifies such discrimination—it no more justifies according constitutional status to their objection, however conscientions their objection might be—than the fact that some persons object to their taxes being spent in aid of military activities, for example, or capital punishment, or abortion (etc.), justifies according constitutional status to *their* objection.[96]

Of course, because the nonestablishment norm forbids government to discriminate in favor of religious activities, government may not spend taxes to aid religious activities *as such*—as *religious* activities. But what if government's discrimination can be understood to affirm only one or more of those few very basic religious beliefs that the moderate version of the nonestablishment norm allows government to affirm? No matter, because government may affirm those beliefs *only noncoercively*. In affirming the beliefs—and, in that sense and to that extent, in discriminating in favor of religion—government may not coerce any person to affirm the beliefs, nor may it coerce any person to attend a religious service in which the beliefs are affirmed or otherwise to lend support to the beliefs—for example, financial support, in the form of tax dollars.[97] So, one *is* constitutionally entitled to have one's taxes *not* spent in aid of religious activities *as such*; one's objection to having one's taxes spent to support religious activities—religious activities *as such*—does have constitutioual status.

But none of this means that government must, or even should, discriminate agaiust religious activities; none of this entails that government must, or should, disfavor religious activities as such. That it is wrong for government to discriminate *in favor of* an activity does not mean that it is right for government to discriminate *against* the activity—any more than that it is wrong for government to discriminate against an activity means that it is right for government to discriminate in favor of the activity. One is not constitutionally entitled to have one's taxes *not* spent in aid of religious activities if excluding religious activities from the spending program

---

96. *See* Esbeck, *supra* note 89, at 18.

> As citizens we are taxed to support all manner of policies and programs with which we disagree. Tax dollars pay for weapons of mass destruction that some believe are evil. Taxes pay for abortions and the execution of capital offenders, that some believe are acts of murder. Taxes pay the salaries of public officials whose policies we despise and oppose at every opportunity. Why is religion different?

Id.

Esbeck continues: "If the answer is that we are protecting a religiously informed conscientious right not to have one's taxes go toward the support of religion, the Supreme Court has already rejected such a claim." *Id.* (citing Tilton v. Richardson, 403 U.S. 672, 689 (1971)).

97. *See supra* text accompanying note 48.

discriminates against the activities, if it disfavors the activities as religious activities.[98] Given the great extent to which the citizenry of the United States is religious,[99] it seems perverse to suggest that the nonestablishment norm should be construed not only to forbid government to discriminate in favor of religious activities, but also to require government to discriminate against such activities.

The serious question, in my judgment, is not whether the nonestablishment norm requires government to discriminate against religious activities. The serious question is whether the free exercise norm permits government to discriminate against religious activities.[100] Recall: Government may not discriminate against a religious activity—that is, it may not discriminate against a religious activity *as such*, as a *religious* activity—by denying to persons, because they engage in the activity, a benefit it would otherwise confer on them. It simply would make no sense, it would be naive and even foolish, to forbid government to ban "the casting of 'statues that are to be used for worship purposes'" while leaving government free to deny to persons, because they cast such statues, a benefit it would otherwise give to them.[101]

---

98. Thus, I disagree with those, like Kathleen Sullivan and the Baptist Joint Committee on Public Affairs, who argue that an objection to one's taxes being spent in aid of religious activities has constitutional status. *See* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 208-14 (1992); Brief of Baptist Joint Committee on Public Affairs, National Council of Churches of Christ in the USA, American Jewish Congress, Union of American Hebrew Congregations, Hadassah, the Women's Zionist Organization of America, Inc., People for the American Way, and National Coalition for Public Education and Religious Liberty as *Amicus Curiae* in Support of the Respondents, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995). Is there persuasive historical support for the claim that one's objection to one's taxes being spent in aid of religious activities has constitutional status? I am skeptical. *See Rosenberger*, 515 U.S. at 856-57 (Thomas, J., concurring)

> [T]he history cited by the dissent cannot support the conclusion that the Establishment Clause 'categorically condemn[s] state programs directly aiding religious activity' when that aid is part of a neutral program available to a wide array of beneficiaries. Even if Madison believed that the principle of nonestablishment of religion precluded governmental financial support for religion *per se* (in the sense of government benefits specifically targeting religion), there is no indication that at the time of the framing he took the dissent's extreme view that the government must discriminate against religious adherents by excluding them from more generally available financial subsidies .... The dissent identifies no evidence that the Framers intended to disable religious entities from participating on neutral terms in even-handed government programs. The evidence that does exist points in the opposite direction ....

Id.

