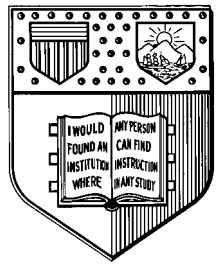

The Pluralistic Foundations of the Religion Clauses

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THE PLURALISTIC FOUNDATIONS OF THE RELIGION CLAUSES

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Contemporary Supreme Court interpretations suggest that the religion clauses are primarily rooted in the value of equality.[1] In interpreting the Free Exercise clause the United States Supreme Court has argued that in the absence of discrimination against religion or in the presence of other constitutional values, there is no violation of the Constitution when a statute inadvertently burdens religion.[2] Similarly, equality values have played a strong role in the Court's Establishment Clause jurisprudence.[3] Many distinguished commentators have pointed to the equality focus and have argued that it gives insufficient attention to the value of religious liberty.[4] In my view, these commentators are right in contending that an equality emphasis misses much of importance in religion clause jurisprudence, but their emphasis on liberty or equal liberty[5] is too narrow. Instead, I will suggest an understanding of the proper place of equality in religion clause jurisprudence requires an appreciation of the full range of values with

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[1] Without approving of the trend, Daniel Conkle has suggested that "formal neutrality has become the dominant theme under both the Free Exercise and Establishment Clauses." Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future,* 75 IND. L.J. 1 (2000); Thomas C. Berg, *Slouching Toward Secularism*, 44 EMORY L.J. 433, 446-47 (1995)(decisions "increasingly driven by the equal treatment theme"). The emphasis on equality is closely associated with, but not identical too, a "neutrality" approach to the Establishment Clause. See Mitchell v. Helms, 530 U.S. 793 (2000)(Thomas, J., plurality opinion); Zelman v. Harris, 536 U.S. 639, 676 (2002)(Thomas, J., concurring). Formal equality, but not substantive equality, is the principal, but not exclusive value of that approach. Neutrality is a doctrinal approach, then; formal equality is the primary value that it serves.

[2] Employment Div. v. Smith, 494 U.S. 872 (1990). For criticism of *Smith*, see Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty,* 70 NEB. L. REV. 651 (1991); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision,* 57 U. CHI. L.REV. 1109 (1990)[hereinafter McConnell, *Revisionism*]. For support of *Smith,* see William P. Marshall, *In Defense of Smith and Free Exercise Revisionism,* 58 U.CHI.L.REV. 308 (1991). For debate about the original meaning of the clause, compare Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective,* 60 GEO. WASH.L.REV. 915 (1992)(denying rights of exemption) with Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 HARV. L. REV. 1409 (1990)[McConnell, *Origins*]. For John Locke's position, see JOHN LOCKE, A LETTER CONCERNING TOLERATION 41-42 (James Tully, ed., Hackett Pub. Co., Indianapolis: 1983). For analysis of the effect of incorporating the clause into the Fourteenth Amendment, see Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment,* 88 NW. U.L. 1106 (1994).

[3] Thomas C. Berg, *Religious Liberty in America at the End of the Century,* 16 J.L. & RELIGION 187, 189 (2001)(referring to the Court's "shift in emphasis from separation to equality"); Berg, note 1, at 446-47; Conkle, *supra* note 1*;* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause,* 90 CALIF. L.REV. 673 (2002).

[4] *See, e.g.,* Berg*,, supra* note 1*;* Choper, *supra* note 2; McConnell, *Revisionism, supra* note 2.

[5] Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion,* 140 U.PA.L.REV. 555, 566-68 (1991)(the religion clauses protect the values of liberty and equality or a regime of equal religious liberty).

regard to both religion clauses,[6] and that appreciation in turn is independently important. Discussion of the failure to recognize the full range of values underlying the Free Exercise Clause is, of course, a necessary prelude to discussion of the Establishment Clause. But it is more than that. The failure to appreciate the breadth of values underlying the Free Exercise Clause is not only of theoretical importance, but also of pragmatic importance because recognition of the full range of values underlying the Free Exercise Clause could persuade citizens, jurists, and legislators that greater protection is appropriate in particular circumstances. With respect to the Establishment Clause, the failure to recognize the full range of relevant values has an additional difficulty. By failing to appreciate the value of protecting religion against a government trying to be "helpful," not only the Supreme Court, but also distinguished scholars[7] make some Establishment Clause problems appear easier than they are. In reality, too many values interact in too many complicated ways to hope or expect that the clauses could be reduced to a single value like equality or even a small set of determining values, and the failure to appreciate this leads the Court and important commentators to miss the extent to which the values underlying the Establishment Clause come into conflict with each other.

In exploring these arguments, Part I argues that the Free Exercise clause is supported by six values: (1) It protects autonomy; (2) It avoids the cruelty of forcing an individual to do what he or she is conscientiously obliged not to do or to penalize an individual for responding to an obligation of conscience;[8] (3) It preserves respect for law and minimizes violence triggered by religious conflict;[9] (4) It combats religious discrimination;[10] (5) It promotes political

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[6] Some scholars have somewhat broader views of the scope of religion clause values than most others in the field, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1154-1301 (2d. ed. The Foundation Press, 1988); Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise,* 67 TUL. L.REV. 87, 112-17 (1992)[hereinafter Hall, *Civic Virtue*]; Timothy L. Hall, *Religion, Equality, and Difference,* 65 TEMPLE L.REV. 1 (1992)[hereinafter Hall, *Equality*]; Daniel O. Conkle, *Toward A General Theory of the Establishment Clause,* 82 NW. U.L.REV. 1113, 1132-35 (1988) [hereinafter Conkle, *General Theory*] also displays eclectic views of Establishment Clause values. See generally DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES (Foundation Press, New York: 2003)[hereinafter CONKLE, CONSTITUTIONAL LAW]. Although I share their commitment to a broad understanding of the values underlying the religion clauses, I part company with them concerning the character of the religion clause values, the way in which they should be defended, and the manner in which they should be applied. Moreover, none focus upon the complicated ways in which equality relates to the Religion clauses.

[7] See, e.g., Berg, supra note 3; JESSE CHOPER, SECURING RELIGIOUS LIBERTY (1995); Douglas Laycock, *The Underlying Unity of Separation and Neutrality,* 46 EMORY L.REV. 43 (1997); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion,* 39 DEPAUL L.REV. 993 (1990); Lupu, *supra* note 5; Michael McConnell, *Coercion: The Lost Element of Establishment,* 27 WM. & MARY L.REV. 933 (1985-1986)[hereinafter McConnell, *Coercion]*. *But cf.* note 28 *infra* (McConnell recognizes and argues on behalf of the concern that government promotion of religion harms religion).

[8] See text accompanying notes to *infra.*

[9] See text accompanying notes to *infra.*

[10] See text accompanying notes to *infra.*

community;[11] and (6) It protects the personal and social importance of religion.[12]

Part II argues that the Establishment Clause is supported by seven values: (1) It protects religious liberty including the protection of taxpayers from being forced to support religious ideologies to which they are opposed;[13] (2) It stands for equal citizenship without regard to religion;[14] (3) It protects against the destabilizing influence of having the polity divided along religious lines;[15] (4) It promotes political community;[16] (5) It protects the autonomy of the state to protect the public interest;[17] (6) It protects churches from the corrupting influences of the state;[18] and (7) It promotes religion in the private sphere.[19]

In assessing the appropriate relationship between religion and the state, it is vital to draw upon an eclectic mix of resources. No single source of interpretation should be relied upon as dispositive. Although original intent is entitled to some weight in some circumstances, it should not be primary for many reasons. It is not clear that the original intent of the framers was that their intent was to be followed.[20] Even if it were, it seems clear that the framers did not agree upon the appropriate relationship between religion and government.[21] And, even if they did agree, it is not clear that a theory of law requiring us in the twenty-first century to be bound by the will of a group of eighteenth century white male agrarian slaveholders would have a lot to recommend it.[22] Moreover, our whole history of constitutional interpretation testifies that

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[11] See text accompanying notes to *infra.*

[12] See text accompanying notes to *infra.*

[13] See text accompanying notes to *infra.*

[14] See text accompanying notes to *infra.*

[15] See text accompanying notes to *infra.*

[16] See text accompanying notes to *infra.*

[17] See text accompanying notes to *infra.*

[18] See text accompanying notes to *infra.*

[19] See text accompanying notes to *infra.*

[20] H. Jefferson Powell, *The Original Understanding of Original Intent,* 98 HARV. L. REV. 885 (1985).

[21] Conkle, *supra* note 6, at 19. For an excellent account of different paths taken to the religion clauses and their historical antecedents, see JON WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT : ESSENTIAL RIGHTS AND LIBERTIES 7-36 (Westview Press, Boulder: 2000).

[22] Gordon S. Wood, *Slaves in the Family*, NEW YORK TIMES BOOK REV. 10 col. 3 (Dec. 14, 2003): "Seeing Washington and Jefferson as slaveholders, men who bought, sold , and flogged slaves, has to change our conception of them. They don't belong to us today; they belong to the 18th century, to that course and brutal world that is so remote from our own." Although we might wish that the eighteenth century were more remote from our own in its

precedent is a more important source of interpretation than original intent.[23]

Precedent may be more important than original intent, but it can not be of primary importance for our inquiry. Our point here is not to follow the law as if we were lower court judges, so precedent could not be our primary guide. In determining the value of the religion clauses, we should consult the best thinking on the subject and that should include the writing of framers, jurists, political theorists and commentators. Moreover, we should be influenced by how relationships between church and state have worked in practice, and there the testimony of historians, political scientists, sociologists, and theologians is indispensable. In short, my view is that in interpreting the religion clauses, we should act like constitutional scavengers,[24] appropriating the best of theory and the best descriptions of how the world actually works in arriving at our conclusions. On the other hand, the task is not to produce a "perfect" Constitution[25] divorced from the values, experiences, and traditions of our nation. Our scavenging must produce insights that comfortably fit within our evolving traditions.[26]

In the end, there is no substitute for practical reason. Indeed, when it comes to applying the religion clauses to concrete cases, I press for the view that there is no pat formula, no single determining principle to resolve them. Balancing or prudential judgment is unavoidable with respect to both religion clauses By this I do not mean to suggest that ad hoc balancing is always appropriate. Far from it. The mix of values frequently suggests the formulation of rules and standards to apply in specific factual contexts.[27] That these rules or tests may differ need not

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coarseness and brutality, Wood's point about the founders is on the mark.

[23] Cf. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 97 (Harvard University Press, Cambridge:1993)(on an originalist view, the "resulting understanding of the Constitution would be dramatically different from the understanding that prevails today").

[24] *Cf.* Gregory S. Alexander, Book Review, 71 CORNELL. L.J. 249 (1985): "In the deconstructed legal culture lawyers must be intellectual scavengers raiding other disciplines for helpful vocabularies, using as much of the discourse as seems helpful, and discarding the rest."

[25] Although I do not share Henry Monaghan's views of the due process clause, I think it unassailable that there can be a gap between what is constitutional and what is just. Henry P. Monaghan, *Our Perfect Constitution* , 56 N.Y.U. L. Rev. 353 (1981).

[26] RONALD DWORKIN, LAW'S EMPIRE 176-275 (The Belknap Press, Cambridge: 1986).

[27] Thomas Berg recognizes that different tests may be appropriate in different Establishment Clause contexts, and he suggests that inquiry as to the underlying values that point to one test or another is required. See generally Thomas C. Berg, *Religious Clause Anti-Theories,* 72 NOTRE DAME L.REV. 693, 696-97 (1997). I agree with this methodological perspective, but part company with Professor Berg regarding the scope of values underlying the Establishment Clause. *Cf.* Kathleen M. Sullivan, *Foreword, The Justices of Rules and Standards,* 106 HARV. L. REV. 22 (1992); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379-430 (1985); Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285; Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978).

signal confusion. They may simply respect relevant differences. To have a sense of this, however, it is necessary to consider a range of situations. Accordingly, I discuss many examples including (1) the ingestion of peyote; (2) animal sacrifice; (3) the government's use of religious symbols; (4) government's involvement with monotheistic prayer including the Pledge of Allegiance; (5) the teaching of evolution in the public schools; (6) government protection of conscientious objectors and those who refuse to work on the Sabbath; and (7) government support for religion within and without the public schools.

In both parts of this article, I argue that the religion clauses can not be explained by reference to equality. The equality value is important, but I try to show that many deviations from equality are deeply embedded in the framework of government operations. For example, it will not work to maintain that our Constitution regards religion and non-religion as equal. Indeed, the religion clauses are best interpreted to protect religion not just because of values like autonomy, equality, and religious peace, but because religion is regarded as important. In my view, this is a regrettable interpretation. It obviously is a bitter pill for religious skeptics to swallow, and it should even be a source of regret for most religious believers. As I will argue, however, it appears to be the best reading of our evolving Constitution.[28] Nonetheless, the foundational view that religion is important does not flirt with theocracy. Far from it. The Constitution forbids coercion and the favoring of one religion over another - except when it doesn't - more on that later. Even more important, with some exceptions, the Constitution is best interpreted to curb government intervention to favor religion, not because religion is a constitutional stepchild, but because the seductions of governmental dependence are great and because government is not to be trusted.

The upshot of these values and principles is that other deviations from religious equality are sometimes permitted. Government can engage in noncoercive monotheistic prayers, engage in practices that are forbidden by many established religions, and remove obstacles from the practice of some religions, but not others. Deviations from religious equality are not always fatal, nor should they be. Similarly, compliance with religious equality should not always pass muster under the religion clauses. The kind of formal equality denying religious liberty to all who are burdened by a law not aimed at religions is unworthy of respect. Financial aid afforded to religious and non-religious schools alike raises serious Establishment Clause issues despite compliance with equality. The same applies to proposals to permit equal access to classrooms for religious and secular leaders. For those who revel in simplicity these conclusions will be unsettling. But there is a deeper concern. Compliance with equality is seen by many as a proxy for fairness. If equality is not the central meaning of the religion clauses, there is the suspicion that everyone is not being treated fairly. That suspicion is correct, and improvements can be made, particularly in the direction of substantive equality. I will argue, however, that religious equality can not possibly be achieved in a diverse society. Given the pluralistic character of the values underlying the religion clauses and the variety of contexts in which questions about the legal status of religion arise, equality can best be seen as one important value in a rich and

[28] In so arguing, I support the view that interpretation of the Constitution is a mixed normative and descriptive judgment.

evolving tradition.

I. THE FREE EXERCISE CLAUSE

The Massachusetts Bay Colony in an effort to protect its inhabitants from blasphemers and heretics banished them from the colony. If those banished returned, the authorities engaged in whippings, cut off ears, bored tongues with hot irons, and/or executions.[29] Freedom of religion for minority religions was the right to keep quiet, the right to be punished, or the right to leave Massachusetts.[30] To stay in Massachusetts was to accept the terms of the orthodox religious deal.[31]

The fighting legal issue regarding free exercise today is not whether persons are free to hold opinions different from the majority or to express those opinions in the public square, but the extent to which government can restrict religious action.[32] There is general agreement that government may not single out religious action for special adverse treatment.[33] The question is whether a general law that incidentally burdens religious conduct is vulnerable on the ground that it violates the free exercise of religion. Let me begin by giving two examples and proceed to analyze them under the Court's approach, under traditional liberal approaches, and under communitarian approaches before developing my own views.

(1) The state of Oregon outlaws the ingestion of peyote regardless of the motivation for doing so. Four persons ingest peyote: the first as part of a religious ceremony of a Native American church; the second, as an integral part of an artistic life on the belief that the ingestion

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[29] TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY 48-49 (University of Illinois Press, Urbana: 1998); JAMES A. MORONE, HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY 70 (Yale University Press, New Haven: 2003).

[30] Hall, *supra* note 6, at 29-30. The colonists thought they were following the will of God. For the more influential argument that most religious persecutors misunderstood the will of God, see LOCKE, *supra* note 2, at 23-26. Augustine, on the other hand, thought that religious persecution was theologically justified. HANS KUNG, GREAT CHRISTIAN THINKERS 81(Continuum, New York: 2000). And Locke's toleration did not extend to Catholics, Muslims, and atheists. Locke, *supra,* at 50-51. For critical evaluation of Locke's argument for religious liberty, see Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997). On the Christian theory of persecution, see generally PEREZ ZAGORIN, HOW THE IDEA OF RELIGIOUS TOLERATION CAME TO THE WEST 14-45 (Princeton University Press, Princeton: 2003); John T. Noonan, Jr., *Development in Moral Doctrine, in* CHANGE IN OFFICIAL CATHOLIC MORAL TEACHINGS 291-93 (Charles E. Curran, ed., Paulist Press, New York: 2003).

[31] HALL, *supra* note 29, at 48-71.

[32] Sometimes government can interfere with religion without interfering with religious action , for example, by desecrating sacred places. See generally, David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty,* 76 CORNELL L. REV. 769 (1991).

[33] Church of the Lukumi Babalu Aye, 508 U.S. 520 (1993).

of peyote is an important part of the creative process; the third, as an integral part of a hedonistic life style; the fourth, who does it just to see what it might be like.

(2) Three persons violate a law against the torture of animals: the first, as part of a required religious ceremony; the second, as a piece of performance art; the third, as a part of his sadistic life style.

A. The Court's Approach

Although the matter is not entirely free of difficulty, it seems that the Court as currently constituted would deny the religious claims in each of the cases mentioned above. Justice Scalia, writing for the Court in *Employment Division v. Smith,*[34] argued that a law outlawing the ingestion of peyote could constitutionally be applied to a participant in a religious ceremony of the Native American Church.[35] Justice Scalia did not suggest that a cognizable religious claim was outweighed by the importance of the state interest in the individual case. Rather he maintained that there was no cognizable religious interest in the first place.[36] Any other conclusion, he suggested would lead to a "system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[37] Ironically, under existing law, the artistic claimant in both examples would have a cognizable speech claim[38] (even though it would undoubtedly not be successful). It seems that the first amendment is somewhat more solicitous for speech than it is for religion.[39] I believe one would have to rise very early in the morning to justify this differential treatment, and the Court has been sleeping on the subject for some time. In any event, the Court's bottom line would be the same for all claimants in both examples. One way or another, their claims would be denied;

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[34] 494 U.S. 872 (1990).

[35] The case actually dealt with the denial of unemployment compensation benefits to individuals who had been fired from their jobs at a private drug rehabilitation center for ingesting peyote as a part of a religious service. 494 U.S. at 874. In order to resolve the case the Court had to determine whether the law prohibiting ingestion of peyote could constitutionally have been applied to the drug use at the religious ceremony. *Id.* at 876.

[36] *Id.* at 878-80. Justice Scalia maintained that a religious claim could be mounted only in circumstances where religion was singled out for special treatment (*id.* at 884) or where the religious interest was accompanied by another constitutional interest, giving rise to a "hybrid" claim. *Id.* at 881-82. On the fate of *Smith* in the lower courts, see Carol M. Kaplan, *The Devil is in the Details: Neutral Generally Applicable Laws and Exceptions from Smith,* 75 N.Y.U. L.REV. 1045 (2000).

[37] *Id.* at 890. The sweep of the opinion led Michael McConnell to say that the *Smith* decision was "undoubtedly the most important development in the law of religious freedom in decades." McConnell, *Revisionism, supra* note 2, at 1111.

[38] Laws of general application with an incidental impact on freedom of speech are required to meet what has in practice been a relatively undemanding test. United States v. O'Brien, 391 U.S 367 (1968).

[39] On the irony of this, see KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 22-24 (Princeton University Press, Princeton: 1995).

equal protection under the law is not always sweet.

B. Liberal Theory

Equality of application can be achieved in a different way, however. Followers of Immanuel Kant believe that rights may not be infringed unless the exercise of those rights interfere with the rights of others.[40] So, with respect to the peyote example, a follower of Immanuel Kant might argue that the autonomous choice of the individuals involved should be respected because the exercise of the choice to ingest peyote does not interfere with the rights of another.

The animal torture example is particularly difficult for the Kantian. The Kantian traditionally believes that humans are distinguished from animals in their ability to reason and make autonomous choices.[41] Animals, on this reasoning, have no rights because they are not moral creatures.[42] Applying the principle that the autonomous choices of individuals should be protected unless they interfere with the freedom of others, a principled Kantian would have to conclude that the believer, the artist, and the sadist should each be protected in a just state. Nietzsche once wrote that to have a system is to lack integrity,[43] and I would hope that followers of Kant would lack integrity in this circumstance, *i.e.,* they should not follow their principles. Indeed, Kant did not follow his principles. He argued that animal cruelty could be proscribed because it brutalized human beings,[44] but this prefers one life style over another, and sidesteps the notion that imposing suffering on animals is an independent wrong regardless of its impact on human beings.[45]

What the approaches of Scalia and Kant have in common is that neither of them treat religious liberty as different from other forms of liberty. Religion is not deemed to be special,

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[40] IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 35, 43-44 (J. Ladd trans. 1965)(may not interfere with the freedom of another); JOHN RAWLS, A THEORY OF JUSTICE 204 (Cambridge, Mass., The Belknap Press: 1971)("[A] basic liberty covered by the first principle can be limited only for the sake of liberty itself, that is, only to insure that the same liberty or a different basic liberty or a different basic liberty is properly protected and to adjust the one system of liberties in the best way."); RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 199-200 (Cambridge, Mass., Harvard University Press: 1977)(except in extreme cases, rights may be limited only when another right is abridged).

[41] See generally IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (L. Beck trans. 1959).

[42] IMMANUEL KANT, THE METAPHYSICAL PRINCIPLES OF VIRTUE 105 (J. Ellington trans. 1964)

[43] Friederich Nietzsche, *The Twilight of the Idols, in* THE PORTABLE NIETZSCHE 463, 470 (Walter Kaufmann, ed., trans, Penguin Books, Harmandsworth, England: 1968).

[44] KANT, *supra* note 42, at 106 (cruelty to animals violates a duty to oneself because it reduces compassion which, in turn, will harm relations with other human beings).

[45] Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship,* 30 UCLA L.REV. 1103, 1138-40 (1983).

and religious liberty would have no special privilege in these examples.[46]

C. Communitarian Theory

Some forms of communitarianism, however, would argue for different treatment. Communitarians maintain that liberalism exalts individual liberty at the expense of democracy and self government,[47] autonomy at the expense of civic virtue[48] or community, and rights at the expense of duties.[49] This cluster of ideas can lead to differing approaches regarding freedom of religion. Suppose we distinguish between participatory communitarians, traditional communitarians, and substantive communitarians.

A participatory communitarian might place most emphasis on self government[50] and the capacity of the polity to change. Rights, on this conception, would not be discarded, but would emphasize those rights that flow from the idea of self government and the conditions that make self government possible.[51] On that analysis, it is easy to see how rights of freedom of speech and press would arise. It is less easy to ground a comprehensive conception of freedom of religion rights.[52] It would be possible to squeeze freedom of religion into the idea of self

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[46] *Cf.* RAINER FORST, CONTEXTS OF JUSTICE 69 (John M. Farrell, trans., University of California Press, Berkeley: 1994)("A person's conviction is worthy of protection because it is identity determining, and not because it is religious").

[47] MARY ANN GLENDON, RIGHTS TALK 109-44 (The Free Press, New York: 1991).

[48] ALASDAIR MCINTYRE, AFTER VIRTUE (2d ed. University of Notre Dame Press, Notre Dame, Indiana: 1984). GERTRUDE HIMMELFARB, THE DE-MORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES 3-18, 246-57 (Alfred A. Knopf, New York: 1995). Many of those associated with communitarianism do not accept the label for one reason or another, and they include McIntyre, Michael Sandel, and Michael Walzer among others. DANIEL BELL, COMMUNITARIANISM AND ITS CRITICS 1 (Clarendon Press, Oxford: 1993). For the argument that liberalism also seeks to support virtues appropriate for the maintenance of a regime of personal freedom, see PETER BERKOWITZ, VIRTUE AND THE MAKING OF MODERN LIBERALISM (Princeton University Press, Princeton: 1999).

[49] GLENDON, *supra* note 47, at 76-108.

[50] Self government does not refer to individual autonomy, but to democratic rule of the polity. At best, of course, it is a metaphor. It would be hard to know who the self is that rules in our "democratic" society. On the difficulties associated with the metaphor, see Steven H. Shiffrin, *Democratic Justice and the "Loyal Opposition,"* THE GOOD SOCIETY

[51] MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 321-28 (Belknap Press, Cambridge: 1996)(cultivation of religion and morality necessary for appropriate discourse in a self governing society). *Cf.* SUNSTEIN, *supra* note 23 (liberal republican defense of rights). *Cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980)(liberal pluralist defense of rights grounded in processes of representative democracy). For criticism of Sunstein and Ely, see James E. Flemming, *Constructing the Substantive Constitution,* 72 TEXAS L.REV. 211 (1993).

[52] On the problem, see ROBERT DAHL, DEMOCRACY AND ITS CRITICS 180-92 (Yale University Press, New Haven: 1989).

government by positing that religion is necessary for the virtues that support self government. Even granting this move, however, it is not clear why self governing citizens could not be permitted to distinguish between those religions that support civic virtues and those that do not. Of course, the notion of self government assumes equality, but on the communitarian understanding, equality of persons does not necessitate equal respect for the choices people make.[53] The participatory branch of communitarianism, therefore, could support some religions, but not others. On the other hand, Cass Sunstein suggests that religious peace is a precondition for self government, and that religious persecution or, more narrowly, government favoritism of religion endangers religious peace.[54] This would provide a limit on persecution, but it would not provide sturdy protection for those religions that were unable to put up a significant fight[55] or in other circumstances where violence or instability were unlikely. Moreover, a virtuous citizenry and a citizenry not embroiled in overt hostilities have value above and beyond their support of political deliberation. Finally, the civic virtue and religious peace values are both instrumental and do not exhaust the range of values supporting religious freedom.

Perhaps traditional communitarianism can provide a stronger footing.[56] It could certainly be argued a substantial part of the American tradition is to protect religion. On the other hand, communitarianism, even on that understanding, justified anti-catholicism[57] and anti-semitism,[58] and discrimination against Jehovah's Witnesses[59] in much of our history, and it is not clear why it would not justify discrimination against Muslims[60] and other minority religions in

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[53] MICHAEL J. PERRY, RELIGION IN POLITICS 59, 64-65 (1999); MICHAEL J. SANDEL, POLITICAL LIBERALISM, 107 HARV. L. REV. 1765, 1794 (1994)(book review).

[54] SUNSTEIN, *supra* note 23, at 133-41, 307.

[55] JOHN H. GARVEY, WHAT ARE FREEDOMS FOR 48 (Harvard University Press, Cambridge: 1996)

[56] IAN SHAPIRO, THE MORAL FOUNDATION OF POLITICS 171 (Yale University Press, New Haven: 2003): "The communitarian outlook is distinctive, and distinctively at odds with the Enlightenment, in that its proponents see the good as collectively given, embedded in the evolving traditions and practices of political communities."

[57] Will Herberg, Protestant-Catholic-Jew 232 (Rev. ed., Anchor Books, Garden City, New York: 1960); John C. Jeffries, Jr. and James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH L.REV. 279 (2001).

[58] STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE (New York University Press, New York: 1997).

[59] Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette, in* TEN LEADING CONSTITUTIONAL CASES (Michael Dorf, ed., Foundation Press, forthcoming 2003).

[60] ROWAN WILLIAMS, WRITING IN THE DUST 67-68 (William B. Erdmans Pub. Co., Grand Rapids, Mich.: 2002); Moore, *supra* note 198, 255, at 111-112.

contemporary culture.[61] American ideals honor freedom of religion; American practice protects freedom of religion except when it doesn't. In interpreting American culture, do we look to the practice or to the theory?[62] If we look to the practice, we ratify violations of religious liberty. If we look to the ideals, we risk abandoning the rich complications of the community for the abstract liberalism that communitarianism purports to denounce.

Substantive communitarians value religion as a source of moral and civic virtue, as a way of life, and a way of truth.[63] These beliefs standing alone, however, are not necessarily tied to freedom of religion.[64] After all, the leaders of the Massachusetts Bay Colony were substantive communitarians. Contemporary substantive communitarians presumably would make distinctions of a quite different sort than those of John Winthrop, Cotton Mather and their fellow colonists. Substantive communitarians value religion as an associational activity and incline against individualism.[65] If the person who ingested peyote for religious reasons was associated with an institutional religion, the substantive communitarian would be sympathetic. The substantive communitarian might have less sympathy for the sincere New Age pacifist believer in God if she did not belong to a religious group. Nonetheless, the substantive communitarian might be consoled by the fact that the pacifist would be following a duty to God rather than making an autonomous choice.

D. Free Exercise Values

In my view, The approaches taken by the Court, by the Kantian liberal tradition, or by

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[61] *Cf.* WIL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 227 (Clarendon Press, Oxford: 1990): "The problem of the exclusion of historically marginalized groups is endemic to the communitarian project."

[62] SHAPIRO, *supra* note 56, at 175: "In most, if not all, communities, there is considerable disagreement about how the collectively given norms and practices that have been inherited should be interpreted and what they require in practice."

[63] "'[R]eligion was especially important to the development of a republican culture.' with religious (including especially Christian) values and insights playing prominent and substantial roles." Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America,* 12 J.L. & RELIGION 337, 356 (1995-96), *quoting* Richard Vetterli and Gary C. Bryner, *Religion, Public Virtue and the Founding of the American Republic, in* TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 92 (Brigham Young University Press, Provo: 1988). Lash, supra note 2, at 1118-22. As will become clear, stress on cultural values does not exhaust the richness of the case for religious freedom.

[64] On the perils of religious communitarianism, see FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 122 (1995). Hall, *C* ivic Virtue, ("Historically, republican principles were a poor ally for religious liberty. They could as easily justify jailing a dissenting preacher who threatened republican solidarity as giving hin free room to propagate minority religious tenets, and they were the joists over which the platform of religious establishment was most frequently laid.").

[65] *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 17 (Basic Books, New York: 1993)(defining religion in terms of group worship).

communitarianism are not sufficiently sensitive to the special claims of religious believers.

1. Autonomy

Both the religious claimants and the non-religious claimants in our examples maintain that they have made an autonomous choice to lead their lives in a particular way and that the state is burdening an important aspect of their lives. Autonomy, unquestionably is a significant value, and it is part of the reason that free exercise of religion is supportable. Moreover, it should be clear that the *free* exercise of religion implies the right not to practice religion.[66] As we have seen, however, the autonomy value does not distinguish religious claims from artistic claims or hedonistic claims. If autonomy is the crucial value, one can make a case for all of the claimants in the peyote and animal torture examples.

2. Obligation and State Cruelty

Unlike the other claimants, the religious claimant maintains that her conduct is dictated by an moral obligation, not pursued according to a choice or a preference.[67] To be sure, the religious claimant has made the choice to accept the obligation (or may believe that he or she has been given the grace to accept the obligation).[68] Nonetheless, it seems particularly cruel[69] for the

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[66] *Cf.* Torcaso v. Watkins, 367 U.S. 488, 496 (1961)(requirement that a notary swear a belief in God unconstitutional because it invaded freedom of belief and religion).

[67] For these purposes, it should not matter whether the obligation comes from a belief in God, traditional or otherwise. It is enough that the obligation is morally based. See Welsh v. United States, 398 U.S. 333 (1970)(interpreting the University Military Training and Service Act to protect conscientious objection on moral grounds without belief in God); Seeger v. United States, 380 U.S. 163 (1965)(interpreting the University Military Training and Service Act to protect conscientious objection not based upon belief in a traditional God); AMY GUTMANN, IDENTITY IN DEMOCRACY 168-78 (Princeton University Press, Princeton: 2003); see also William Herbrechtsmeier, *Buddhism and the Definition of Religion: One More Time*, 32 J. FOR THE SCIENTIFIC STUDY OF RELIGION 1(1993).

[68] Marshall, *supra* note 2, at 327 argues that religion might be best understood as a "product of man's freedom rather than his external obligation." He suggests that this is more consistent with the commitment to freedom in the first amendment. This characterization is put forward to resist the free exercise claim of obligation. This conception of religion is underdeveloped, and seems to be beside the point. Certainly it is not inconsistent with the Constitution to interpret free exercise of religion to embrace the following of obligations when they are freely accepted. To the extent obligations are deemed to be imposed without the possibility of rejection (presumably under some deterministic reasoning), the case for protection seems even stronger. On the importance of obligation to religion and the role of subjectivity in accepting the obligation, see KARL RAHNER, FOUNDATIONS OF CHRISTIAN FAITH: AN INTRODUCTION TO THE IDEA OF CHRISTIANITY 343-44 (William V. Dych trans., A Crossword Book, New York: 1978).

[69] One might argue that the problem is not cruelty, but rather that the state has no jurisdiction to interfere in the religious sphere. McConnell, *Religious Freedom at a Crossroads,* 59 U.CHI. L.REV. 115, 172 (1992). To be sure, the Framers had a widespread view that some things belonged to God and others to the state (Hall, *Equality, supra* note 6, at 32-36), but it is not clear from the historical evidence that exemptions of this type fell on God's side of the ledger (see Hamburger, supra note 2), and this approach would be difficult ro reconcile with a balancing approach

state to force an individual to do what he or she is obliged not to do or to penalize an individual for responding to an obligation.[70] Moreover, to conflate religious obligations (or obligations of conscience) with life style preferences seems to conflate too much.[71] Whether or not the religious claimant should be punished for ingesting peyote, that claimant has a stronger case than the artist who simply prefers, however strongly, to engage in an artistic project. The point here is not that religion is more important. The religion may be completely wrong. The point is the existential difference in the choice facing the claimants. Nor should it be decisive whether the consequences facing the religious claimant for violating the obligation are deemed by the claimant to implicate eternal punishment though that factor might be relevant to the degree of burden.[72] To force someone to do what they are obliged not to do is specially cruel regardless of the consequences feared by the claimant.[73]

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that seems inevitable once exemptions are recognized. See notes to *infra.* As to broader instances of religious persecution, if the "jurisdiction" view of free exercise were the sole basis for protection, those who as a matter of moral conscience, not based on belief in God, would not be protected. One might still argue that the jurisdiction view is a part of the values underlying the Free Exercise Clause. Given the originalist pedigree for the argument, this makes some sense. There remains the question whether the recognition of even a partial religious base for the Free Exercise Clause should be deemed to violate the Establishment Clause. For discussion of that issue, see notes to *infra.*

[70] Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause,* 27 WM. & MARY L.REV. 985, 993 (1986)(requiring conduct that is at odds with religious duty is more serious than overriding preferences). McConnell, *supra* note 69, at 173: "The Free Exercise Clause does not protect autonomy; it protects obligation." As McConnell observes, an analogy to discrimination against the handicapped is appropriate here. The failure to accommodate the handicapped treats them as if they are the same when they have important differences from other. By contrast, racial discrimination treats people who are the same as if they are different. See McConnell, *Revisionism, supra* note 2, at 1140.

[71] Joshua Cohen, *Democracy and Liberty, in* DELIBERATIVE DEMOCRACY 202-07 (Jon Elster, ed. Cambridge University Press, Cambridge, England: 1998), pointing to the special nature of moral and religious obligation argues that deliberative democrats can support religious liberty because denying it would deny the principle of equal citizenship that lies behind deliberative democracy. This move accents the liberal character of liberal communitarianism, *i.e.,* it derives from a rights theory as to what is owed to citizens in order for them to participate in a community rather than rights they have that flow from the nature of a community. SANDEL, *supra* note 51, at 64-66 argues that the unencumbered self of individualism wrongly emphasizes choice and that it can not explain freedom of religion. He suggests that there is no choice, but to follow conscience. This ignores the extent to which conscience can be cultivated or desensitized through voluntary action, and it ignores what the Christian tradition would call sin, which in many cases involves succumbing to temptation despite conscience. See also note 68 *supra.*

[72] For the claim that free exercise claims of this stripe should be limited to those claimants who fear extra temporal consequences, see CHOPER, *supra* note 2, at [page number]. For a vigorous critique, see Gary J. Simson, *Endangering Religious Liberty,* 84 CAL. L.REV. 441 (1996). See also Hall, *supra* note 6, at 32-36.

[73] The existence of obligation need not necessarily be a prerequisite for a Free Exercise claim. Suppose a law prohibits gender discrimination and does not provide an exemption for the selection of religious leaders such as priests or ministers. Suppose further that the particular religion bringing the claim does not argue that it is obliged to discriminate on the basis of gender, but chooses to follow tradition or does so in order to avoid schism. Arguably, the application of the law might violate constitutionally protected freedom of association. But it might be argued that religious autonomy might be particularly important. Let us bracket consideration of that argument for our discussion

3. Ineffectiveness, Respect for Law and Mitigation of Violence Triggered by Religious Conflict

Because the claim of the religious person flows from an obligation, a second reason supports special religious consideration. As John Locke famously argued, persecution in order to change beliefs might succeed in controlling external conduct, but it is unlikely to be effective in controlling beliefs.[74] To be sure, modern impositions upon religion are designed to control conduct. But the existence of a law does not eliminate the perception of an obligation. Attempted enforcement of laws against religious claimants might not even succeed in controlling external conduct. It can frequently promote disrespect for law.[75] For example, persons drafted to serve in the military despite religious objections will often refuse to serve in the military. The military will not get another soldier, but the state will be forced to support another inmate whose crime consists of following his or her perception of God's will over that of the state. It would push this argument too far to suggest that the absence of religious exemptions generally presents a serious risk of violence, but the goal of religious peace is certainly a compelling reason to ground a constitutional opposition to more general forms of religious persecution.[76]

4. Equality and Anti-discrimination

As Christopher Eisgruber and Lawrence Sager have argued in detail, enhanced judicial scrutiny for religious claimants is appropriate because of the possibility of discrimination on the basis of religion.[77] American colonists fled from and then imposed religious inequality. The

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of the Establishment Clause.

[74] LOCKE, *supra* note 2, at 27. See also James Madison, *Freedom of Conscience: Memorial and Remonstrance, in* MARVIN MEYERS, THE MIND OF THE FOUNDER 9 (Bobbs-Merrill Co., Indianapolis: 1973).

[75] Madison, *supra* note 74, at 15.

[76] LOCKE, *supra* note 2, at 33; Madison, *supra* note 74, at 14; J. JUDD OWEN, RELIGION AND THE RISE OF LIBERAL RATIONALISM: THE FOUNDATIONAL CRISIS OF CHURCH AND STATE 168-70 (University of Chicago Press, Chicago: 2001). For an argument that the goal of religious peace has moral dimensions stretching beyond pragmatism, see JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 56-78 (Sheed & Ward, New York: 1960). For doubts about the distinctiveness and cogency of this value, see Smith, *supra* note 17, at 207-10.

[77] Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct,* 61 U.CHI. L.REV. 1245 (1994). See also Stephen Pepper, *Taking the Free Exercise Clause Seriously,* 1986 BRIGHAM YOUNG U.L.REV. 299, 306-07; Jesse H. Choper, *Religion and Race under the Constitution: Similarities and Differences*, 79 CORNELL L.REV. 491 (1994); Michael J. Perry, *Freedom of Religion in the United States: Fin De Siecle Sketches,* 75 IND. L.J. 295 (2000). For doubts that an anti-discrimination principle would have yielded substantial protection in the areas where judicial scrutiny has been the most effective in protecting religion, see Prabba Sipi Bhandari, *The Failure of Equal Regard to Explain the Sherbert Quartet,* 72 N.Y.U.L. L.REV. 97 (1997). For a wide ranging and sensitive exploration of the possibilities of the equality value regarding the religion clauses, see Hall, *Equality, supra* note 6.

Eisgruber and Sager deny that the value of religion entitles it to constitutional protection, *supra* at 1249. Their argument in part turns on objections to the subjective character of balancing and views about the proper roles

Constitution was designed to put an end to such discrimination.[78] In a sense, as Jack N. Rakove puts it, "[T]he religion question occupied a position similar to the race question in mid-twentieth century America."[79] Of course, the adoption of the Constitution did not usher in a nation of religious equality. Discrimination against Catholics, Jews, Jehovah's Witnesses, Mormons, Muslims, atheists, and agnostics among others stain our history.[80] Although much of this discrimination has been in civil society, the Court has played a role in reflecting the religious prejudices of American society. Nonetheless, the Court is well prepared to stamp out clear cases of discrimination. Thus, when the City of Hialeah outlawed animal sacrifice as a part of a religious ritual while permitting it in other circumstances, the Court unanimously struck the ordinance down.[81] Although the question of what counts as discrimination and the question whether discrimination is sometimes justified can sometimes be complicated, I know of no commentator and no Justice who denies that equality is an important free exercise value.