99. According to recent polling data, "[a]n overwhelming 95% of Americans profess belief in God." Richard N. Ostling, *In So Many Gods We Trust*, TIME, Jan. 30, 1995, at 72. Moreover, "70% of American adults [are] members of a church or synagogue." Book Note, *Religion and Roe: The Politics of Exclusion*, 108 HARV. L. REV. 495, 498 n.21 (1994) (reviewing ELIZABETH MENSCH & ALAN FREEMAN, THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE? (1993)). *Cf.* Andrew Greeley, *The Persistence of Religion*, CROSS CURRENTS, Spring 1995, at 24.

100. *See* Volokh, *supra* note 92, at 14.

101. *See supra* note 17.

Therefore, for government to deny a benefit to schools or charitable organizations that they would receive but for the fact that they are religiously affiliated is for government to discriminate against religious activities in violation of the free exercise norm. (A religiously affiliated school and a religiously affiliated charitable organization is each a species of religious activity.) Similarly, if government were to deny a voucher to parents that they would receive but for the fact that the private school to which they chose to send their child is religiously affiliated, government would discriminate against religions activity in violation of the free exercise norm.[102] As the Supreme Court acknowledged over a half century ago, in *Everson v. Board of Education*, the free exercise and nonestablishment norms together require "the state to be neutral in its relationship with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used to handicap religions than it is to favor them."[103] Indeed, the Court insisted, in *Everson*, that the free exercise norm prevents a state from "exclud[ing] individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[104]

9

I have sketched, in this Essay, some of what the nonestablishment norm forbids government to do. I have also sketched some of what the norm does not forbid government to do—or, at least, some of what, in my judgment, it should not be understood to forbid government to do. I now want to turn to this inquiry: given both what the nonestablishment norm forbids government to do and also what it does not forbid government to do, should we Americans want the nonestablishment norm to be part of our constitutional law? Should we want the nonestablishment norm *not* to be part of our constitutional law? Should it be largely a matter of indifference whether the norm is part of our constitutional law? As I noted earlier in this Essay, that we Americans should want the free exercise norm (i.e., *qua* antidiscrimination

---

102. *But see* Strout v. Commissioner, 13 F. Supp. 2d 112 (D. Me. 1998).

103. 330 U.S. 1, 18 (1947).

104. *Id.* at 16 (emphasis added). "[W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." *Id.*

Contrary to intimations by the dissenting justices in *Everson*, the New Jersey law at issue in *Everson* did *not* single out Catholic schools. The law singled out private, not-for-profit schools. "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part." Chapter 191, [New Jersey] Laws of 1941, Approved June 9, 1941. Moreover, the record in *Everson* did not warrant the conclusion that the law's singling out private, not-for-profit schools was, in context, a subterfuge for discriminating in favor of Catholic schools and against whatever other religiously affiliated or secular private, not-for-profit schools then existed or might later exist.

norm) to be part of our constitutional law is not controversial. It is widely agreed that it is a good thing that the free exercise norm is part of our constitutional law. (Again, the principal general reason why it is a good thing is based on our historical experience.) Now we come to this question: should we Americans also want the nonestablishment norm—for example, the moderate version of the norm—to be part of our constitutional law? Is it a good thing that the constitutional law of the United States includes not just the free exercise norm but the nonestablishment norm as well? Note, with respect to this question, that although the international law of human rights includes provisions that function just like the free exercise norm—in particular, forbidding government to discriminate against religious practice—the international law of human rights does not include anything like a nonestablishment norm.[105] Nor does government action that would violate the nonestablishment norm necessarily violate any human right.

Consider, for example, the Constitution of Ireland, which, in the Preamble, affirms a nonsectarian Christianity:

> In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,
> We, the people of Éire,
> Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,
> . . . .
> Do hereby adopt, enact, and give to ourselves this Constitution.[106]

Given the religious commitments of the vast majority of the people of Ireland, it is not at all surprising that the Irish Constitution affirms Christianity. In so doing, the Irish Constitution violates no human right. Three things are significant here. First, the religious convictions implicit in the Irish Constitution's affirmation of Christianity in no way deny—indeed, they affirm—the idea that *every* human being, *Christian* or not, is sacred; they affirm, that is, the very foundation of the idea of human rights.[107] Second, the Irish Constitution's affirmation of Christianity is not

---

105. The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, *supra* note 8, which is the principal international document concerning religious freedom, contains nothing like a nonestablishment requirement.