5. Promotion of Political Community

The recognition of free exercise promotes political community in numerous ways. First, the existence of equal liberty with its implications for violence prevention is a necessary prerequisite for the maintenance of a tenable political community. Nations divided by the

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of judges and legislators. *Id.* at 1258-59. These familiar objections would seem to apply to vast areas of constitutional adjudication including freedom of speech, an area that they regard as a model instance of constitutional value. *Id.* at 1250-51. They also deny that the cruelty of burdening conscience makes religion special. *Id.* at 1262-65. They note that it would be equally cruel to burden the conscience of the non-religious and to punish the disabled or deny benefits to the disabled for that which they can not do. *Id.* at 1264. In this respect, they are correct, but this is no ground for saying that religious believers should not receive a measure of protection. It simply shows that those of non-religious moral conscience and the disabled should receive a measure of protection. To be sure, the cruelty rationale does not show that religion is itself valuable, but it is a partial basis for denying that equality is the exclusive basis for free exercise protection. Finally, Eisgruber and Sager argue that religion can be a force for good or evil. *Id.* at 1265-67. They suggest that believers who violate otherwise valid laws are not likely up to actions that are for the good of the republic. *Id.* at 1265-66. This, of course, is part of the basis for a balancing test. But the larger point of Eisgruber and Sager is that under our Constitution, for government to endorse one view about what is valuable in life over another is "indefensibly partisan." *Id.* at 1266. Even assuming a nonpartisan government on this understanding was workable and desirable (but see Shiffrin note ?), this, as I argue *infra,* slides too fast over the question whether our Constitution can best be interpreted in this way. As I have suggested, *supra,* we might have a better Constitution if it did not regard religious views as superior to non-religious views (among other things religion would be better off), but we have a flawed Constitution.

[78] See also Madison, *supra* note 74, at 11, speaking of the *"equal* title to the free exercise of religion." (emphasis in original).

[79] Jack N. Rakove, *Once More into the Breach: Reflections on Jefferson, Madison, and the Religion Problem, in* MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 54 (Diane Ravitch & Joseph P. Viteritti, eds., Yale University Press, New Haven: 2001).

[80] See generally R. LAURENCE MOORE, RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICA (Oxford University Press, New York: 1987).

[81] Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

prospect or the reality of religious persecution can hardly nurture the kind of political community that one would hope to have.[82] Second, the pluralistic character of American religion allows for Madisonian checks and balances, thus stabilizing the political community.[83] Third, the protection of free exercise has symbolic implications that reach beyond its non-symbolic functions. One of the defining characteristics of the United States is its commitment to religious liberty. That the country has been at the forefront of offering such protection is a substantial part of the pride of being an American citizen.[84] There are grounds to question whether a commitment to rights is enough to bind together a strong political community,[85] but it seems inescapable that the commitment to religious liberty is an important ingredient in binding the political community together.[86] Finally, as will be discussed *infra,* it can be argued that the protection and promotion of religious liberty supports the kind of civic virtue that is necessary for the maintenance of a viable political community.[87]

6. Importance of Religion

Religion can itself be regarded as independently important. Like autonomy, this consideration could support free exercise even if other aspects of life were important (as they surely are). But it is possible to argue that religion is deemed to be constitutionally more

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[82] *Cf.* Conkle, *supra* note 6, at 1166-69 (religiously inclusive policies support political community).

[83] McConnell, *Origins, supra* note 1, at 1515-16. *But see* Smith, *supra* note 17, at 204-07 (questioning the pluralism rationale).

[84] William P. Marshall, *Religion as Ideas: Religion as Identity,* 7 JOURNAL OF LEGAL ISSUES 385, 402 (1996)(interpretation of religion clauses has much to do with how we view our society), *citing* STEVEN H. SHIFFRIN, THE FIRST AMENDMENT DEMOCRACY AND ROMANCE 5 (HARVARD UNIVERSITY PRESS, CAMBRIDGE: 1990)(similar argument for the speech clause).

[85] Charles Taylor, *Religion in a Free Society, in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 109-113 (James D. Hunter & Os Guiness eds., 1990).

[86] Abner Greene, *The Political Balance of the Religion Clauses,* 102 YALE L.J. 1611 (1993) argues that religious exemptions are justified because of constitutional limitations on the effectiveness of religious groups in the political process. To be sure no legislature could base legislation on the ground a view of what God's will might be on the subject, and this might foreclose some legislation of interest to some religious groups. Nonetheless, religious groups can be enormously powerful in politics. Consider the Mormons in Utah or the Lutherans in Minnesota. The inability to have religious terminology in the preamble to legislation is of little political moment. Moreover, religious argument is routinely presented in public life, and it is typically easily translated in secular elterms. Finally, as will be discussed, *infra,* the Establishment Clause does not generally foreclose legislatively created religious exemptions. Although Greene's argument is elegantly presented, to my mind it does not present a persuasive argument for religious exemptions. On the role of religion in democratic life, see Steven Shiffrin, *Religion and Democracy,* 74 NOTRE DAME L.REV. 1631 (1999).

[87] See text accompanying notes to

important that other forms of the good life[88] (not merely as a hedge, for example, against discrimination) even though the Constitution rightfully imposes severe limits on governmental attempts to promote religion. I want to consider these contentions in the course of treating the underlying purposes and functions of the Establishment Clause.[89] For the present, it is enough to conclude that even if religion is not deemed to be specially important under the Constitution, religious claimants deserve special attention when the state imposes a burden on their conduct.

E. Applying the Free Exercise Clause

Special attention need not mean inevitable victory, however.[90] What seems warranted is a prudential judgment weighing the appropriate facts and circumstances. As Donald Gianella suggested nearly forty years ago, the relevant factors include the importance of the secular governmental interests, the relationship of the governmental means to its interests, the impact that an exemption would have on the government interests, all balanced against the impact on religious liberty including its importance in the particular case.[91] In addition, religious equality interests should be taken into account.

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[88] To argue that it is crueler to force one to violate one's conscience than to force one to abandon a personally vital artistic project is not to say that religion is more important than religion; it is to say that violating conscience is more harsh wholly apart from the value of the religion or the value of the artistic project. On the other hand, if religion is regarded as independently important from a constitutional perspective, theological arguments for freedom of religion might then be recognized as part of the structure underlying the religion clauses. For example, Locke and others made theological arguments about the limited jurisdiction of government with respect to religion and about the unchristian character of persecution. LOCKE, *supra* note 1. To accept Lockean arguments is to reject arguments based on other theologies. This seems ironic on some readings of the Establishment Clause. Stephen D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse,* 140 U.PA.L.REV. 149, 149-50, 153-166 (1991). In my view, the religion clauses are not neutral. They favor religion over non-religion (and non-deistic theistic religion in particular), and if theological grounding of the religion clauses is accepted, the theological partisanship becomes even thicker. Although such theological arguments have a historical pedigree and have independent theological appeal, for reasons that will become clear, I believe it best to restrict the formal grounding of the clauses to a civic perspective to the extent possible.

[89] See text accompanying notes to

[90] Indeed, even before *Smith*, courts were not particularly sensitive to religious claimants. See James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L.REV. 1407 (1992)(tracing the cases). Accord, Choper, supra note 2, at 684; Ira C. Lupu, *The Trouble with Accommodation,* 60 GEO.WASH. L. REV. 743, 756 (1992). Aside from inflating the importance of governmental interests, the Court has exhibited a distressing insensitivity to what amounts to a burden on the free exercise of religion. See Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989). To some extent this narrow conception of burden proceeds from favoring the dominant American religious tradition over that of minority religions. See Williams & Williams, supra note 32. For particularly strong claims in favor of religious liberty, see Kathleen M. Sullivan, *Religion and Liberal Democracy,* 59 U.CHI.L.REV. 195, 219 (1992)(suggesting that voluntary crucifixion should perhaps be protected).

[91] Donald A. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee,* 80 HARV. L.REV. 1381, 1390 (1967).

So, under the first example, in my view, the religious claimant should win. Conceding the significance of the state interest, it would not be sacrificed in any significant way if a religious exemption were compelled; the law burdens religion in a significant way; and there are good reasons to believe that a minority religion is being discriminated against. For example, if the Protestant majority ingested peyote as part of a communion service in Oregon, the law against peyote ingestion would surely have exempted religious ceremonies. The *Smith* case thus reeks of insensitivity to the plight of a religious minority.[92] This is not to say that the Court believes that the equality value has no role to play in free exercise analysis. Nonetheless, the Court's conception of the equality value in the free exercise arena leaves much to be desired. As to the non-religious claimants, whether or not it is good policy to outlaw their conduct, there is surely no constitutional barrier. We do not live in a Kantian country. To be sure, the artist might raise a free speech claim. Even assuming his conduct fell within the scope of the First Amendment, however, the artist would lose and should lose.

The animal sacrifice case, however, is more difficult.[93] On the one hand, the state interest is important, *i.e.,* animals deserve protection.[94] Surely, they deserve protection against the non-religious claimants. On the other hand, the law may impose a serious religious burden. Moreover, there are some equality concerns. Animals are treated horribly in this society, so that our meals will taste better.[95] If the state permits such vile treatment of animals for culinary purposes might it not be hypocritical to outlaw similar treatment for religious purposes? Another equality concern is exposed by asking the question whether there would be a similar prohibition if majority religions employed animal sacrifice as a part of their ceremonies. The question answers itself, but too much should not be made of the point. What if human sacrifice were an occasional part of our majority religions? Presumably, no prohibition would be passed if that were the case. But that counterfactual should not justify the inhumane practice of a minority religion.[96] Equality is an important value, but it is not all important.

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[92] It might be argued that ingestion of peyote is more dangerous than ingestion of wine, but the record in the *Smith* case showed that ingestion of peyote in the Native American Church led to resistance of drug abuse rather than its cultivation. See McConnell, *Revisionism, supra* note 2, at 1135. The problem ranges well beyond the facts of the *Smith* case. See, e.g., Sullivan, *supra* note 90, at 216 (*Smith* "entrenches patterns of *de facto* discrimination against minority religions").

[93] I am assuming that the state does not single out penalties for animal sacrifices performed in the exercise of a particular religion only or by religious groups only. Any such action would plainly be unconstitutional. Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993).

[94] On ethical issues concerning the relationships between humans and other animals, see PETER SINGER, ANIMAL LIBERATION (2d ed., Random House, New York: 1990); TOM REGAN, DEFENDING ANIMAL RIGHTS (University of Illinois Press, Urbana: 2001); ANIMAL RIGHTS AND HUMAN OBLIGATIONS (Tom Regan & Peter Singer, eds., 2d ed. Prentice Hall, Englewood Cliffs: 1989).

[95] SINGER, *supra* note 94, at 95-157.

[96] To be sure, some religions may do otherwise objectionable things to animals as a sign of spiritual respect. The ascription of "inhumanity" in the interest of animal protection is taken from a civic perspective.

In the end, one is forced to choose between vindicating religion and stopping the inhumane treatment of animals. For purposes of argument, let us suppose that the religious treatment of animals is no worse that employed for culinary purposes or for medical research,[97] I would conclude that the equality concerns should militate toward the invalidation of the law. On the other hand, if the religious ceremony involved treatment that is worse than that employed for other purposes, I would uphold the law.

These examples highlight two objections to invoking heightened scrutiny of religious burdens. The first is that the process of making such decisions is subjective. Supporting this objection is the fact that honest and intelligent people disagree on how to resolve these cases when scrutiny is invoked. Those Justices who employed scrutiny in the peyote case were divided over the resolution. The Constitutional Court of South Africa was also deeply divided over the issue in a similar case.[98] That subjectivity is involved does not mean that the decisions are arbitrary. If they were arbitrary, the justices would be flipping coins rather than engaging in argument about recurring decisionmaking factors. Moreover, controversy permeates the outcome of constitutional decisions. The deep logic of the subjectivity objection is that if there are no obvious objective answers to legal questions, the decisions should be in the hands of the legislatures.[99] To fully canvass this, we would need to replough the ground unfurled in the debate over judicial review. We are not going there.

More serious is the claim that review of this type violates the Establishment Clause. The idea is that the Establishment Clause forbids the favoring of religious claimants over non-religious claimants.[100] In order to engage that objection, we need to determine the underlying purposes of the Establishment Clause.

II. THE ESTABLISHMENT CLAUSE

A. The Court's Approach

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[97] Sidney Gendin, *The Use of Animals in Science, in* ANIMAL SACRIFICES: RELIGIOUS PERSPECTIVES ON THE USE OF ANIMALS IN SCIENCE 15-60 (Tom Regan, ed., Temple University Press, Philadelphia: 1986).

[98] Prince v. President of the Law Society of the Cape of Good Hope, Case CCT 36/00 (2002)(cannabis use for religious purposes by person who wished to become a member of the bar).

[99] ANTONIN SCALIA, A MATTER OF INTERPRETATION (Princeton University Press, Princeton: 1997); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (Free Press 1990).

[100] Philip R. Kurland, *Of Church and State,* 29 U.CHI. L.REV. 1, 5 (1961). For the claim that discriminating in favor of religious claimants violates the freedom of speech clause, see William P. Marshall, *Religion as Ideas: Religion as Identity,* 7 J.CONTEMP. LEGAL ISSUES 385, 393 (1996)

A good starting point [101] for exposing the complexity of the Establishment Clause is the case of *Allegheny County v. ACLU* [102] where a Nativity Scene was placed in a central place in a public building during the Christmas season.[103] The Court invalidated the display as a violation of the Establishment Clause,[104] but four justices, led by Justice Kennedy dissented.[105] Kennedy argued that so long as there was no coercion[106] or proselytizing,[107] government should be able to recognize and accommodate the role that religion plays in American society.[108] In a sense Kennedy argued that instead of a high wall between church and state, government should be permitted to build bridges.[109] Indeed, Kennedy pointed to a large set of practices in which government had shown its recognition of the importance of religion from the prayer opening the Supreme Court sessions[110] to Thanksgiving Proclamations by numerous Presidents[111] and the existence and support of legislative chaplains[112] and a prayer room for members of the House and Senate.[113] To block Allegheny County from cooperating with this display, argued Kennedy,

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[101] In a sense there is no good starting point because it could be argued that the line of cases involving government appropriation of religious symbols is quite different, for example, from cases involving financial aid to religious organizations. One attempt to unify the multifaceted factual contexts is to analyze them under the test of *Lemon v. Kurtzman,* 403 U.S. 602 (1971) that scrutinized government actions for a primary religious purpose or effect or excessive governmental entanglement. Many including a fair number of justices have attacked the test in ways that would weaken Establishment Clause protection. My colleague Gary Simson has argued that the test should be strengthened in ways that so far as I can tell mark him out along with Kathleen Sullivan as the two strongest defenders of free exercise and separation of church and state (taken together) among academics. Gary Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach,* 72 CORNELL L.REV. 905 (1987).

[102] 492 U.S. 573 (1989).

[103] *Id.* at 578.

[104] *Id.* at 579.

[105] *Id.* at 655. Kennedy, J., was joined by Rehnquist, C.J., White and Scalia, JJ. *Id.*

[106] *Id.* at 659-60.

[107] *Id.* at 660-61.

[108] *Id.* at 657-60.

[109] William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall– A Comment on Lynch v. Donnelly,* 1984 DUKE L.J. 770, 771 (referring to the shift from walls to bridges in a comparable case).

[110] 492 U.S. at 672.

[111] *Id.* at 671.

[112] *Id.* at 672.

[113] *Id.*

would show hostility toward religion.[114]

Justice Kennedy and his concurring justices clearly promote a communitarian line.[115] From this perspective, the state should be able to cooperate with those forces of society that promote virtue; the state should not be viewed as alien from the views of the people; indeed, in the absence of coercion the majority of the community ought to be able to express themselves through local governments without rigid constitutional intervention. Ironically, the four justices who vote "for" religion in the *Allegheny County* case form a crucial part of the majority of the Court in the peyote case that not only denied the rights of the religious claimant in that case, but would deny it in any and all cases where a statute incidentally impacts religion even in a severe way, at least in the absence of some other constitutional interest. This looks like hostility to religion in the free exercise context. It may not be pretty, but what unites the perspective of these four justices is a communitarian perspective which favors majority religions over minority religions because the majority is deemed entitled to express their religious views through the state.[116]

The communitarian perspective is disfavored by the majority of the Court however. Instead, the prevailing justices take an egalitarian line. Using an approach offered by Justice O'Connor in an earlier case,[117] Justice Blackmun inquires whether the display involves an endorsement of religion.[118] An endorsement of religion is regarded as invalid because it "sends a message to nonadherents that they are outsiders, not full members of the political community and an accompanying message to adherents that they are insiders, favored members of the political community."[119] Blackmun concludes that viewers may fairly understand that the purpose of the

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[114] *Id.* at 655, 657,

[115] Although the communitarian themes seem evident in Justice Kennedy's opinion here, I do not mean to suggest that Justice Kennedy's constitutional jurisprudence routinely promotes communitarian values.

[116] An alternative view would be that these justice are simply statist, that they are "shedding an inordinate distrust of religion [with] an inordinate faith in government." McConnell, *supra* note 69, at 116. Certainly these justices ordinarily opt for a limited judicial role with respect to the state except, for example, with respect to affirmative action, racial gerrymandering, the 2000 election, and many first amendment circumstances to name a few. Why the activity in some spheres and not in others? My suspicion and suggestion is that their capacity to empathize with some groups more than others plays a role. McConnell also recognizes that the views of the Court favor mainstream over nonmainstream religions. *Id.* at 139.

[117] Lynch v. Donnelly, 465 U.S. 668, 687 (1984)(O'Connor, J., concurring).

[118] Allegheny County v. ACLU, 492 U.S. 573, 592 (1989); see also William W. Van Alstyne, *What is "An Establishment of Religion"?,* 65 N.C.L.Rev. 909, 914 (1987); *cf.* Eisgruber & Sager, *supra* note 77, at 1245 (applying an equality analysis to free exercise issues).

[119] It is possible to read this test as protecting the feelings of citizens. So understood, the test is vulnerable to substantial objections. William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence,* 66 IND. L.J. 351 (1991). A better understanding of the approach is that the feelings of a reasonable person are a proxy for whether the government has deviated from religious equality and that the deviation in this

display is to endorse religion, and it is, therefore, invalid.[120] Taking *Smith* together with *Allegheny County,* not to mention other cases, it would be easy to conclude that equality is the central value of the religion clauses. In *Smith,* religion and non-religion are treated equally, and the law is upheld; in *Allegheny County,* religion is seemingly endorsed by the state, and the law is invalidated. A proper reading of the Establishment Clause cases, however, would lead to the conclusion that equality is neither a necessary condition in some cases to avoid a constitutional violation nor a sufficient condition in other cases. To put it another way, Establishment Clause analysis has been unduly narrow. I will suggest that Establishment Clause analysis would better proceed if it took a page from the methodology employed in free speech cases.[121] That is, it should evaluate the challenged state action against the full range of Establishment Clause concerns, and it should proceed to determine if the state's promotion of particular interests sufficiently justifies the impingement on Establishment Clause concerns.[122] Examples in which the state pursues formal equality can be especially useful because they help us to draw upon other interests implicated by the Establishment Clause. I want to explore those other interests and then apply them to some specific examples.

B. Establishment Clause Values

The Establishment Clause serves multiple functions: it is a prophylactic measure that protects religious liberty including the protection of taxpayers from being forced to support religious ideologies to which they are opposed; as we have discussed, it stands for equal citizenship without regard to religion; it protects against the destabilizing influence of having the polity divided along religious lines; it promotes political community; it protects the autonomy of the state to protect the public interest; it protects churches from the corrupting influences of the state; and it promotes religion in the private sphere.

1. Liberty

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context is itself a violation. The test is also vulnerable to other serious objections though most of them have bite only if applied to a number of areas outside the cases involving the use of religious symbols by government. See McConnell, *supra* note 69, at 147-56 (arguing in the end that the endorsement test should be modified in the government symbols area)

[120] 492 U.S. at 598-602 (Blackmun, J., joined by Brennan, Marshall, Stevens, & O'Connor, JJ.).

[121] Shiffrin, *supra* note 84, at 9-45.

[122] Most establishment clause scholars do not allow for explicit balancing. My colleague Gary Simson, however, explicitly argues for a form of balancing albeit more restricted than what I recommend. Gary Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach,* 72 CORNELL L.REV. 905, 922-32 (1987)(proposing a necessary to serve a substantial governmental interest test for a part of establishment clause analysis). The debate on whether to balance and, if so, how open ended the balancing should be is, of course, well developed in the free speech context. See, e.g., STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT: CASES-COMMENTS-QUESTIONS 149 fn. b (3d ed. West Pub. Co., St Paul: 2001)(citing sources).

A longstanding argument about the relationship between the Free Exercise clause and the Establishment Clause is that the Free Exercise clause protects liberty directly and the Establishment Clause protects liberty indirectly.[123] Thus, if the state sponsors school prayer, the sponsorship exerts pressure on little children to participate in the prayer. Indeed, the Court has held that a prayer at a high school graduation has this effect.[124] From the liberty perspective those who voted for the claimants in the peyote case and against Allegheny County were voting to protect religious liberty in both cases. This interpretation also addresses the objection that preferring religious claimants over non-religious claimants in the peyote case would violate the Establishment Clause. To the contrary, if the Establishment Clause is interpreted to protect religious liberty, favoring the religious claimants in the peyote case would advance the objectives of both clauses.[125]

A particular liberty interest raised when government seeks to fund religious institutions is the right of taxpayers not to be forced to support religious ideologies to which they are opposed.[126] It is not clear to me that this interest is entitled to the weight attached to it by opponents of vouchers and other subsidies of religious institutions. If taxpayer liberty were the

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[123] The liberty aspect of the Establishment Clause is emphasized in CHOPER, *supra* note 2 and McConnell, *Coercion*, *supra* note 7.

[124] Lee v. Weissman, 505 U.S. 577 (1992).

[125] Wilber G. Katz, *Freedom of Religion and State Neutrality, 20* U.CHI. L.REV. 426, 428, 433 (1953)(protecting religious freedom does not violate Establishment Clause); Donald A. Gianella, *Lemon and Tilton: The Bitter and the Sweet of Church State Entanglement,* 1971 S.CT.REV. 14, 153 (religious liberty is the central value of both clauses); Berg, *supra* note 1, at 452 (religious voluntarism at the heart of both clauses); Cf. Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments,* 27 WM. & MARY L.REV. 943, 948 (1986)(Establishment Clause violation requires purpose to aid religion and significantly endangering "religious liberty in some way by coercing, compromising, or influencing religious beliefs," so cases granting religious exemptions ordinarily present no constitutional problem); Michael W. McConnell, *supra* note 7, at 939-40 (Establishment Clause violation requires coercion or interference with religious choice so that accommodating religion is unproblematic); Michael Paulsen, *Religion, Equality, and the Constitution,* 61 NOTRE DAME L.REV. 311, 313 (1986)(both clauses support religious liberty so no tension between them). On the difficulties of relying on religious liberty alone, see CONKLE, CONSTITUTIONAL LAW, *supra* note 6, at 122. I do not mean to suggest that promoting religious liberty can never violate the Establishment Clause. See notes to *infra* and accompanying text. But stopping free exercise violations can never violate the Establishment Clause.

[126] Madison, *supra* note 74, at 10 argued that the compulsion to pay even three pence was objectionable because it opened the door to "force him to conform to any other establishment." Isaac Backus vigorously complained of the "extortion" involved when taxpayers were forced by the state to support religions. Isaac Backus, *An Appeal to the Public for Religious Liberty, in* ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM 303-343 (William G. McLoughlin, ed., The Belknap Press, Cambridge: 1968). On this aspect of religious liberty, see LEONARD LEVY, THE ESTABLISHMENT CLAUSE (1994); Douglas Laycock, *The Benefits of the Establishment Clause,* 42 DePAUL L.REV. 373, 374 (1992).

key issue, the appropriate remedy would be refunds, not prohibitions.[127] Nonetheless, this concern is worthy of some weight in an Establishment Clause balance.

2. Equality

If a state is permitted to endorse a particular religion, formally creating insiders and outsiders on the basis of religion, there is good reason to fear that formal marginalization will carry over to the social and economic sphere. Discrimination on the basis of religion would be subtly encouraged. In addition, compliance with formal equality is not necessarily consistent with substantive equality. Equality of form can be accompanied by inequality of effect. Politicians were not blind to the impact of state establishments at the outset of our history. As Leonard Levy points out in his excellent history of the establishment clause, "[T]he American establishments were non-preferential in law and theory but not necessarily in fact. In the four New England states that maintained establishments, the Congregationalists dominated overwhelmingly, as was expected when they adopted the system of tax-supported nonpreferential aid."[128] This inequality of effect was a vital factor in the movements to eradicate the state establishments.

One of the failures of the *Smith* case was its refusal to take inequality of effect seriously enough to expose the state action to serious constitutional scrutiny. As we shall discuss, a similar insensitivity accompanies the Court's treatment of vouchers.[129] Nonetheless, I will argue that deviations from equality sometimes best accommodate the interests at stake in particular concrete contexts. Moreover, deviations from formal equality may sometimes be justified in the interests of substantive equality.[130]

3. Stability

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[127] Another possibility would be to require that those who have religious objections give a somewhat higher amount (to assure sincerity) to charity. Kent Greenawalt, *Conflicts of Law and Morality – Institutions of Amelioration,* 67 VA. L.REV. 177, 208 (1981).

[128]. LEVY, *supra* note 126, at 77. See also *id.* at 135; Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent,* 27 WM. & MARY L.REV. 875, 878 (1986)(disproportionate impact was the source of "bitter religious strife."). Cf. Alan E. Brownstein, *Constitutional Questions About Vouchers*, 57 NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW 119, 126 (2000)("Facial neutrality of government action does not guarantee religious equality . . . .").

[129] The Court's general handling of inequality of effect in constitutional law is perverse. For example, one of the great scandals of constitutional law is its refusal to take seriously the inequalities associated with disproportionate racial impact while studiously policing state regulations that have a disproportionate impact on interstate commerce.

[130] See note *infra* and accompanying text.

Religious wars have plagued the world for many centuries. If the state is open for capture by religious groups, the potential for intolerance, ugly confrontation, and violence is multiplied. Nonetheless, it goes too far to suggest that a significant purpose of the Establishment Clause is to assure that the polity is not divided politically along religious lines. The stability of our country does not depend upon keeping religious arguments out of public life. Indeed, churches have made progressive contributions to the political life of the country. William Brennan famously wrote in *New York Times v. Sullivan* that our Nation has a profound national commitment to the principle that debate on public issues should be uninhibited robust and wide open.[131] It mocks that commitment to say that we believe that debate on public issues should be uninhibited, robust and wide-open except when it comes to religious speech. The speech clause does not contradict the religion clause. The First Amendment is not at war with itself.

Although the Establishment Clause should not be read to limit the role of religion in public debate, the concern that religious divisions can lead to violent conflicts is serious. We live in a country in which Catholics have been beaten over disputes about the role of the Bible in the public schools; Jehovah's Witnesses have been the perennial objects of maltreatment; anti-semitism has been a persistent problem; and the Ku Klux Klan has spread a reign of terror designed to produce a White "Christian" America. The potential for violence is sufficiently serious that caution about governmental actions that embrace some religions while excluding others is appropriate. It may well be that the religious divisions in our country have been substantially less violent because the Establishment Clause has precluded state capture for religious purposes

4. Promoting Political Community

It is possible to maintain a political community with an established religion. The dangers to a political community from an established church are not as significant as those that are triggered by religious persecution. Nonetheless, a government that treats all citizens as insiders regardless of their religious beliefs helps to foster an inclusive political community.[132] Though religious persecution predictably triggers responsive hostility, the use of government symbols to mark out some religions as outsider or at the margins of the political community is itself risky. Symbolic affronts themselves undermine the kind of reciprocal respect that is helpful in supporting political community.

5. Protecting the Autonomy of Government

Another historical concern is that religions will use the government to further their own

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[131] [cite]

[132] Conkle, *supra* note 6, at 1166-69.

sectarian ends.[133] The framers after all had fled countries in which they believed that religions had used the machinery of the state to their disadvantage. Moreover, in the pre-Vatican II age, Protestant Americans worried that if Catholics came to power, they would threaten liberties and institute the type of persecutions all too prevalent in Europe. That these concerns were exaggerated and fueled by class and ethnic prejudice does not negate the legitimacy of a concern that religions might use government for their own ends. Indeed, the Protestants captured the public school system and used it in an attempt to instill their own religious views.[134] That they called this hegemony "nondenominational" did not successfully paper over the fact that Protestants were using government to further their own religious ends. This concern need not mean that the Establishment Clause precludes religious participation in political life. It does, however, exhibit concern that particular forms of legislation make government an instrumentality of particular religions. If government abolishes capital punishment in response to lobbying by religious believers, there is no Establishment Clause problem.[135] If it places a Creche in a prominent public place, it is reasonable to be concerned that religion is using government to further its own sectarian ends.

6. Protecting Churches

Mark Dewolfe Howe emphasized the contribution of Roger Williams to the analysis of freedom of religion in *The Garden and the Wilderness.*[136] According to Howe, Williams warned that close connections between church and state would work to the detriment of religion. If the church is the garden and the state is the wilderness, Williams was said to worry that the state would ruin the garden and transform it into the wilderness.[137] In fact, Williams was even more pessimistic than Howe let on. Williams fled England because the Church of England was not pure and was banished to Rhode Island after he had criticized the Puritans of Massachusetts for maintaining impure churches. He ultimately came to believe that all churches were impure --

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[133] Lemon v. Kurtzman, 403 U.S. 602, 623 (1971). See generally Marci A. Hamilton, *Power, The Establishment Clause, and Vouchers,* 31 CONN. L.REV. 807 (1999).; Marci Hamilton, *The Constitution's Pragmatic Balance of Power Between Church and State,* SD02 ALI-ABA 501 (1998). But see Ira C. Lupu, *Threading between the Religion Clauses,* 63-SPG LAW AND CONTEMP. PROBS. 439 (2000).

[134] Conkle, *supra* note 1, at ("[T]hroughout most of our country's history, there has been an overt Christian, and primarily Protestant, dominance in American law and public life.").

[135] MICHAEL J. PERRY, UNDER GOD: RELIGIOUS FAITH AND RELIGIOUS DEMOCRACY 20-34 (Cambridge University Press: Cambridge: 2003); Shiffrin, *Religion and Democracy, supra* note 86, at 1652-56.

[136] MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN HISTORY 5-12 (University of Chicago Press, Chicago: 1965). See also ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION 46-66 (1996). EDMUND S. MORGAN, ROGER WILLIAMS: THE CHURCH AND THE STATE (1967); PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION (The Bobbs-Merrill Co., Indianapolis: 1953); Conkle, *General Theory, supra* note 6, at 1181-82; Van Alstyne, *supra* note 118, at 914. On some of the personal complications of Williams, see Hall, *supra* note 29; Steven D. Smith, *Separation and the Fanatic,* 85 VA.L.REV. 213 (1999).

[137] HOWE, *supra* note 136, at 5-6, 12.

even his own. One need not fear that the wilderness might corrupt the garden because there was no garden to be corrupted.[138]

Nonetheless, Howe was right to emphasize the contribution of Williams.[139] Williams, like Madison [140] and Jefferson,[141] argued that God was not so stupid as to place the fate of religion in the hands of politicians.[142] He argued that politicians historically had operated in ways that did not benefit religion.[143] This should hardly be surprising. Politicians operate from many motives. They are probably motivated by a desire to further the public interest for far more than they are ordinarily given credit. But they are often corrupted by the desire to be reelected, by the need for campaign funds, and by the various foibles of human beings. We have witnessed numerous cases in which *religious* leaders have faltered in the trust placed in them to advance the cause of religion. How much less should one expect that politicians might be expected to act as trustees

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[138] PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 38-53 (Harvard University Press, Cambridge: 2002) shows that the theological views of Williams were extreme, but Hamburger apparently intends this as a way of discrediting Williams's political views and in that respect is unsuccessful.

[139] It is necessary to separate Williams arguments from their theological underpinnings. It is not necessary to believe that the number of authentic Christians would be a small portion of the population in order to believe that there are dangers to religion when government seeks to promote religion, but, for Williams, this was an important truth. KRAMNICK & MOORE, *supra* note 27, at 48.

[140] James Madison argued that religious establishments "instead of maintaining the purity and efficacy of Religion, have had a contrary operation." Madison, *supra* note 74, at 12. Hall, *supra* note 6, at 121: "The revolutionary generation was also repeatedly warned that government sponsorship of religion frustrated the very process of virtue creation. Madison warned that such sponsorship corrupted religion itself, and thus corrupted religion's capacity for generating true virtue. If religion was to flourish and with it the possibility that citizens would acquire the virtues necessary for self-government, Roger Williams wall of separation between the fruit-producing garden and the destructive encroachment of the wilderness had to be vigorously maintained."

[141] As Jefferson put it, "I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines . . ." Quoted in Van Alstyne, *supra* note 109, at 775 n. 18.

[142] DONALD SCAGGS, ROGER WILLIAMS' DREAM FOR AMERICA 15-17 (Peter Lang, New York: 1993).

[143] KRAMNICK & MOORE, *supra* note 27, at 57: According to Williams, "Whenever civil rulers had emerged as would-be protectors or champions of religion, they had appropriated religion to profane interests-- to their own quest for profits and power." *Accord* MORGAN, *supra* note 27, at 120. *Cf.* Zorach v. Clausen, 343 U.S. 306 (1952) (Black, J., dissenting): " State help to religion injects political and party prejudices into a holy field. . . . Government should not be allowed, under cover of the soft euphemism of 'co-operation,' to steal into the sacred area of religious choice." *Cf.* McConnell, *supra* note 69, at 146: "[G]overnment is unlikely to be a valuable contributor to our understanding of spiritual truth;" McConnell, *Origins, supra* note 1, at 1438: "It is anachronistic to assume, based on modern patterns, that governmental aid to religion and suppression of heterodoxy were opposed by the more rationalistic and supported by the more intense religious believers of that era. The most intense religious sects opposed establishment on the ground that it injured religion and subjected it to the control of civil authorities."

on behalf of religion.[144] Indeed, when politicians combine with merchants to commercialize Christmas,[145] when they invoke the name of God to justify unjust wars (often God is invoked on both sides of a conflict),[146] and when they suggest that God favors one political party over another, it becomes increasingly obvious that religion is being used to serve politics, not the other way around.[147]

Even more serious, the reliance of religious organizations upon the state for evangelical purposes tends to undermine their integrity.[148] Indeed, there is considerable evidence that the Roman Catholic Church, the church with the historically strongest ties to the state in Europe and Latin America, has compromised its commitment to social justice in its effort to maintain its privileged position in many countries.[149] At least prior to Vatican II, Catholic support of dictators in some countries and opposition to them in others followed a relatively consistent pattern. If the dictator supported religious privileges such as subsidies for Catholic education, the Church did

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[144] Charles Taylor, *Religion in a Free Society, in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 103 (James D. Hunter & Os Guiness eds., 1990)("[T]he separation of church and state did not have to mean bracketing God or religion. It may have for some, but that is not the way most Americans understood disestablishment. In fact many supported the measure in the name of religion, to preserve its strength and integrity from the enervating and corrupting effect of state interference.").

[145] Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr,* 73 N.C.L. REV. 1567, 1626 (1995).

[146] STEVE BRUCE, POLITICS AND RELIGION 4 (Polity Press, Cambridge: 2003)("Everyone claims divine approval. All states mobilize for war by first enlisiting God as their recruiting sergeant."). See Bob Dylan' song, WITH GOD ON OUR SIDE (1963): "And that land that I live in - Has God on its side. . . . The Germans now too have God on their side. . . . If God's on our side[,] He'll stop the next war."

[147] William W. Van Alstyne, *What is 'An Establishment of Religion'?,* 65 N.C.L.REV. 909, 914 (1987): "[I]t profanes religion for any secular authority to trade on its practices for its (the state's) civil or secular ends, *i.e.,* it is a trespass on religion by the state; the state has no right to take things from the voluntary communities of faith and entangle them as instruments in the conduct of civil affairs." McConnell, *supra* note 69, at 127 (objecting to the secularization and cheapening of religious symbols in the hands of government).

[148] See Backus, *supra* note 126, at 334; T.B. MASTON, ISAAC BACKUS 71 James Clarke & Co. Ltd., London: 1962).

[149] Of course, the Church's commitment to social justice did not include a commitment to religious freedom. STEVE BRUCE, GOD IS DEAD: SECULARIZATION IN THE WEST 116 (Blackwell Publishing, Malden, Mass. 2002). Instead the Church's commitment was to support the truth, thus the burning of heretics at the stake, the Inquisition and the like. Although the Protestant commitment to religious freedom preceded that of the Catholic Church, it too was not easy to come by. See Berg, *supra* note 145, at 1613: "[As] Niebuhr pointed out, the Puritan faction in seventeenth-century England 'pled for liberty of conscience when it was itself in danger of persecution; and threatened all other denominations with suppression when it had the authority to do so.' In America, of course, it is a familiar story that the Puritans who came seeking their own religious freedom immediately denied it to others. Even after official disestablishment, . . . American authorities put in place a range of preferences for generic Protestantism, despite the supposed Protestant commitment to 'soul liberty' and to the exemption of religious concerns from the cognizance of government. It has always proved difficult for religious persons to see the practices familiar to them as anything other than 'natural' and necessary to public order."

not oppose the dictator.[150] If the dictator opposed Catholic privilege, the Church opposed the dictator.[151] There were exceptions on both sides.[152] The Church was relatively quiet about Hitler despite his suppression of religious freedom because it calculated that its best interests were nonetheless served by keeping quiet.[153] Strong Church forces criticized Latin American dictators despite support for the Church because they felt morally obliged to do so[154] (though the Vatican

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[150] Speaking of the position of the Catholic Church in many European countries well into the twentieth century, Rene Remond writes: "Imbued with the juridical tradition inherited from Rome, the catholic church attached great importance to an explicit recognition of its rights, written into laws, which obviously rules out any separation [of church and state]. The Pope continued to reaffirm as ideal a Christian state whose leaders made open reference to religion, made its teaching the rule of their actions and imposed on their nationals a respect for the obligations fixed by the church." RENE REMOND, RELIGION AND SOCIETY IN MODERN EUROPE 160 (Blackwell Publishers, Oxford: 1999).

[151] Cf. ROBERT P. KRAYNAK, CHRISTIAN FAITH AND MODERN DEMOCRACY 3 (University of Notre Dame Press, South Bend: 2001): The Roman Catholic Church "supported emperors and kings throughout much of its history; and although it resisted them on many occasions to defend the freedom of the church and the needs of the people, it did not really accept liberal democracy until very recently, when the Second Vatican Council (1962-65) endorsed a qualified version of democratic human rights." Cf. CHARLES R. MORRIS, AMERICAN CATHOLIC: THE SAINTS AND SINNERS WHO BUILT AMERICA'S MOST POWERFUL CHURCH 69 (Vintage Books, New York: 1997) (Pope Gregory XVI and Pope Pius IX maintained that it was "insanity" to believe in liberty of conscience and worship or of the press). For the claim that the Church's move to accept liberal democracy emerged shortly after World War II and that Vatican II's formulations were a formal expression of the Church's prior move, see Remond, *supra* note 150, at 174-77. Remond's analysis is that the Church regarded the Enlightenment's emphasis on rationalism and its companion devotion to democracy as the major threat to the evangelical mission of the Church, but the administrations of Franco, Mussolini, Hitler, and Vichy France taught the Church that there were some things worse than democracy. Accordingly, the Church simultaneously embraced liberal democracy and opposed communism. See *id.* at 159-77. Although Remond's analysis is plausible for the Church in France (which was in no position to push for control after its collaboration with the Vichy regime), the Church in Italy took the position that "Fascism's failing was not due to its authoritarianism, its violence or denial of democracy, but to 'its refusal to found itself on the Church and to profess itself Catholic.'" CAROLYN M. WARNER, CONFESSIONS OF AN INTEREST GROUP: THE CATHOLIC AND POLITICAL PARTIES IN EUROPE 80 (Princeton University Press, Princeton: 2000). On the other hand, the American Catholic Church supported liberal democracy long before the Vatican. MORRIS, *supra,* at 135.