106. IR. CONST. preamble. Moreover, Constitution of Ireland Article 6 states, in relevant part: "All powers of government, legislative, executive and judicial, derive, *under God*, from the people, whose right it is to designate the rulers of the State and, in the final appeal, to decide all questions of national policy, according to the requirements of the common good." *Id.* art. 6, § 1 (emphasis added). And Article 44 states, in relevant part: "The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honor religion." *Id.* art. 44, § 1. Article 40 states that "[t]he publication or utterance of *blasphemous*, seditious, or indecent matter is an offence which shall be punishable in accordance with law." *Id.* art. 40, § 6, 1°, ii (emphasis added). On "Religion in the Preamble," see J.M. KELLY, THE IRISH CONSTITUTION 6-7 (Gerald Hogan & Gerry Whyte eds., 3rd ed. 1994).

Although it affirms Christianity, the Irish Constitution explicitly disallows the "endowing" of any religion. Article 44.2.2 states: "The State guarantees not to endow any religion." IR. CONST. art. 44, § 2, cl. 2.

107. The idea of human rights is that each and every human being is sacred, and that

meant to insult or demean anyone; it is meant only to express the most fundamental convictions of the vast majority of the people of Ireland.[108] Third, and most importantly, the Irish Constitution protects the right, which is a human right, to freedom of religion; moreover, it protects this right not just for Christians, who are the vast majority in Ireland, but for all citizens. Article 44 states, in relevant part: "Freedom of conscience and the free profession and practice of religion are . . . guaranteed to every citizen. . . . The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status."[109] Therefore, the conclusion that in affirming Christianity the Irish Constitution violates a human right—or that in consequence of the affirmation Ireland falls short of being a full fledged liberal democracy—is, in a word, extreme.[110] Something Brian

---

therefore there are certain things that ought not to be done to any human being and certain other things that ought to be done for every human being. *See* MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES (1998).

108. In correspondence, Gerry Whyte of the Trinity College (Dublin) Faculty of Law (and co-author of J.M. KELLY, THE IRISH CONSTITUTION, *supra* note 106) has called my attention to

> the sectarian nature, in the context of the Christian tradition, of the Preamble. Which Christian denomination was sustained by Jesus Christ "through centuries of trial" in Irish history? And what does that imply about Christ's attitude to that denomination which was responsible for such oppression? Criticism of the Preamble is not so much that it endorses Christianity above other world religions but rather that it is sectarian within the Christian tradition.

Letter from Gerry Whyte to Michael J. Perry, July 12, 1994 (quoted with permission). Nonetheless, the existence in the Irish Constitution of the clause to which Professor Whyte refers—"who sustained our fathers through centuries of trial"—seems quite unremarkable, given the extreme brutality, including religious oppression, endured by the Irish people during the several centuries in which they were a colonized people. In any event, it is difficult to see how the existence of the clause in the Irish Constitution violates anyone's human rights. Incidentally, anyone who thinks that the Catholic Church calls the shots in Ireland knows little about contemporary Ireland. *See* Colm Tóibín, *Dublin's Epiphany*, NEW YORKER, Apr. 3, 1995, at 45.

109. IR. CONST. art. 44. Article 44 also states that "[l]egislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, *nor be such as to effect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.*" *Id.* (emphasis added).

110. There *is* a problem with the Irish situation, however. The presidential oath required by Article 12 of the Irish Constitution reads as follows:

> In the presence of Almighty God I do solemnly and sincerely promise and declare that I will maintain the Constitution of Ireland and uphold its laws, that I will fulfill my duties faithfully and conscientiously in accordance with the Constitution and law, and that I will dedicate my abilities to the service and welfare of the people of Ireland. May Ged direct and sustain me.

Id. art. 12.

The authors of J.M. KELLY THE IRISH CONSTITUTION inform us that "the Human Rights Committee of the United Nations recently indicated that the religious flavour of the Presidential oath violated Article 18 of the International Covenant on Civil and Political Rights on freedom of thought, conscience, and religion." KELLY, *supra* note 106, at 85.

Barry said in his book, *Justice as Impartiality*, is relevant here:

> We must, of course, keep a sense of proportion. The advantages of establishment enjoyed by the Church of England or by the Lutheran Church in Sweden are scarcely on a scale to lead anyone to feel seriously discriminated against. In contrast, denying the vote to Roman Catholics or requiring subscription to the Church of England as a condition of entry to Oxford or Cambridge did constitute a serious source of grievance. Strict adherence to justice as impartiality would, no doubt, be incompatible with the existence of an established church at all. But departures from it are venial so long as nobody is put at a significant disadvantage, either by having barriers put in the way of worshipping according to the tenets of his faith or by having his rights and opportunities in other matters (politics, education, occupation, for example) materially limited on the basis of his religious beliefs.[111]

The question arises, therefore, whether, even though it is certainly a good thing—a *very* good thing—that the constitutional law of the United States includes the free exercise norm, it is also a good thing that it includes a nonestablishment norm that opposes even a weak, Irish-style establishment. (If there is a satisfactory answer to this question, *a fortiori* there is a satisfactory answer to the question whether it is good that our constitutional law opposes a stronger than Irish-style establishment of religion.) What need is there for government in the United States to be free to do at least what Ireland has done? What of value is lost, if anything, by forbidding government to do even what Ireland has done?[112]

As many religious believers understand, politics is generally an incompetent domain for the discernment of theological truth.[113] Moreover, in a society that, like

---

Presumably the same problem attends the judicial oath required by Article 34, which has the very same "religious flavour." The judicial oath begins with "In the presence of Almighty God" and ends with "May God direct and sustain me." IR. CONST. art 34.

111. BRIAN BARRY, JUSTICE AS IMPARTIALITY 165 n.c (1995).

112. Commenting on the nonestablishment norm, Doug Laycock has said something in which I concur:

> [I]f I had to give up one of the rights in the First Amendment, this is the one I would give up. A rule against government persuasion or influence is less critical than a rule against government coercion. In terms of history, in terms of comparative law and, in terms of what the rest of the world does, the Establishment Clause is an extraordinary protection. We would probably still be a free society without it. But I at least would mourn the loss. Repeal of our protection against religious persuasion by government would be a serious loss . . . .

Laycock, *supra* note 36, at 379. For a helpful comparative perspective, suggesting what some of the losses might be were we Americans to abandon the nonestablishment norm, see Richard S. Kay, *The Canadian Constitution and the Dangers of Establishment*, 42 DEPAUL L. REV. 361 (1992).

113. *See* Derek H. Davis, *Assessing the Proposed Religious Equality Amendment*, 37 J. CHURCH & STATE 493, 508 (1995):

> [A] governmental policy of remaining neutral in regard to religion [is not] a denial of religious truth; it is only a commitment to steer clear of a dimension of life about which government has little competence, leaving the pursuit of religious truth to every individual. We would do well to heed the words of James

ours *and unlike Ireland's*, is so religiously pluralistic—and increasingly so—government would alienate many citizens and thereby fray, if not tear, the bonds of political community by attempting even a weak (Irish-style) establishment. Finally, from a practical standpoint, it is utterly unnecessary for us to incur the costs referred to in the preceding sentence by letting the politically powerful attempt even a weak establishment of religion. Doug Laycock has put the point well:

> In the case of religion, no one has to rule. There is no need for the government to make decisions about Christian rituals versus Jewish rituals versus no religious rituals at all. For government to make that choice is simply a gratuitous statement about the kind of people we really are. By making such statements, the government says the real American religion is watered-down Christianity, and everybody else is a little bit un-American.[114]

The point that there is no need for government to discriminate in favor of religion applies, of course, to more than just religious rituals.

The nonestablishment norm is sometimes mistakenly thought to be at least a faintly anti-religious constitutional ideal. It therefore bears emphasis, at this point, that one important way to protect freedom *of* religion is to protect, as the nonestablishment norm does, freedom *from* governmentally endorsed religion—which is, of course, a freedom of religious believers no less than of religious nonbelievers. An important way to protect the freedom of those of us who count ourselves religious to follow our religious consciences where they lead—especially the freedom of those of us who are not politically powerful—is for the constitutional law of the United States to forbid the politically powerful among us to act, in large ways or small, in obvious ways or subtle, to privilege ("establish") their brand of religion. Thus, the nonestablishment norm is good news not just for the atheists and agnostics among us; it is good news for us all. It is noteworthy, too, that the nonestablishment norm protects not only freedom of religion, *but religion itself.* One way for government to corrupt religion—to co-opt it, to drain it of its prophetic potential—is to seduce religion to get in bed with government; an important way to protect religion, therefore, is to forbid such intimacy.[115]

> Madison: "The religion of every man must be left to the conviction and confidence of every man. In matters of religion no man's right is to be abridged by the institution of civil society; religion is wholly exempt from its competence." These words . . . embody the true meaning of "religious equality."

114. Laycock, *supra* note 36, at 380. *See also* Laycock, *supra* note 42, at 317-18.

115. *See* Davis, *supra* note 113, at 507-08. As Davis states:

> In this framework religion becomes a tool, a means to control behavior, an instrument to revivify the people, a cheap hireling to provide a basis for unity, a means merely to achieve political ends. In the end, religion is the loser. True religion, genuine faith, is defamed, desecrated, and trivialized. This is the lesson of history, yet we are on the verge of repeating the same error. Religious belief has its public dimensions, to be sure, but it is first and foremost a matter of private right. Church-state separation is the great protector of true faith, not its inhibitor.