[152] One exception was that the Church would often be quiet in circumstances where speaking out would risk persecution by the government. Despite many courageous actions, for many of the decades in the twentieth century, this was the pattern in Mexico. See VIKRAM R. CHAND, MEXICO'S POLITICAL AWAKENING 153-203 (University of Notre Dame Press, Notre Dame, Indiana: 2001).

[153] For the suggestion that Pope Pius XXII was relatively silent about Hitler largely because it felt that a strong Germany was necessary as a buffer against communism, see WILLIAM J. O'MALLEY, WHY BE CATHOLIC 161 (Crossroad, New York: 2001). Consider ALISTER E. MCGRATH, THE FUTURE OF CHRISTIANITY 10 (Blackwell Pub., Oxford: 2002): "The failure of German churches to make a significant impact on Hitler's rise to power, and his gradual move toward reaffirmation of imperial claims, raised serious questions concerning the moral credentials of Christianity . . . ."

[154] MICHAEL FLEET & BRIAN H. SMITH, THE CATHOLIC CHURCH AND DEMOCRACY IN CHILE AND PERU 4 (University of Notre Dame Press, Notre Dame, Indiana: 1997): "During the late 1960's and 1970's, the Church emerged as a critic and antagonist of repressive military regimes in several [Latin American] countries. Catholic bishops became champions of human rights and popular interests . . . In the early and mid 1980's, Church leaders and activists helped to persuade a number of military governments to relinquish power to civilian successors. . . .

has taken strong efforts to cut back on the political involvement of priests and bishops).[155] Although the current Pope has been willing to take unpopular positions because he thinks they are right, the Church has historically muffled its stance in favor of social justice when it thought its evangelical interests were served by doing so.[156] Indeed, for centuries, it was willing for political leaders to play a major role in the selection of religious leaders.[157] As Alister E. McGrath observes, "A church which scents the powerful fragrance of power and influence shows a worrying ability to become accommodating and flexible on matters which some might regard as non-negotiable."[158] If it is desirable for religious voices to play a role in the democratic process,[159] it is not helpful to provide incentives for them to be silenced.

Ironically, conservatives are ordinarily first in line to decry the influence of politicians in the private sphere, yet they are more sanguine about government's involvement in religion. Progressives who ordinarily are prepared to sanction extensive governmental involvement in the private sphere wake up to see the dangers when government becomes involved with religion. The progressive position might be recast this way: government involvement in the market is full of dangers, but the failure to intervene is even more dangerous because the market threatens to exploit labor, ruin the environment, and the like. On the other hand, the progressive might

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The Church thus played a generally progressive role in most of Latin America during the last thirty years." See generally JEFFREY KLAIBER, S.J., THE CHURCH, DICTATORSHIPS, AND DEMOCRACY IN LATIN AMERICA (Orbis Books, Maryknoll, New York: 1998).

[155] BRIAN H. SMITH, RELIGIOUS POLITICS IN LATIN AMERICA: PENTECOSTAL V. CATHOLIC 51-83 (University of Notre Dame Press, Notre Dame, Indiana: 1998).

[156] See FLEET & SMITH, *supra* 154, at 13, the Church's "political influence has been decidedly conservative through most of its history." The Church continues to promote its evangelical interests through ties with governments when it is able to do so even in the post Vatican II context. See note 326 *infra*. For nuanced discussion of the power and limits of the Church's involvement in politics, see TIMOTHY A. BYRNES, TRANSNATIONAL CATHOLICISM IN POSTCOMMUNIST EUROPE (Rowman & Littlefield Pub., Lanham, Maryland: 2001); TIMOTHY A. BYRNES, CATHOLIC BISHOPS IN AMERICA (Princeton University Press, Princeton: 1991).

[157] The Church made moves from the middle of the nineteenth century to regain control, but it took a century to complete the task. REMOND, *supra* note 150, at 180-83. In Latin American colonies, the Church permitted political leaders to censor ecclesiastical communications including those from the Vatican. This was not eliminated in Brazil until 1890. JOSE CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 114 (University of Chicago Press, Chicago: 1994).

[158] MCGRATH, *supra* note 153, at 12. Accord, MICHAEL M. WINTER, MISGUIDED MORALITY: CATHOLIC MORAL TEACHING IN THE CONTEMPORARY CHURCH xiv, 38, 53-61, 78-87 (Ashgate, Aldershot, England: 2002); Peter Wehner, *A Screwtape Letter for the Twentieth-First Century,* in WHAT'S GOD GOT TO DO WITH THE AMERICAN EXPERIMENT?, 41, 43 (E.J. Dionne Jr. & John J. Diulio, eds. Brookings Institution Press, Washington: 2000); Cal Thomas & Ed Dobson, *Blinded By Might: The Problem with Heaven on Earth,* in WHAT'S GOD GOT TO DO WITH THE AMERICAN EXPERIMENT?, *supra,* at 51, 52.

[159] One might argue that religious participation in democratic life makes churches too dependent on the state. This would seem to depend on the content of the participation. It would certainly be worrisome with respect to religious lobbying for church privileges. It would seem to be less of a concern for religious lobbying on moral issues.

believe that the dangers of involvement in the religious market are not outweighed by a need for intervention. It is unclear, however, why the conservative sees the dangers of intervention in the business market to be greater than the dangers of intervention in the religious market.

In any event, when Justice Kennedy complains that those who seek to prevent the Nativity Scene display are hostile to religion, he ignores not only non-Christian religious believers, but historic concerns about tight church-state relations within the Christian tradition that stretch back for centuries.[160] Kennedy's brand of name calling has no place in Establishment Clause jurisprudence.

7. Promoting Religion

Many would argue that separation of church and state has served to promote religion.[161] Assuming this is correct, the question would arise whether was a good thing or a bad thing, or more precisely, whether this was a constitutionally cognizable value. First, has separation of church and state promoted religion.

(a). Separation Positive for Religion?

Whether or not it is a good thing to promote religion, there is substantial evidence to support the view that the absence of established churches in the United States has been positive for religion. Most scholars, for example, would conclude that the United States citizenry is more religious than their counterparts in European countries where established churches persisted for centuries.[162] As Everett Ladd writes, "By just about every measure that survey researchers have

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[160] Hall, *Civic Virtue, supra* note 6, at 124: "Liberal theorists have argues convincingly that government is powerless to create civic virtue directly without risking either social unrest or corruption of the very sources of virtue it seeks to strengthen. This is the core insight out of which the Establishment Clause originated, and one whose persuasiveness has not diminished with the passage of two centuries."

[161] Conkle, *General Theory, supra* note 6, at 1180: [O]ur judicially enforced separation of religion and government may well invigorate religion and work to its long-term benefit." FOWLER & HERTZKE, *supra* note ?, at 10-11. For a sustained argument to this effect, see ROGER FINKE & RODNEY STARK, THE CHURCHING OF AMERICA, 1776-1990, at 18-21 (Rutgers University Press, New Brunswick: 1992). It is not clear that the workings of this aspect were generally foreseen by the framers. RAKOVE, *supra* note 79, at 54 (Jefferson expected religion to fade; Madison did not). But see MOORE, *supra* note 198, 255, at 17 (founders thought religion would prosper if government stopped enforcing religious orthodoxy or otherwise caring about it).

[162]. One religious leader has remarked that, "It would not be unduly dramatic to claim that Western Europe, at least is suffering from a spiritual and moral crisis of immense proportions." BASIL HUME, REMAKING EUROPE: THE GOSPEL IN A DIVIDED CONTINENT 59 (SPCK, London: 1994). On the other hand, American elites are surely as secular as European elites. PHILIP JENKINS, THE NEXT CHRISTENDOM: THE COMING OF GLOBAL CHRISTIANITY 161 (Oxford University Press: Oxford, 2002). Peter L. Berger, *The Desecularization of the World: A Global Overview, in* THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS 1, 10 (Peter L Berger ed. William B. Erdmans Pub. Co., Grand Rapids: 1999). Indeed, Berger is quoted as saying that, "If India is the most religious country on our planet, and Sweden is the least religious, America is a land of Indians ruled

conceived and employed, the United States appears markedly more religious than its peers in the family of nations, the other industrial democracies."[163] James Madison seems to have been prescient when he argued that state supported churches become dependent, compliant, even lazy, bloated, and corrupt.[164] They lose the necessary vitality to attract and maintain loyal committed followers. As suggested earlier, the Roman Catholic Church in particular seemed to lose a grip on its commitment to offer a moral voice in substantial parts of European society. The Church may have done itself no favors when it sided with Franco in Spain,[165] Salazar in Portugal,[166] the

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by Swedes." HUSTON SMITH, WHY RELIGION MATTERS 103 (HarperSanFrancisco, New York:2001). For the argument that European's religiosity may survive the relative abandonment of religious institutions, see Grace Davie, *The Exception that Proves the Rule*, *in* THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS, *supra,* at 68-71; see generally GRACE DAVIE, RELIGION IN MODERN EUROPE (Oxford University Press, Oxford: 2000); GRACE DAVIE, RELIGION IN BRITAIN SINCE 1945: BELIEVING WITHOUT BELONGING (Blackwell, Oxford: 1994). For the contention that religion is more alive in Europe than is generally supposed, see ANDREW M. GREELEY, RELIGION IN EUROPE AT THE END OF THE SECOND MILLENNIUM (Transaction Publishers, New Brunswick: 2003). Part of what Davie and Greeley are arguing is that the glass is half full; part is to question what measures are appropriate to focus upon; Greeley, in particular, argues that Europe is an aggregation that hides too much, that there are obvious transnational categories, e.g., age, gender, class, but that the particular national experience is more important than the European experience in explaining religious phenomena. For example, those who generalize about Europe need to explain Ireland, North and South, as well as Poland, not to mention the substantial difference between the French on most measures and those displayed in countries like Spain, Portugal, and Italy. In addition, for example, Greeley finds significant attitudinal differences between the Catholics of Northern Ireland and the Catholics of the South.

[163].Quoted in Derek H. Davis, *The U.S. Supreme Court as Moral Physician,* 43 J. OF CHURCH AND STATE 213, 230 (2001). Cf. Stephen M. Feldman, *Critical Questions in Law and Religion: An Introduction, in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 2 (Stephen F. Feldman, ed., New York University Press, New York: 2000): "A 1997 Gallop Poll found that 90 percent pray; 96 percent believe in God, 63 percent give grace or give thanks to God aloud, and 42 percent attended organized religious services the previous week. . . . Recent studies suggest that 'nine persons in ten believe Jesus Christ actually lived, seven in ten believe he was truly God, and six in ten think one must believe in the divinity of Christ to be a Christian. [Studies also document] consistently high levels of belief in life after death, heaven, and Christ's presence in heaven.'" Although belief and attendance rates are generally lower in most European countries than the United States, it would not be appropriate to describe European countries as secular: "[E]ven in the most apparently 'secular' of contemporary societies there are areas of society or of individual life where religious influences remain important." HUGH MCLEOD, RELIGION AND THE PEOPLE OF WESTERN EUROPE: 1789-1989, at 154 (2d ed. Oxford University Press, Oxford: 1997). On the European demographics, see JENKINS, *supra* note 162, 163, at 94-96. Modern day commentators might well have described eighteenth century American society as secular. MOORE, *supra* note 198, 255, at 15, "Most Americans in 1787 neither belonged to no regularly attended any house of worship. Church membership varied from place to place but stood somewhere around 10 percent of the total population."

[164] See generally Madison, *supra* note 74, at 12, 13. For the claim that monopoly churches "tend to be lazy and fail to mobilize high levels of commitment," see Rodney Stark & James C. McCann, *Market Forces and Catholic Commitment: Exploring the New Paradigm,* 32 J.FOR THE SCIENTIFIC STUDY OF RELIGION 111, 118 (1993).

[165]. McLeod, *supra* note 163, at 16. For some of his reign Franco nominated half of the bishops in Spain. Late in 1953 a new concordat lessened his control while Catholicism was declared to be the only religion of the Spanish nation though citizens were to be free to practice other religions. GEORGE HUNSTON WILLIAMS, THE CONTOURS OF CHURCH AND STATE IN THE THOUGHT OF JOHN PAUL II 29 (Baylor University Press, Waco: 1983). In 1978, the Spanish Constitution declared: "There shall be no state religion. The public authorities shall take account

Vichy regime in France,[167] with long reign of the Christian Democrats in Italy,[168] or when it was quiescent[169] in Hitler's Germany.[170] Similarly, the Anglican Church could hardly have benefitted from its control by the English government.[171] Nor is it likely, that the Church of Sweden has

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of the religious beliefs of Spanish society and shall accordingly maintain relations of cooperation with the Catholic Church and other faiths." Quoted in FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT, *supra* note 324, at 383. For discussion of the negative impact of the Church's embrace of Franco, see CASANOVA, *supra* note 157, at 75-91.

[166] LIBRARY OF CONGRESS, FEDERAL RESEARCH DIVISION COUNTRY STUDIES, http://memory.loc.gov/frd/cs/pttoc.html

[167] WARNER, *supra* note 151, at 68-71(arguing that the Church was "undeniably an integral part of the Vichy order," that it made the mistake of condemning De Gaulle, and that in the aftermath of the war it "would no longer be viewed as the guardian of things eternal, and certainly not of France"). Even if the leaders of the French Church had wished to distance itself from the Vichy regime (clergy were in fact divided over the desirability of the resistance), policies of several Popes had decentralized the French church to make it less able to offer resistance to Rome which it was richly inclined to do. The byproduct of the ecclesiastical struggle was that the French church was unable to offer a strong voice in French politics. Interestingly, the politics of those bishops who wanted distance from Rome tended to be monarchist and conservative; those who wanted closer political ties with Rome tended to favor Republican politics. *Id.* at 56-68.

[168] John G. Francis, *The Evolving Regulatory Structure of European Church-State Relationships,* J. OF CHURCH & STATE 775, 786.

[169] Despite courageous exceptions, the complicity of German Protestants was widespread. John S. Conway, *The Political Role of German Protestantism, 1870-1990,* J. OF CHURCH & STATE 819.

[170]. HANS KUNG, THE CATHOLIC CHURCH: A SHORT HISTORY 176-80 (John Bowden trans., The Modern Library, New York: 2001); Warner, *supra* note 151, at 188, 190 (Church encouraged the Zentrum, a Catholic political party to sign the Enabling Act that gave Hitler dictatorial powers and turned over birth records to the Nazis facilitating the identification of Jews, and told Catholics in 1933 that the Nazi regime was theirs to obey); Morris, *supra* note 151, at 242 (the Catholic Church was the last organization in the world that should have been relying on pragmatic arguments in dealing with Hitler). On the other hand, the Church had some distance from the Nazis enabling it to achieve a substantial amount of political damage control. *Id.* at 185-202. The Church in Italy was even more successful in the latter regard. In general, "The Pope agreed to accept the Fascists and Mussolini agreed that the Catholic religion would be taught in every Italian school. He also promised to pay the salaries of Catholic priests and set up the Vatican City in Rome." BBC, *Modern World History: Fascism in Italy,* http://www.bbc.co.uk/education/modern/fascism/fascihtm.htm. Despite this agreement, the Church and Mussolini had many disagreements over the years that allowed the Church to "distance itself from Fascism without also incriminating Catholicism or appearing to reverse itself." WARNER, *supra* note 151, at 53. The demand that the Church "disown certain political and social movements in exchange for limited ecclesiastical freedoms" was a frequent problem in Eastern Europe and Latin America. ERIC O. HANSEN, THE CATHOLIC CHURCH IN WORLD POLITICS 57 (Princeton University Press, Princeton: 1987).

[171] Indeed, Roman Catholics now outnumber Anglicans in England. Michael W. McConnell, *The Establishment and Disestablishment at the Founding: Part I: Establishment of Religion,* 44 WM. & MARY L. REV. 2105, 2115 (2003): "The main victim of the establishment today, if there is one, may be the established church itself." On the prospects for an Anglican recovery and reconceptualization, see BEYOND COLONIAL ANGLICANISM: THE ANGLICAN COMMUNION IN THE TWENTY-FIRST CENTURY (Church Publishing Inc., New York: 2001).

benefitted from its association with the Swedish government.[172] In each of these countries religiosity is now relatively low.[173] By contrast, the Roman Catholic Church sided with the Irish against England, the Poles against the Communists, and with the people against many Latin American dictators.[174] Catholicism is deeply tied with the national

identity in Ireland[175] and Poland[176] and is strong throughout Latin America. [177]

Citing evidence such as the foregoing, Jose Casanova argues that the strategy of the Church opposing separation of church and state in many circumstances precipitated religious decline.[178] Moreover, Roger Finke and Rodney Stark argue that religiosity is stronger in the United States as opposed to Europe precisely because of the separation of church and state.[179] Nonetheless, any claim that the relationship between church and state is invariably the decisive

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[172] Eva M. Hamberg & Thorleif Pettersson, *The Religious Market: Denominational Competition and Religious Participation in Contemporary Participation,* 33 J.FOR THE SCIENTIFIC STUDY OF RELIGION 205, 206 (1994).

[173] At least since Vatican II, the Catholic Church has accepted religious pluralism as a political fact, has abandoned the view that the state has the responsibility to defend and promote religious truth, and has settled on the view that the state is obliged to embrace the secular value of protecting religious freedom. John Courtney Murray, *The Issue of Church and State at Vatican Council II*, *in* THE CHURCH IN THE WORLD 35, 41-44 (Charles P. O'Brien, ed., Bruce Publishing Co. Milwaukee: 1967). Pope Pius XI stated in a 1933 encyclical that the separation of church and state was "impious and absurd." Quoted in MORRIS, *supra* note 151, at 237.

[174] See note 30 *supra*.

[175]. MCLEOD, *supra* note 163, at 20-21. But see note ? *infra*.

[176]. CHARLES TAYLOR, VARIETIES OF RELIGION TODAY 77 (Harvard University Press, Cambridge: 2002) (observing that the French Canadian identity is bound up with Catholicism as well).

[177]. Fighting against imperialism can be a major source of growth in the Church, at least when it takes a stance against the imperialists. See George Scialabba, "A Faith that Shaped Today's World," Boston Sunday Globe section D5, cols 3-6 (August 18, 2002): "The faith grew astonishingly fast in the second and third centuries, especially among the lower classes. . . . . Roman persecution was fitful, but even at its fiercest was unavailing. The blood of martyrs [was] indeed the seed of the church." For the claim that the Church's activities on behalf of the poor (particularly poor non-Church members) was also a significant factor in its growth, see ANTON WESSELS, EUROPE: WAS IT EVER REALLY CHRISTIAN: THE INTERACTION BETWEEN GOSPEL AND CULTURE 196 (John Bowden, trans., SCM Press LTD, London: 1994). The primary thesis of Wessels' monograph is that the evangelical success of Christianity depended upon its ability to adapt its message to the customs, habits, and rituals of the different cultures it encountered.

[178] CASANOVA, *supra* note 157, at 22, 29.

[179] FINKE & STARK, *supra* note 161. See also Rakove, *supra* note 79, at 54: "To judge by the results, [the] market oriented approach offers the best explanation for the best explanation for the remarkable success of the American experiment in religious pluralism." For a powerful criticism of the Finke and Stark perspective in the context of Great Britain, see Steve Bruce, *The Truth About Religion in Britain,* 34 JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 417 (1995). See also BRUCE, *supra* note 149, at 204-28 (focusing on the U.S.).

factor for the rise or fall of religiosity would be difficult to sustain. Religion has thrived during and after many dictatorships. Consider the Constantinian dictatorship and the many that followed.[180] I suspect that Nicholas Burns goes too far when he writes that, "Without Constantine, we might not even remember Jesus' name in the twentieth century."[181] I doubt that Burns is correct, but the extent to which repression worked to enhance some religions and diminish others may not be fully appreciated in much of the religion clause literature.[182] Indeed, there is some evidence that participation may have been assisted by religious privileges under dictatorships in Central and South America[183] as well as Africa.[184]

Equally significant, if religions flourish when the church is separated from the state and protections for religious freedom are in place, one might expect that religion would now be flourishing in Europe.[185] Yet Europe has emerged as the poster child for secularism.[186] Clearly factors other than the relationship between church and state play a significant role in the sociology of religion. Corruption, or perceived corruption, in the clergy had a devastating impact

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[180] KUNG, *supra* note 170, at 37-40.