Id.; *see also* Marsh v. Chambers, 463 U.S. 783, 804 & n.16 (1983) (Brennan, J., joined by Marshall, J., dissenting).

So, we Americans *should* want the nonestablishment norm to be part of our constitutional law.[116] It *is* a good thing that our constitutional law includes not just the free exercise norm, but also the nonestablishment norm—for example, the moderate version of the nonestablishment norm.[117] Moreover, it is not a bad thing, or such a bad thing, that, as I noted earlier, our constitutional law does not include the radical version of the nonestablishment norm. (That is, it is not (such) a bad thing that, as I noted earlier, no generation of "We the People" ever established and our constitutional bedrock does not include the radical version of the nonestablishment norm.) More precisely, it is not (such) a bad thing that in the United States, government is free to affirm—but only noncoercively—the belief that there is a God, who created us and who both loves us and judges us, and the belief that because God created us and loves us, we are all sacred (inviolable). The "establishment" of religion permitted by the moderate version of the nonestablishment norm—which establishment is much weaker than, for example,

---

Even a best case scenario for the fruits of government attempting a weak establishment is depressing. *See* Laycock, *supra* note 36, at 380-81.

> Government by its sheer size and prominence will have a disproportionate influence on the kinds of rituals that are exercised and on public perception of what are appropriate rituals. The result will not be pretty. Government-sponsored religion is theologically and liturgically thin. It is politically compliant. It is supportive of incumbent administrations. In intolerant communities, it inevitably tends to impose the majority's forms, rituals, and terminology on everybody. In tolerant communities, efforts to be all-inclusive inevitably lead to desacralization, to the least common denominator, to a secular incarnation with plastic reindeer, to Christmas and Chanukah mushed together as the Winter Holidays. By stripping all the specific elements of different faiths and denominations and attempting to keep only the common elements that all faiths share, tolerant governments produce a mishmash that no faith can accept or believe in. It has always been a great puzzle to me why certain elements of the religious community invest so much effort in demanding that government model bad religion in this way. There are serious costs to these government religious observances.

Id.

116. Should government be free to discriminate, if not in favor of one or more religions in relation to one or more other religions, at least in favor of religion generally? There is no such thing as "religion generally." There are generic prescription drugs, but there is no "generic" religion. *See* Lee v. Weisman, 505 U.S. 577, 616-18 (1992) (Souter, J., joined by Stevens & O'Connor, JJ., concurring); Marsh v. Chambers, 463 U.S. 783, 819-21 (1983) (Brennan, J., joined by Marshall, J., dissenting). There is no such thing, therefore, as "discrimination in favor of religion generally." The idea that there could be such a thing is deeply misconceived.

117. Together, the free exercise and nonestablishment norms "minimize government influence on religious choices." Laycock, *supra* note 89, at 45. But to answer the question "Is it good that the two norms are part of our constitutional law?" by saying "Yes, because the two norms minimize government influence on religious choice" is little helpful: To ask whether it is good that the two norms are part of our constitutional law is the same as asking whether it is good that our constitutional law minimizes government influence on religious choices. And whatever the warrant for concluding that it is good that our constitutional law minimizes government influence on religious choice is also the warrant for concluding that it is good that the free exercise and nonestablishment norms are part of our constitutional law.

the already quite weak establishment of religion (Christianity) effectuated by the Irish Constitution—poses no credible threat to any person's conscience, whether the conscience is religious or secular; in particular, it excludes no person from full and equal citizenship in the political commuuity, whether the person is a religious believer or a religious agnostic or even an atheist. Indeed, the belief that we are all inviolable, religious believers and nonbelievers alike—a belief that for many in the Uuited States is grounded on the belief that God created us and loves us—is the very foundation not only of the general idea of human rights but also of particular human rights claims, including the claims that everyone's conscience must be respected and that full and equal citizenship in the political community should not be conditioned on one's religious belief or lack of it.[118]

We end, therefore, where we began: "Converging developments . . . reveal with ever sharper clarity the audacious ganible that underlies the American experiment. The American republic simultaneously relies on ultimate beliefs (for otherwise it has no right to the [human] rights by which it thrives), yet rejects any fixed, final, or official formulation of them (for here the First Amendment is clearest, most original, and most constructive)."[119]

118. *See generally* PERRY, *supra* note 107.

119. GUINNESS, *supra* note 1, at 18-19.