[181] Nicholas Burns, "A Diplomat's Journey," in WHY I AM STILL A CATHOLIC 75 (Kevin Ryan & Marilyn Ryan, eds Riverhead Books, New York: 1998).

[182] On the suppression side, see KUNG, *supra* note 30, at 81: "[T]he African churches, even those of Carthage and Hippo, were overwhelmed by Islam in the seventh century without resistance and vanished without a trace into history."

[183] JENKINS, *supra* note 162, 163, at 27-28, 57-58

[184] *Id.* at 153.

[185] For the claim that new religions are flourishing in Europe, see Rodney Stark, *Europe's Receptivity to New Religious Movements: Round Two,* 32 J. FOR THE SCIENTIFIC STUDY OF RELIGION 389 (1993).

[186] The probable complexity of the appropriate analysis is indicated by Jose Casanova. Krishan Kumar & Ekaterina Makarova, *An Interview with Jose Casanova*, 4 THE HEDGEHOG REVIEW 91, 92 (Summer, 2002): "The traditional model of secularization offers a plausible account of European developments but not of American ones. The alternative American paradigm linking religious vitality to free religious market works relatively well for the United States but not for contemporary Europe. Neither can offer a plausible account of the significant internal variations within Europe. Most importantly, neither works very well for other world religions and other parts of the world."

on the church[187] particularly in France;[188] vivid reminders of the existence of evil fuel the perception that a loving God does not exist,[189] the Church's position on birth control has troubled millions;[190] attendance is stronger in rural areas than in urban areas;[191] women are more likely to be religious than men[192] (though the Church's position on the role of women has taken a substantial toll);[193] poor people are more likely to be religious than the wealthy; the Enlightenment with its emphasis on reason and science[194] has rocked the faith of many.[195]

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[187] MCGRATH, *supra* note 153, at ix, 105. Support for religion in Ireland has wavered in part because of corruption in the clergy (*id.* at x) and presumably because of increased wealth.

[188]. MCLEOD, *supra* note 163, at 8-11, 15, 26-30, 57, 60-62, 72, 82-83, 11 (2d ed. Oxford University Press, Oxford: 1997). The split between clerical and anti-clericals has long been central to French politics. Kung, *supra* note 170, at 155. Anticlericism need not signal a rejection of religion. For an interesting account of anticlericism in Spain, see Ruth Bethar, *The Struggle for the Church: Popular Anticlericalism and Religiosity in Post-Franco Spain, in* RELIGIOUS ORTHODOXY AND POPULAR FAITH IN EUROPEAN SOCIETY *supra* note ?, at 76.

[189] According to George Shuster, other factors, "could not have decimated Christianity so savagely had it not been for the rise of the conviction that the problem of evil is beyond solution. It was the powerlessness of the individual in the face of tyranny which was so awful, so shattering and so unnerving an experience." George Shuster, *Christian Culture and Education*, *in* THE CHURCH IN THE WORLD, supra note 173, at 86, 92. For discussion of the problem of evil, see generally SUSAN NEIMAN, EVIL IN MODERN THOUGHT: AN ALTERNATIVE HISTORY OF PHILOSOPHY (Princeton University Press, Princeton: 2002).

[190] The American experience in this regard presumably mirrors that of Europe. The American Church experienced a significant decline in attendance and a substantial decline in contributions. ANDREW GREELEY, THE CATHOLIC MYTH 23-24, 96, 134 (Touchstone, New York: 1997). This amounted to nothing less than a historic crisis of authority in the Catholic church. ANDREW GREELEY, THE CATHOLIC REVOLUTION: NEW WINE, OLD WINESKINS, AND THE SECOND VATICAN COUNCIL 8, 13, 56-57, 73 (University of California Press, Berkeley: 2004).

[191]. *Id.* at 75-97. In some cases this phenomenon is better explained by class difference. Moreover, the hopelessness for many of urban life sometimes pushes them toward religion. Taylor, *supra* note 176, at 38-39. Nonetheless, socioeconomic modernization tends toward secularization. PETER L. BERGER, THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION 108-09, 130-31 (1967).

[192]. MCLEOD, *supra* note 163, at 28-35. One explanation for the greater religiosity of women suggests that religion stresses the "'feminine' values of kindness, empathy, and compassion, and does not value the masculine characteristics of aggression and dominance." BENJAMIN BEIT-HALLAHMI AND MICHAEL ARGYLE, THE PSYCHOLOGY OF RELIGIOUS BEHAVIOR, BELIEF AND EXPERIENCE 65 (Routledge, London: 1997). Women tend to see God as supporting, loving, and forgiving; men tend to see God as a power and controller. *Id.* at 140. It is ironic that the Catholic Church would insist on limiting important ministerial functions to males although some steps have been taken to loosen the historic restrictions. See HUME, *supra* note 162, at 54. On the political impact of female religiosity, see MORRIS, *supra* note 151, at 46: "Avoiding undue clerical influence in public affairs was advanced in the French Parliament as an important reason for denying women suffrage."

[193] On the toll, see MORRIS; for a theological defense of the Church's position, see STEIGEL; for a theological critique, see KUNG; for a political defense, see Jenkins, *supra* note 151, at 109, 196, 198-200, 209.

[194] On the limits of a naturalistic view, see Alan Donagan, *Can Anybody in a Post-Christian Culture Rationally Believe the Nicene Creed, in* CHRISTIAN PHILOSOPHY 92 (Thomas P. Flint, University of Notre Dame Press, Notre Dame, Indiana: 1990). For a brilliant discussion of the relationship between scientism, religion, and romanticism, see PETER L. THORSLEV, JR., ROMANTIC CONTRARIES (Yale University Press, New Haven: 1984). See

It is not clear, however, that these factors vary significantly between European countries and the United States. One factor that might be significant in the United States is that it was founded by religious dissenters who were intense in their religiosity and prone to form new sects rather than compromise[196] their individualistic integrity.[197] The existence of freedom of religion in the United States with the concomitant ability to form many different churches might have had a particularly strong impact in the United States given the religious demographics of the population. Despite the multiplicity of factors relevant to the sociology of religion, then, there is support for the view that the avoidance of tight connections between church and state has served to promote religion in the United States.

(b). The Value of Religion

The question remains whether promoting religion is a good thing, and whether the religion clauses of the Constitution should be interpreted to favor religion over non-religion. The debate over the utility of religion, of course, is longstanding. In his Farewell Address George Washington maintained: "Of all the dispositions and habits which lead to political prosperity,

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also REINHOLD NIEBUHR, DOES CIVILIZATION NEED RELIGION? 5 (The MacMillon Co., New York: 1927): "The sciences have greatly complicated the problem of maintaining the plausibility of the personalization of the universe by which religion guarantees the worth of human personality; and science applied to the world's work has created a type of society in which human personality is easily debased." On the limits of science, see generally HUSTON SMITH, *supra* note 162. For the methodological atheism of Habermas, see JURGEN HABERMAS, RELIGION AND RATIONALITY (MIT Press, Cambridge: 2002); MARC P. LALONDE, CRITICAL THEOLOGY AND THE CHALLENGE OF JURGEN HABERMAS (Peter Lang Publishing, Inc., New York: 1999); MARGARET M. CAMPBELL, CRITICAL THEORY AND LIBERATION THEOLOGY: A COMPARISON OF THE INITIAL WORK OF JURGEN HABERMAS AND GUSTAVIO GUTIERREZ (Peter Lang Publishing, Inc., New York: 1999).

[195] On the other hand, to the extent that an emphasis on reason and science "undermines all the old certainties; uncertainty is a condition that many people find it very hard to bear; therefore, any movement (not only a religious one) that promises to provide or to renew certainty has a ready market." Peter L. Berger, *The Desecularization of the World: A Global Overview, in* THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS 1, 7 (Peter L Berger ed. William B. Erdmans Pub. Co., Grand Rapids: 1999).

[196] Finke and Stark argue that the uncompromising character of religious institutions is a strong factor in maintaining their power to attract and maintain membership. Thus they argue that the liberalization of Vatican II in the Catholic Church caused its membership and contributions to decline. *Supra* note 161, at 255-75.

[197] In countries where Catholicism dominates, in this post reformation era, the potential for schism seems less. Catholic who can no longer live with the church frequently leave organized religion altogether or, less frequently, join other denominations. Perhaps because Protestant denominations emphasize the lack of a central authority, the potential for multiple schisms has been greater. *See* Timothy P. Schilling, *When Bishops Disagree: Rome Hunthausen & the Current Church Crisis,* CXXX COMMONWEAL 15, 21 (Sept. 12, 2003)(comparing propensity of Catholics and Protestant to engage in schism). *Cf.* FOWLER & HERTZKE, *supra* note ?, at 33: "In Europe, if you have become alienated from the established church you likely drift away; in America you are as likely to form or join a new church."

religion and morality are indispensable supports."[198] By contrast, John Stuart Mill conceded the importance of morality, but denied the utility of religion.[199] He maintained that a belief in the supernatural served useful purposes in the early stages of human development, but could now be dispensed with.[200] He suggested that religion was largely believed because of authority, education and public opinion[201] and that a supernatural foundation was no longer needed for moral beliefs. Indeed, he argued that a supernatural foundation was positively harmful in that belief in religion discouraged criticism of beliefs that were imperfect.[202] Mill admitted that religion would be attractive so long as "human life is sufficient to satisfy human aspirations, so long there will be a craving for higher things, which finds its most obvious satisfaction in religion. So long as earthly life is full of sufferings, so long there will be need of consolations, which the hope of heaven affords to the selfish, the love of God to the tender and grateful."[203] Nonetheless, Mill thought an alternative to what he believed to be "baseless fancies" existed.[204] Just as human beings have been willing to sacrifice all for their nation, Mill believed that they could be attracted to play their part in the destiny of the human race, a role in which they need not sacrifice themselves to the whole, but would accommodate freedom and duty, and would be consoled by living the kind of life that would be admired by family or friends, dead or living.[205]

Many have been moved by the kind of humanistic ideals of Mill. Moreover it is hard to deny the force of public opinion. If religion were authoritatively regarded as superstition in a society, socialization against religion would be powerful. Moreover, it would be possible to

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[198] George Washington, *Farewell Address, in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 213, 220 (James D. Richardson, ed., Bureau of National Literature and Art, Washington, D.C., 1908); *Cf.* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293 (George Lawrence trans., J.P. Mayer, ed., Anchor Books, Garden City, New York: 1966): "I do not know if all Americans have faith in their religion - for who can read the secrets of their heart? - but I am sure they think it is necessary to the maintenance of republican institutions. That is not the view of one class or party among the citizens, but of the whole nation; it is found in all ranks." R. LAURENCE MOORE, TOUCHDOWN JESUS: THE MIXING OF SACRED AND SECULAR IN AMERICAN HISTORY (Westminster John Knox Press, Louisville: 2003): "We [know] that, whether [the framers] were Deist or Congregational or Episcopalian, or not much of anything, they shared an important assumption: Religion was the foundation of virtue."

[199] John Stuart Mill, *Utility of Religion, in* NATURE AND UTILITY OF RELIGION 50-51 (George Nakhanian, ed., The Liberal Arts Press: New York: n.d.)

[200] *Id.* at 63-65.

[201] *Id.* at 51-59.

[202] *Id. at* 46-47, 65.

[203] *Id.* at 68.

[204] *Id.*

[205] *Id.* at 70-71.

organize a society around the humanistic appeals of Mill.[206] Indeed, those appeals are present in any religion worthy of the name. As Reinhold Niebuhr puts it, "[M]orality is as much the root as the fruit of religion."[207]

But we do not write on a clean slate. For millions of citizens, religion fills a need that humanism does not fill. For those citizens, the dominant religions in the United States provide an explanation for the mysteries of the universe,[208] a grounding for the importance of personality in an impersonal world,[209] a sense of obligation and mission not provided by humanism,[210] and a "guaranteed security against the forces of nature."[211]

Moreover, religious institutions regularly create rituals and other events that create opportunities for moral reflection. This makes religiously-based moral practice less lonely and provides more social support for its burdens. Such events are not incompatible with secular humanism, but particularly outside educational settings, they are relatively rare. By comparison, then secular humanist moral agency is rather isolated.[212]

Whether religiosity is desirable from a political perspective, however, is open to

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[206] For the argument that many east Asian countries have been organized through the aggressive promotion of a form of secular humanism with considerable success, see T.R. REID, CONFUCIUS LIVES NEXT DOOR: WHAT LIVING IN THE EAST TEACHES US ABOUT LIVING IN THE WEST (Random House, New York: 1999).

[207] NIEBUHR, *supra* note 145, at 14.

[208] For reflections on living without an explanation, see THOMAS NAGEL, WHAT DOES IT ALL MEAN: A VERY SHORT INTRODUCTION TO PHILOSOPHY 95-101 (Oxford University Press, New York: 1987).

[209] *Id.* at 4.

[210] See generally HANS KUNG, WHY I AM STILL A CHRISTIAN (David Smith trans., Abingdon Press, Nashville:1985).

[211] NIEBUHR, *supra* note 145, at 5. See also JONATHAN SACKS, THE DIGNITY OF DIFFERENCE 82 (Rev. ed. Continuum, London: 2003)(religions are "a significant space outside of and in counterpoint to a late-modern Western culture that tends systematically to dissolve the values and virtues that give meaning to a life." MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 56-62 (Oxford U. Press 1991) writes that, "One polar response to the problem of meaning is to conclude that life is, finally and radically meaningless . . . . [The other] is 'religious': the trust that life is ultimately meaningful, meaningful in a way hospitable to our deepest yearnings." See also Marshall, *supra* note 100, at 387: "Religion addresses the most important questions at the core of human existence -- the existential questions of meaning, morality, and the nature of Truth. It provides many with a sustaining meaning for life–and an explanation for death." Marshall, however, argues that the psychological need to hold on to these explanations leads to intolerance particularly when everlasting life is thought to be at stake. *Id.* at 388-90. On the latter point, see generally William P. Marshall, *The Other Side of Religion* 44 HASTINGS L.REV. 843 (1993). *Cf. Berg,* supra note 145, at 1589-90, 1596-97 (recognition that only one God exists can induce humility, but it can lead to false absolutes and arrogance).

[212] Thanks to Seana Shiffrin for the points made in this paragraph.

question. Measuring the extent to which religion promotes altruism is tricky business.[213] To the extent there is a case for religion in this regard, it lies among the group that is religiously active in significant ways. Nonetheless, the overall impact of religion is arguably suspect. For example, as Mary Ann Glendon observes, "Crossnational studies repeatedly show that the proportion of children in poverty in the United States is greater than in other countries with which we frequently compare ourselves."[214] If altruism were connected with religion, one might have expected the "religious" United States to take better of its children than secular Europe. On the other hand, Europeans remain influenced in their values by a prior religious history[215] and they are more comfortable with a strong government welfare role which has the advantage of avoiding free rider problems. Moreover, some sociologists worry that as Europe continues to secularize its commitment to humane values will wane. Finally, whatever the comparative dimensions with Europe, it is hard to ignore that substantial role played by religious associations in directly assisting the poor.

Even if religion did not promote altruism, there are grounds to believe that religious associations promote civic participation[216] and themselves provide moral and political criticism uncontaminated by the profit motive.[217] For example, there are strong grounds to credit religious

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[213]. The evidence is mixed. BEIT-HALLAHMI & ARGYLE, *supra* note 192, at 200-03, but churches surely work to promote altruism and oppose the notion of "every man for himself." HUME, *supra* note 162, at 14. *Id.* at 48.

[214] MARY ANN GLENDON, RIGHTS TALK, *supra* note 47, at 107.

[215] HANS KUNG, ON BEING A CHRISTIAN 30-31 (1978).

[216] FOWLER AND HERTZKE, *supra* note ?, at 32: "On the social and civic level, religious people are more likely to give to charity, vote, and be influenced in community activities than the nonreligious." Obviously other associations promote civic virtue, but the contribution of religion to civic virtue can in combination with other factors serve to justify special constitutional protection. Hall, *Civic Virtue, supra* note 6, at 112-117.

[217] CARTER, *supra* note 65, at 112.

groups with positive efforts for social change in American history. Religious leaders and groups have played important roles in movements for the abolition of slavery, rights for workers in a wide variety of contexts, women's suffrage, civil rights, and a number of other progressive causes. Moreover, religious groups have been an important force in lobbying for the poor.[218] From a political perspective, I believe that religion has on balance been a positive political force in the United States[219] and a negative force in Europe, but there is room for argument on both sides.

Even if those who follow religious precepts are more altruistic than those of a relevant control group, and even if religious associations promote civic values, it has to be admitted that deep religious commitments have led to intolerance, discrimination, and violent civil and international wars.[220] But there is more. Perhaps the dominant strain of Protestantism in the United States has stressed the importance of faith as opposed to good works, the extent to which the life of importance is the next life, not this one,[221] and the virtue of accepting business and governmental institutions as they are, thus encouraging a predominantly secular economy where business is business, and predominantly secular political institutions where naked self interest dwarfs ethical considerations.[222] These emphases on faith, the next life, and acceptance of one's lot in life are hardly calculated to produce an active engaged citizenry.

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[218] On the contributions of religious groups to grassroots progressive groups, see Richard Parker, *Progressive Politics and Visions: And, Uh, Well . . . God, in* WHAT'S GOD GOT TO DO WITH THE AMERICAN EXPERIMENT?, 56, 60 (E.J. Dionne Jr. & John J. Diulio, eds. Brookings Institution Press, Washington: 2000).

[219] Shiffrin, *supra* note 86, at 1646-52.

[220]. KUNG, *supra* note 170, at 137-38. The prospect of religious wars in the third world is quite real. See JENKINS, *supra* note , at 13. On the other hand, I wonder how much of the violence apparently attributable to religion might have occurred in any event with some other method of creating the Other who needed to be slain. Hitler and Stalin, for example, did not need religion to support mass murder. JOHN GRAY, AL QAEDA AND WHAT IT MEANS TO BE MODERN 2 (Faber and Faber, London:2003). See also SACKS, *supra* note 211, at 5-6 (the causes of conflicts in which the fault line is divided along religious lines is frequently political or economic); O'MALLEY, *supra* note 153, at 136 ("Surely the war in Northern Ireland today has nothing whatever to do with whether the pope is the vicar of Christ."). Having said that, I do not mean deny that one of the disadvantages of religion is that it has played a substantial role in the creation of violence. One of the explanations for this is that the human need to feel a sense of certainty about religious matters (as opposed to feelings of insignificance and chaos) breeds intolerance about those who have reached different conclusions. For powerful development of this position, see Marshal, *supra* note 211. Marshall is careful to observe that the tendency toward intolerance is not a property of all religions. *Id.* at 853.

[221] For many decades in the twentieth century, the American Catholic Church's emphasis on loyalty and patriotism, rocking the boat only in areas of special interest for religious freedom, may have had political effects similar to the dominant strain of Protestantism (though it was socially segregated from the modern culture). For an excellent description of Catholic culture in the first six decades of the twentieth century and the factors which caused it to change, see MORRIS, *supra* note 151. For one view of the various Muslim perspectives, see L. CARL BROWN, RELIGION AND STATE: THE MUSLIM APPROACH TO POLITICS (Columbia University Press, New York: 2000).

[222] See generally NIEBUHR, *supra* note 145. On the relationship between Protestantism and economic attitudes, Niebuhr seems to follow R.H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM 227-53, 277-81 (Adam Seligman, intr., Transaction Publishers, New Brunswick: 1988).

Even if religion generally produced an engaged citizenry, certain aspects of many religions unquestionably run counter to the public good, at least from a progressive perspective. Consider the teaching of conservative religions about the role of women in the family and society,[223] about birth control, and homosexuality.[224] Consider the impact of conservative religious teachings on toleration of others.[225] And, then, there is the issue of hell. It is questionable whether the traditional doctrine of hell is psychologically productive for anyone,[226] let alone children.[227] In the absence of religion, a family that threatened its children with eternal torture[228] for sexual indiscretions would presumably be guilty of child abuse.

(C) The Constitutional Value of Religion

Conceding that there are arguments on both sides on the civic value *vel non* of religion, the question remains whether it is reasonable to interpret the religion clauses to favor religion.[229] Of course, part of the motivation for the Establishment Clause had nothing to say about the value of religion. The Establishment Clause was designed to make sure among other things that the

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[223] For a brilliant Catholic feminist critique and reconstruction of traditional Catholic teachings about Mary, see ELIZABETH A. JOHNSON, TRULY OUR SISTER: A THEOLOGY OF MARY IN THE COMMUNION OF SAINTS (Continuum, New York: 2003).

[224] For a critique of the historically negative stance taken by Christianity on sexuality, see JAMES B. NELSON, BETWEEN TWO GARDENS: REFLECTIONS ON SEXUALITY AND RELIGIOUS EXPERIENCE (The Pilgrim Press, Cleveland: 1983).

[225] For the claim that the Puritan doctrine separating the elect from the immoral others has played a dominant role in American history, see MORONE, *supra* note 29.

[226] It is easy to see how the doctrine can lead to intolerance. See Marshall, *supra* note 211.

[227] HANS KUNG, ETERNAL LIFE? 131 (Edward Quinn, trans. Doubleday and Co., 1981): "The problem of hell may not be dismissed in silence if only because the *fear of hell*-which has become a proverbial expression-has done immense harm over the course of centuries."

[228] There are alternatives to the literal interpretation. Indeed, as Ellen Badone observes, "[S]ince the 1950's Catholic teachings on Hell and Purgatory have changed dramatically." RELIGIOUS ORTHODOXY AND POPULAR FAITH IN EUROPEAN SOCIETY, *supra* note ?, at 7. See RICHARD P. O'BRIEN, CATHOLICISM 1176-77 (New ed., HarperSanFrancisco, 1994)(not clear that persons actually go to hell, conceiving hell as separation and isolation or as nonbeing). For a subtle discussion, see KARL RAHNER, THE CONTENT OF FAITH 634-37 (Karl Lehmann & Albert Raffelt eds., Harvey D. Egan, S.J., trans, Crossroad Pub. Co., New York: 1994).

[229] For arguments that it should be so interpreted, see JOHN H. GARVEY, *supra* note 55, at 42-57(arguing religious freedom is protected because religion is a good thing); Smith, *supra* note 17, at 153-56. For arguments against, see Eisgruber & Sager, *supra* note 77. The framers certainly had no interest in promoting false religions. This was one of the reasons for the notion that persons should not be forced to support religions to which they were opposed. TRIBE, supra note 6, at 1160-61. Moreover, the early American church histories were written to allay the worry that disestablishment would promote quack religions and undermine the morality of the nation. Moore, *supra* note 80, at 4-13.

federal government did not interfere with the then reigning state establishments of religion.[230] This does not mean that the framers favored tight connections between church and state. Far more likely, the framers respected the autonomy of states to conduct their own affairs. They plainly did not believe that tight connections between church and state at the federal level would be good for religious liberty.[231]

Beyond federalism, a substantial theme of the framers favoring separation of church and state sounded in religious reasons. The notion was that some things belonged to God and others to the state.[232] Moreover, the framers seemed generally to value religious commitments over non-religious commitments, many like George Washington believing that the nurturing of religion was necessary for the promotion of civic virtue. On the other hand, a founder like Thomas Jefferson did not favor the promotion of institutional religion.[233] He believed among other things that it was unnecessary. From Jefferson's perspective, God had already supplied us all with a moral sense.[234] Indeed he hoped that traditional religion would fade away.[235] The presence of the Enlightenment theme in the foundation of the republic cannot be avoided.[236] Moreover, there are

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[230]. See. e.g., Daniel O. Conkle, *supra* note 6, at 1113, 1132-35 (1988); but cf. Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 17-18 (1995)(exclusive purpose of the Establishment Clause); Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1157-60 (1991)*;* Akhil Reed Amar, *Some Notes on the Establishment Clause,* 2 ROGER WILLIAMS U.L. REV. 1, 3 (1996)(accord).

[231] CONKLE, CONSTITUTIONAL THEORY, *supra* note 6, at 1134: "The national government was conceived as a government of limited and enumerated powers, and these powers did not extend to matters of religion."

[232] John Locke was influential in this regard. LOCKE, *supra* note 2, at 26-30. See also Madison, *supra* note 74, at 9-10; Michael McConnell, *Why is Religious Liberty the "First Freedom"?,* 21 CARDOZO L.REV. 1243, 1245-50 (2000); Michael McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age,* 1993 B.Y.U. L.REV. 163, 167-70. This argument has also been used to oppose democracy. See KRAYNAK, *supra* note 151, at 45-106.

[233] EUGENE R. SHERIDAN, JEFFERSON AND RELIGION 67-68 (Princeton University Press, Princeton: 1998)(Jefferson's opposition to Christian churches).

[234] SHERIDAN, *supra* note 233, at 19. For intellectual history relevant to this view of conscience, see LINDA HOGAN, CONFRONTING THE TRUTH: CONSCIENCE IN THE CATHOLIC TRADITION 1-99 (Paulist Press, New York: 2000).

[235] RAKOVE, *supra* note 79, at 254. MOORE, supra note 198, 255, at 17. Although Jefferson opposed doctrines associating Jesus Christ with the divine, he ultimately came to favor Christian moral teachings. See Sheridan, *supra* note 233.

[236] William Lee Miller argues, "In the long run, across the whole culture, . . . the interpretation . . . that insists upon religion as the necessary foundation of America's republican institutions. The Enlightenment, with its edge of scepticism, was to much present in the Revolution, in the new nations institutions, in key founders, in the mind of significant segments of the people - and, in effect, in the great silences and protections and negations of the Constitution itself - for that to be persuasive." William Lee Miller, *The Moral Project of the American Founders, in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 35 (James D. Hunter & Os Guiness eds., 1990). Instead, he maintains that the distinctive feature "of the

even greater grounds to question whether it is reasonable to interpret the religion clauses as proceeding from a religious foundation in the more pluralistic and more skeptical age in which we live.[237] One approach to this might be to say that an overlapping consensus of the religious (more precisely, most of the religious) and non-religious support freedom of religion,[238] and that the clauses should not be interpreted to favor one position over the other. From this perspective, if the separation of church and state promoted religion, the Constitution would be indifferent. It might be a fact; it might be valued by many; but it would not be a constitutional value. The same could not be said from this perspective of the Roger Williams value. From a religious perspective, protecting religions from the corrosive effects of state interference is of religious importance. From the perspective of the non-religious, the Roger Williams value serves to limit government's attempts to promote religion. From that perspective, it has instrumental value of constitutional significance.

Although there is much to commend in the overlapping consensus approach as an ideal, it seems clear that government has favored religion, at least to a limited extent throughout our constitutional history, and that such favoritism has not been regarded as unconstitutional. As I will subsequently discuss, the presence of "In God We Trust" on the coins, for example, is a non-trivial indication that government can favor religion in some contexts without violating the Constitution. One way to look at this is that the Constitution favors religion over non-religion, but that there are limits to which the government can promote religion both because of respect for non-believers and for reasons that appeal to many religious believers. Alternatively, one could posit that the Constitution is indifferent about the fate of religion, but compromises have been made along the way. As I will suggest in connection with discussion of the Pledge of Allegiance and "In God We Trust," I think the latter perspective is at odds with our constitutional history. It seems reasonable to interpret the religion clauses as favoring religion,[239] but with significant limitations on how that favoritism is expressed. Such a position does not undercut the protection of free exercise for non-believers. If there is one proposition unanimously favored in religion law it is that the decision to accept or reject religion should be a

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American beginning was neither the religious underpinnings nor the emancipation from them but the combination." *Id.* at 37. Nonetheless, the enlightenment theme in the United States was not as hostile to religion as it was in Europe. In part, this was because those who supported religion also supported republicanism contrary to the pattern in Europe. *Id.*

[237] Although original intent of the framers is relevant to constitutional interpretation, multiple sources of interpretation should guide constitutional interpretation. Shiffrin, *supra* note 45, at 1103, 1197-98. But see McConnell, *supra* note 232 (placing stress on original intent).

[238] *Cf.* Berg, *supra* note 145, at 1581-82 (suggesting the presence of an overlapping consensus at the founding, but arguing that the rise of the welfare state tears the consensus apart). Of course, in the concrete, no consensus exists as to how to define religious freedom in concrete contexts.

[239] Certainly an attempt to justify the religion clauses from anti-religious premises would be a non-starter. As I will ultimately suggest, given the plurality of positions, there is no neutral ground to stand upon.

voluntary matter.[240] Moreover, the free speech clause, Article VI, section [3], prohibiting religious test oaths for public office,[241] and the Equal Protection Clause, also make clear that our Constitution does not tolerate governmental discrimination against the non-religious. Nor does such a position do much to threaten governmental involvement in the religious sphere to promote religion. Favoring religion ordinarily counsels *against* government action designed to favor religion. Distrust of politicians is not only a mark of our system of checks and balances; it is a fundamental ingredient of the religion clauses.[242] Nonetheless, the Establishment Clause can not be fairly read to preclude all actions by politicians that favor religion any more than the Free Exercise clause precludes all state actions with a negative impact on religion. Although there are easy cases, applying the Establishment Clause frequently call for nuanced practical judgments that can not be reduced to simplistic formulas.

C. **Applying the Establishment Clause**

The *Allegheny County* case is an model case for those who would reduce the Establishment Clause to an equality model. The county's action favors Christianity. This it may not do. End of case. If equality were the sole value underlying the Establishment Clause, one would expect that governmental deviations from religious equality would invariably be unconstitutional and that government conformity with equality would invariably be constitutional. But neither of these propositions are correct. Government deviations from equality are frequently constitutional. For example, governmentally sponsored monotheistic prayers are ordinarily constitutional, at least outside the context of public schools; government frequently takes positions that contradict religious doctrine without violating the Establishment Clause; and government ordinarily may remove obstacles from religious practice in ways that discriminate against or burden non-religious actors. Similarly, conformity with equality does not immunize government from Establishment Clause liability. For example, government may not permit religious teachers in public school classrooms even if it does so on an equal basis. Equality's explanatory power is thwarted precisely because of the pluralistic foundations of the Establishment Clause.

1. Acceptable Deviations from Equality

a. Monotheistic Prayer

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[240] *Cf. Berg, supra* note 27, at 733: "[T]he reliance on religious voluntarist beliefs to ground religious freedom is not the sort of reliance that amounts to real favoritism or preference for religion or a particular faith. Indeed, the purpose of the voluntarist principle is to give equal liberty to all beliefs. That government relies on one belief to ground that principle does not in itself create any favoritism in how government actually treats its citizens – and again, it is how government actually treats citizens, not the grounds on which it relies, that is most important to neutrality."

[241] On the significance of this provision, see KRAMNICK & MOORE, *supra* note 27, at 26-45.

[242] Berg, *supra* note 145, at 1630-31

Justice Kennedy's claim that those who oppose the action of Allegheny County are hostile to religion is widely shared. Many worry that if religious symbols are absent from public life that the impression will be created that religion is unimportant, not part of the lives of the American people, not something that should be part of the lives of children. They worry about the consequences of a political culture devoid of religious symbolism. They worry about the consequences of maintaining a "naked public square."[243]

In response to such worries, much public ceremony contains reference to or prayers to God designed to counter the impression that the United States is a godless government. The formulation and use of the Pledge of Allegiance is one of many governmental actions that pay homage to God. Some such efforts have been declared unconstitutional. The Court struck down prayer[244] and Bible readings[245] in public school classrooms, for example, some four decades ago. Nonetheless, Supreme Court Justices have routinely suggested that the Pledge of Allegiance was not constitutionally problematic. These statements have now been challenged.

Shortly before the fourth of July, 2002, Judge Goodwin of the Ninth Circuit Court of Appeals wrote an opinion declaring the words "under God" in the Pledge of Allegiance to violate the Establishment Clause.[246] It was not a hard argument to make. Far from a lasting tradition reaching to the beginning of the Republic, the words had been added to the Pledge by the Congress in the 1950's.[247] The Supreme Court had clearly stated that it was unconstitutional for the state to promote religion.[248] But, as Goodwin pointedly observed, the under God amendment not only endorsed religion over non-religion; it endorsed monotheism over polytheism.[249] Indeed, its unmistakable purpose was to endorse and promote religion. President Eisenhower, during the Act's signing ceremony, stated: "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural

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[243]. See generally RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (William B. Eerdmans Pub. Co., Grand Rapids: 1984).

[244] Engel v. Vitale, 370 U.S. 421 (1962).

[245] School Dist. v. Schempp, 374 U.S. 203 (1963).

[246] Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002)(judgment stayed on June 27, 2002, pending en banc review). The opinion was ultimately withdrawn in favor of an opinion declaring unconstitutional a school district policy requiring the recitation of the Pledge of Allegiance daily by willing students in each elementary school class, but not invalidating the Congressional act adding the words under God to the Pledge. Newdow v. U.S. Congress, 328 F.3d 466, 483, 490 (2003), *cert denied,* 124 S.Ct. 386 (2003) *and cert. granted sub nom*, Elk Grove Unified School Dist., 124 S.Ct. 384 (2003).

[247] *Id.* at 600.

[248] Everson v. Board of Ed., 330 U.S 1, 15 (1947).

[249] 292 F.2d at 607-08. Compare Larson v. Valente, 456 U.S. 228, 224 (1982)("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another).

schoolhouse, the dedication of our Nation and our people to the Almighty."[250]

Person from very different traditions could support the Goodwin opinion. Obviously strong followers of the enlightenment tradition would find the opinion congenial. If you think that beliefs in God and spirits is just superstition, believed because of fear or ignorance, then the idea that children should be encouraged to pledge allegiance to a flag "under God" is difficult to swallow.[251] Many of strong religious views oppose the God amendment. First, one can think that the mixture of politics and religion works to the detriment of religion. Justice Brennan once wrote that the phrase "In God We Trust" on the coins had lost religious meaning.[252] I have always thought that such an argument was ironic. When government puts a prayer on a coin, it cheapens the prayer. When government makes Christmas a commercial holiday by cooperating with merchants in putting Christmas lights all over town, it cheapens Christmas. And when I hear the phrase under God in the Pledge of Allegiance, I think of cynical and sanctimonious politicians currying favor with their constituents.

Second, one can ask what good the God amendment does. Just how many children have become religious or stayed religious longer because they mouthed the magic words on school day mornings? It seems unlikely that brief ceremonies of that character have any significant religious influence.[253] Indeed, in the nineteenth century religious promotion was far more conspicuous in the public schools than it is today.[254] Yet many argued that the effort was

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[250] *Id.* at 609.

[251]. Of course, many non-religious products of the Enlightenment would argue that there is a moral order and that the United States Constitution is best understood as requiring that the government create and comply with that order. While the writers of the Declaration of Independence looked to God as the source of that order, non-religious moralists find that the "order is grounded in nature alone, or in some concept of civilization, or even in supposedly unchallengeable a priori principles, often inspired by Kant. So that some Americans want to rescue the Constitution from God, whereas others with deeper historical roots, see this desire as doing violence to it. Hence the contemporary American Kulturkampf." TAYLOR, *supra* note 176, at 69-70. For an argument that the existence of a moral order shows the existence of God, see C.S. LEWIS, MERE CHRISTIANITY 3-32 (HarperSanFrancisco, San Francisco, 1952). For additional discussion of that issue, see ALAN RYAN, JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM 360-62 (W.W. Norton & Co., New York:1995).

[252] This argument is not available with respect to many of the governmentally sponsored ceremonies featuring prayer in the wake of the September 11th tragedy. For the argument that governmentally sponsored prayers should be immune from constitutional objection in exceptional circumstances such as a national crisis combined with mourning so long as the government response occurs within a limited time period from the date of the tragedy, see William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy,* 78 NOTRE DAME L.REV. 11, 31-33 (2002).

[253] The brevity of the ceremonies and their likely ineffectiveness, however, do not rob them of their religious character as the ceremonial deists would have it.

[254] Harold Berman, *Religious Freedom and the Challenge of the Modern State*, *in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY45 (James D. Hunter & Os Guiness eds., 1990)("[T]he great apostle of the public school, Horace Mann, . . . continually emphasized that only through public education could a Christian social consciousness and a Christian morality be

ineffective. Indeed my colleague R. Laurence Moore strongly argues that the "importance of religion to intellectual development in the19th century had almost nothing to do with what happened in public school classrooms."[255]

Third, there is the fear that government involvement in the propagation of religious symbols will discriminate against minority religions. Certainly the Pledge's emphasis on monotheism does precisely that.

Nor does it work to suppose that the God amendment represents a trivial conflict with Establishment Clause values. As I have just discussed, it will not work to claim that it is bereft of religious meaning. The history leading to the adoption of the pledge makes its religious purpose clear.[256] Moreover, the firestorm that followed the Ninth Circuit's opinion itself demonstrated the religious character of the message and the tenacity with which it is held.[257] To claim that it is just ceremonial is to blink that the ceremony was converted into a religious ceremony by the God amendment. To claim that the God amendment is de minimis tells those who are marked as outsiders to pretend that they are not marked as outsiders. The ideal of those who oppose the insertion of under God in the Pledge of Allegiance, however, is one of equal citizenship. Their constitutional vision sees a nation in which the content of one's religion or lack of religion has no bearing on one's identity as an American citizen.

But, unfortunately, they see a nation that does not exist. It never has, and it never will. Certainly, government has been deeply involved in promoting religion over non-religion over the course of American history, and, for the greater part of that history, it has supported Protestantism over other forms of religion.[258] The public schools were formed in large part to support Protestant

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inculcated in the new population as a whole.").

[255]. R. Laurence Moore, *Bible Reading and Nonsectarian Schooling: The Failure of Religious Instruction in Nineteenth-Century Public Education,* 86 THE JOURNAL OF AMERICAN HISTORY 1581, 1598 (2000).

[256] Steven G. Gey, *"Under God,"The Pledge of Allegiance and Other Constitutional Trivia,* 81 N.C.L.R. 1865, 1873-81 (2003).

[257] *Id.* at 1914-15. Similar considerations lead me to the conclusion that "In God We Trust on the Coins" is not de minimus.

[258] James Davison Hunter, *Religious Freedom and the Challenge of Modern Pluralism*, *in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY55 (James D. Hunter & Os Guiness eds., 1990)("While no one Protestant denomination enjoyed the patronage of the state, the cause of a "pan-Protestantism had a substantial, if unoffical, governmental endorsement. The consequence was the restriction of the full civil liberties of other, non-Protestant communities of belief."). *Cf.* DE TOCQUEVILLE, *supra* note 198, at 293: "For the Americans the ideas of Christianity and liberty are so completely mingled that it is almost impossible to get them to conceive of the one without the other; it is not a question with them of sterile beliefs bequeathed by the past and vegetating rather than living in the depths of the soul." See Berg, *supra* note 145, at 1613.

values.[259] Indeed, for most of our history, reading from the Bible in the public schools was considered constitutional[260] at the same time that financial aid to private schools was considered unconstitutional.[261] Perhaps some fine mind can reconcile these two positions on the basis of some neutral principle, but the fact is that the reading was from a Protestant Bible unaccompanied by commentary,[262] and the private schools were largely Catholic. Supporting the Protestant religion was considered neutral common sense promotion of morals; supporting the Catholics was establishing a religion.[263]

Although the Court in the landmark case of *Everson v. Board of Education* said that, "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another,"[264] it is hard to take this language seriously. This is a country in which "In God We Trust" appears on the coins and the currency, the Supreme Court begins its sessions with "God save the United States and this Honorable Court," and Congress has ordained a National Day of Prayer. In theory, of course, these and other practices could be rolled back.[265] In practice, it is inconceivable that they will.[266]

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[259] FINKE & STARK, *supra* note 161, at 139-40; Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Clause Principle,* 27 ARIZ.ST. L.J. 1085, 1120-22 (1995). McConnell, *supra* note 69, at 121.

[260] Michael Dehaven Newsom, *Common School Religion: Common School Narratives in a Protestant Empire*, 11 SOUTHERN CALIFORNIA INTERDISCIPLINARY L.REV. 219, 223-237 (2002)

[261] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 967 (Walter Carrington ed., 8th ed. 1927). See Steven K. Green, *Private School Vouchers and the Confusion over Direct Aid*, 10 GEO. MASON U. CIV. RTS. L.J. 47, 50 (2000) (describing how, from the second half of the Nineteenth Century into the Twentieth, state courts consistently invalidated financial aid to religious schools).

[262] Reading without commentary suggested that it was up to the individual to interpret the scripture, but the Catholic Church taught that its hierarchy was necessary for guidance in the interpretation. See e.g., STEPHEN MACEDO, DIVERSITY AND RESPECT 56-59, 64-76 (Harvard University Press, Cambridge: 2000); MOORE, *supra* note 198, 255, at 25.

[263] HAMBURGER, *supra* note 138 at 364-65. For the contention, somewhat exaggerated to my mind, that anti-Catholic prejudice remains common, see JENKINS, *supra* note 162, 163.

[264] 330 U.S 1, 15 (1947).

[265] For criticism of the Court's expansion of such practices by resort to analogy, see William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall–A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770.

[266] For arguments that they should be, see Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism,* 96 COLUM. L.REV. 2083 (1996); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight,* 64 N.C. L. REV. 1049, 1054-60 (1986); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech By Private Speakers,* 81 NW. U.L. REV. 1, 6 (1986).

What does this hard reality mean for the interpretation of the Establishment Clause? It seems inescapable that the Establishment Clause should be interpreted in light of precedent along with the values of the American people, that the high wall between church and state perspective should be respected as a regulatory ideal, and that when these clash, justices should come as close to the ideal as our evolving traditions permit. From that perspective, it seems clear that generalized governmental endorsements of monotheism are consistent with the Establishment clause. It seems clear that despite all the lip service to equality, the United States Constitution is best interpreted to be consistent with monotheistic ceremonial prayers that do not involve coercion. Indeed, Justice Douglas was on to something when he said that our institutions presuppose a divine being.[267] Now, of course, it need not be that way. Indeed, given the pluralistic character of our people, it seems to me that we would have a better Constitution if we did not have what amounts to a monotheistic established religion, and it should be noted a monotheism of a specific type, one that, among other things,[268] puts in God we trust on the coins, not in Allah we trust.[269]

Of course, we need not be bound by the dead hand of the past. Of course, we should remember that it is *a Constitution* we are interpreting, one designed for ages to come and to be adapted to varying conditions.[270] We, however, have also been counseled to recognize that it is *this* Constitution we are interpreting,[271] and *this* Constitution can not plausibly be understood to foreclose the engraving of in God we trust on the coins and the like.[272] At least, not yet; and

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[267] For defense of the notion that America has a civil religion that includes God, see Robert N. Bellah, *Civil Religion in America*, *in* RELIGION IN AMERICA 3, 5 (William G. McLoughlin & Robert N. Bellah eds., Beacon Press, Boston 1966)("[T]he separation of church and state has not denied the political realm a religious dimension."). More generally, the Bill of Rights might be understood to presuppose a Supreme Being. For an argument that the notion of equality among human beings can not be supported without resort to such a conception, see Waldron. Although there is a strong case for the proposition that religion has on balance been a progressive force in American politics (Shiffrin, *supra* note 86), I do not believe it follows that religion has been a progressive force when employed by American politicians. Particularly problematic has been the theme that God has a "special concern for America." Bellah, *supra* at 9. The notion that God has sanctioned our colonizing efforts in the name of democracy, let alone in the name of God is plainly distasteful.

[268] Michael Perry suggests that the country stands for a moderate version of the nonestablishment norm that includes a loving, judging God and that we are all sacred because God created us and loves us. PERRY, *supra* note 77, at 309-10. He states that government may affirm these views, but may not impose them on others. *Id.*

[269] I do not mean to suggest that Muslims suppose that Allah is a different God than that worshiped by Jews and Christians. Even if the equivalence were generally understood, the cultural importance of saying In God We Trust instead of In Allah We Trust would remain formidable.

[270] McCulloch v. Maryland, 17 U.S. 316, 408 (1819): "[W]e must never forget that it is a *constitution* we are expounding."

[271] WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 7 (Duke University Press, Durham: 1984).

[272] Similarly, the weight of history would support the view that the name Los Angeles (City of the Angels) or City of St. Paul does not violate the Establishment Clause though these names should not act as precedent for new names of governmental entities.

probably, not ever.

How does this apply to the issues put forward by the Pledge. On this analysis, Congress could legitimately put forth a model as to how citizens might honor the flag if they wished.[273] On the other hand, the use of the Pledge in public school classrooms should not be defended. If the Court could strike down prayer and Bible readings in public school classrooms, it is a short step to the recognition that encouraging public recitations of the existence of God by children in public school classrooms are not consistent with the Establishment Clause.[274] If the Court could hold that prayers in graduation ceremonies were coercive in that members of the audience might feel compelled to stand, as it did in *Lee v. Weissman*,[275] how much more coercive is the daily recitation of the Pledge in public school classrooms?[276] There is plenty of room under This Constitution to hold that the coercive atmosphere of peer groups in classrooms can not constitutionally function to induce recitals of belief in God.[277]

There is strong case for an alternative path to the conclusion I have set out, but I do not believe it is ultimately persuasive. This path strives to be pragmatic. It would suggest that justices should make decisions on the basis of what would best protect religious liberty overall. To declare "In God We Trust on the Coins" unconstitutional on this approach would be thought futile because it would trigger a quick constitutional amendment to the contrary.[278] Moreover, it would be dangerous. Aside from the symbolic damage created by amending the Bill of Rights, there is no assurance that a new amendment would be narrowly crafted or that it would be narrowly interpreted.

Certainly, one argument for a pragmatic path would be that it has more integrity than

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[273] Judge Goodwin's revised opinion in *Newdow* does not maintain that the Congressional amendment is unconstitutional, but it does invalidate the school district's policy of having the pledge recited in the classroom. 328 F.3d at 489-90.

[274]. In truth, the worst aspect of the Pledge in the classroom is not the under God phrase - though it is an outrage. The worst aspect is that we place pressure on small children to repeat words saying that we live in a country with liberty and justice for all. This lie is not cured by the assertion that the Pledge really means that we have an *ideal* of liberty and justice for all. Does anybody believe that little third graders make this distinction?

[275] 505 U.S. 577 (1992).

[276] *Cf.* Gey, *supra* note 256, at 1893-97.

[277] For the argument that the recitation of the Pledge is a permissible patriotic act rather than an impermissible religious act, see *Newdow*, 328 U.S. at 471-82 (O'Scanllain, C.J., dissenting from denial of hearing en banc).

[278] *Cf.* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 54 (Harvard University Press, Cambridge: 2001): "[J]ustices otherwise most committed to strict separation of church and state apprehend that judicial rejection of those entrenched practices [such as In God We Trust and Under God] would engender widespread anger and resentment – and perhaps not unreasonably so (even if not rightly) in light of historical understandings of what the Establishment Clause permits."

pretending that equality is not violated by monotheistic ceremonies, or that monotheistic ceremonies are not really religious, or that the public affirmations of and prayer to a deity are trivial.[279] On the other hand, one might object to this approach on the ground that it sacrifices minority rights at the altar of the intense majority, and so it does, but only when thought to be necessary. One might also object that the Court sacrifices its reputation as a court of law when it resorts to pragmatism. But this would not be the first time that the Court's constitutional decisions have been influenced by pragmatic assessments of its own power. Indeed, if concern about the Court's reputation as a legal actor were primary, a decision in favor of the Pledge would be mandatory given the swift condemnation that greeted the Ninth Circuit Court of Appeals when it invalidated the Pledge.

But some might argue that this too misses the point. The point is not the Court's reputation, but the fact that the Court is supposed to be a legal institution immune from political pressure. The Constitution, on this understanding, requires that the Court interpret the Establishment Clause according to the high wall understanding even if the reading is contrary to our history, even if the reading would swiftly be circumvented by a constitutional amendment that might make matters even worse, even if the reading would do great damage to the Court as an institution. To that high-minded objection, I plead guilty. I do not believe that vague slogans or deep analysis of the "rule of law" yield the result that Justices are required to render decisions that threaten to undermine critical constitutional values and institutions.[280]

My concern about the pragmatic approach is pragmatic. I fear that if such an approach were legitimized in defining rights (as opposed to implementation of the "passive virtues"), the Court would not be aggressive as it should be. It is not clear that a Court armed with pragmatic concerns would have had the nerve to desegregate the schools, outlaw prayer in the schools, or recognize the burning of flags to be protected freedom of speech. Despite exceptional appointments, the process of appointing justices is not calculated to produce those who are vigilant in supporting civil liberties. Offering a pragmatic excuse to enforce civil liberties strikes me as a political mistake.

It could, for example, lead one to upholding the pledge in classrooms, for example. To be sure, the prospect of a constitutional amendment in the classroom pledge circumstance is not as sure as it would be if the Court invalidated "In God We Trust" on the coins. After all, Governor Jesse Ventura vetoed a bill that would have required the Pledge to be used in all Minnesota public

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[279] *See* Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment,* 2002 U.Ill. L.Rev. 1233, 1317 (non-religious explanations are disingenuous and offensive).

[280] For the claim that it would be wrong to deny a constitutional right in order to protect the Court, but that under God practice and the In God We Trust practice can be defended as a part of the historical understanding, see *id.* at 55. See generally RONALD DWORKIN, LAW'S EMPIRE (Belknap Press of Harvard University Press, Cambridge: 1986)(denying strategic conceptions of rights).

school classrooms,[281] and only half the states have any such requirement. One could argue that the American people may have no patience for removing In God We Trust from the coins and the like, but doubt that there is enough of a consensus to underwrite a constitutional amendment requiring the Pledge in American classrooms. On this analysis, protecting the liberty of third graders might fall victim to political demagogues, but it is a stronger cause than flailing against inequalities like In God We Trust on the coins.

Nonetheless, the political risks are substantial. Obviously government could function quite effectively without parading religious symbols in a ceremonial way. The intense desire to use these symbols may just show that Americans are a religious people who religiously believe that prayer or the recognition of religion is an important part of public life. There is a lot of that involved. But I am sure there is even more, and it is revealed by the intensity of the outrage accompanying the suggestion that the Pledge of Allegiance presents a problem. There is a desire on the part of many to marginalize those who do not agree, a desire to show who the insiders are, and a desire to send a loud clear message as to who the outsiders are.[282] And thus a pledge purportedly designed to unite a People divides a People into the "good guys" and the "bad guys." The risk that politicians would pander to these currents might be too much for a pragmatist to swallow.

If the use of the pragmatic consideration would enhance civil liberties, I would not hesitate to endorse it, but judges are already too cautious. In the case of the Pledge, it could cause judges to consign our children to religious coercion in the classrooms even if they believed it was unconstitutional. That is too much of a price to pay.

B. Contradicting Religious Doctrine

Government frequently communicates messages or engages in actions that contradict religious doctrine, and these communications and actions have not been thought to violate the Establishment Clause. Indeed, the Constitution allows governments to contradict doctrines of the

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[281]. "My position is that it isn't government's job to mandate patriotism. To me mandating a pledge of allegiance to government is something Saddam Hussein would do." David Wallis, *Questions for Jesse Ventura*, THE NEW YORK TIMES MAGAZINE 11 (August 18, 2002). On the other hand, that Michael Dukakis vetoed a similar bill in Massachusetts did not help his Presidential campaign. Gey, *supra* note 256, at 1868.

[282] *Cf.* Berg, *supra* note 3, at 190 ("The separationist approach [relied] implicitly on the existence of a general religious and moral consensus that made specific references to God seem less necessary; as that moral consensus has broken down, more citizens feel the need to reassert the religious foundations of morality explicitly, an assertion evident in the increasing role of religion in politics in the last 20 years."); Berg, *supra* note 145, at 1613: "Some Americans repeat the pattern of ignoring or underestimating the harm done to dissenters from explicit government advancement of particular religious truths. For example, it is fair to say, as does Professor Douglas Laycock, that many of those who advocate government-initiated displays and rituals, when they could use government outlets for such expression, simply place little or no value on the costs to religious minorities." *Cf.* Van Alstyne, *supra* note 109, at 787: The use by government of religious symbols such as the creche "are disappointing reminders that religious ethnocentrism, as well as religious insensitivity, are still with us. I do not know whether Mr. Jefferson would have been surprised, but I believe he would have been disappointed."

Quakers, the Roman Catholics, the Christian Fundamentalists, the Muslims, and the Jews. The military is not unconstitutional despite the Quakers; capital punishment is not unconstitutional despite the Roman Catholics; state teaching about gender roles and homosexuality in ways that contradict the teachings of Muslims, Christian fundamentalists and other religions is not unconstitutional; state support of medical care is not unconstitutional despite the Christian Scientists; and public high school Friday night football games do not violate the Constitution despite the Jews.

One could attack parts of this list. The Friday football game example to me shows the unthinking hegemony of Christianity, but attempting to change it would trigger enormous antisemitism. In many circumstances, it should be permissible to excuse children from objectionable instruction though this is very different from abandoning the instruction altogether. Capital punishment should probably be unconstitutional on other grounds.

Nonetheless, such government policies raise troubling theoretical issues. Fundamentalist Christians faced with a secular school system ask why they are not the kind of outsiders who should be protected under the Establishment Clause.[283] When fundamentalists believe that God created the world in seven days, why isn't the teaching of evolution an establishment of religion? Surely fundamentalists rightly believe that the majority is treating them as outsiders.

One response to the fundamentalists is that government could not effectively function if it were forced to avoid contradicting religious doctrine in its communications and actions. Indeed, in a pluralistic society it may often be impossible to act without contradicting one religious doctrine or another. For religions divide upon how governments should be organized and how the church should relate to the state. Any organizing action will contradict some religion. Nonetheless, it is not clear this shows that in every case government must be permitted to contradict religious doctrine. Perhaps permitting religious claims on this basis would overwhelm government and the courts, but the empirical foundation for that claim depends upon the process for adjudicating the claims and the degree of scrutiny applied.

A more fundamental response to the fundamentalists is that the Establishment Clause prohibits the establishment of *religion* and the teaching of evolution is not the teaching of religion. A central message of the Establishment Clause is that government has no jurisdiction to determine

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[283] The question I am posing here arises even if the objector has no children in the school. The issue is whether public education in its present form violates the Establishment Clause. If a child is present in the school and she is exposed to instruction that contradicts her religion, then a free exercise issue is presented. Ordinarily, in my view the free exercise claim should prevail. But I see no room for compromise if parents insist on separating their children from other on grounds of intolerance or for depriving their child of vital information or critical thinking skills, skills necessary for democratic citizenship and for adaptability in a changing marketplace. Discussion of the general issue primarily focuses on the *Mozert* litigation culminating in Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988).See, e.g., STEPHEN BATES, BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS 233-302 (1993); Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and The Paradox of a Liberal Education,* 106 HARV. L. REV. 581 (1993).

what God has to say about any subject[284] or to "measure religious truth."[285] The teaching of evolution does not violate this precept. Indeed, a teacher of evolution in the public schools might believe that the best scientific evidence pointed to the truth of evolution, that the Bible pointed in the other direction, and that the Bible was right. The teacher might think that it is her job to teach science and not to teach religion. From this perspective, the teacher or the school has taken no position on the interpretation of the Bible or the weight to be given to it.

Imagine how different it would be if the science teacher taught the science of evolution and proceeded to say, "And this shows that the fundamentalists are wrong." Clearly the science teacher would have left the realm of science for the realm of religion. Despite the example of monotheistic prayers, in the overwhelming majority of cases, when government speaks or acts, it does so for civic reasons, not because God has something to say about the subject. Such actions do not deny the existence of God or that God has something to say about evolution or any other subject. Despite the fact that fundamentalists reasonably experience the teaching of evolution as a contradiction of their religious views, such teaching is not religious within the meaning of the Establishment Clause.[286]

These arguments are hardly satisfying to fundamentalists. But what is the alternative? Should public school teachers teach what God has to say about evolution and other subjects? Should school board meetings resolve the question of God's word or whether there is a God? There may be a compromise to some of these questions. I see no reason why public school teachers should be disabled from teaching that various religions question the views that are being expressed in the classroom – whether those views involve evolution, the legitimacy of war, capital punishment, abortion, or what-have-you. Nothing in the Constitution has been interpreted to prevent teachers from teaching about religion. Students need not be deprived of information about strongly held views within the culture. Indeed, I would argue that fairness demands that students be provided with this information. Without suggesting the judges should police this aspect of education, I would maintain that this dimension of fairness could ground a constitutional obligation to include such material in the curriculum. Public school authorities, who take oaths to defend the Constitution may take on constitutional obligations that are rightly regarded as judicially unenforceable.

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[284] Cf. Sullivan, *supra* note 90, at 198-99 (Establishment Clause creates secular governance of public affairs). I think Sullivan leaves too little room for religious speech in democratic life, but whatever secular governance may mean, it must exclude governmental determinations of what God has to say. Consider Douglas Laycock, *supra* note 266, at 7-8: "'Agnostic' is the label that comes closest to describing the attitude required of the government, but that label is misleading in an important way. An agnostic has no opinion on whether God exists, and neither should the government. But an agnostic also believes that humans are incapable of knowing whether God exists. If the government believed that, it would prefer agnostics over theists and atheists. Agnostics have no opinion for epistemological reasons; the government must have no opinion because it is not the government's role to have an opinion."

[285] TRIBE, *supra* note 6, at 1232.

[286] Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHICAGO-KENT L.REV. 717, 726-27 (2003); *But cf.* Steven D. Smith, *Barnette's Big Blunder*, 78 CHICAGO-KENT L.REV. 625 (2003)(no meaningful way to draw such distinctions).

C. Removing Obstacles from Religious Practice

Government frequently removes obstacles from religious practice. For example, many states make exemptions to their drug laws to permit Native Americans to ingest peyote at religious services. The *Smith* Court stated that legislative exemptions of this sort were not constitutionally required, but they were constitutionally permitted.[287] This obviously favors religious peyote users over non-religious users. But, for reasons I have canvassed earlier, preferences of this type seem reasonable.[288]

More complicated in terms of analysis are provisions like the federal draft law that exempted those who were conscientiously opposed to all wars.[289] This, too, favored religious objectors over others and raises no new issues in that respect, but it favored some religious objectors over other religious objectors, and that should rarely be countenanced. The Court maintained that determining the sincerity of those who object to all wars would generally be easier than determining the religious sincerity of those who object only to particular wars.[290] True enough. But when serious liberty values (forcing someone to kill when their religion commands otherwise) and fundamental equality values (favoring one set of religion over others) combine in the same case, more serious justification needs to be offered. It has also been suggested that permitting such general conscientious objection opportunities would compromise the government's ability to raise the kind of fighting force it needs.[291] If one takes a democratic perspective, that the elites wish to fight a war lacking strong democratic support should undercut the importance of the governmental interest. If the interest is sufficiently grave, a democratic perspective would suggest a less restrictive alternative: justify the war effort to the people.

A final objection to conscientious objection provisions is that it does not just remove obstacles to religious practice; it offers powerful incentives for people to join a religion.[292] I do not

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[287] For strong arguments in favor of legislative accommodation, see Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics,* 60 GEO.WASH.L.REV. 685 (1992); Berg, *supra* note 1, at 476-83.

[288] One might argue that if *Smith* was rightly decided, Establishment Clause problems are more formidable because religious actors are favored over non-religious actors in circumstances that are not required under the Free Exercise clause. See note 59 *infra* and accompanying text.

[289] 50 U.S.C.App. § 456 (j).

[290] Gillette v. United States, 401 U.S. 437, 460 (1970).

[291] *Id.*

[292] *See* generally Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U.PITT.L.REV. 673, 691, 697-700 (1980); Cf. Berg, supra note 1, at 463 (arguing that the real issue in religion-specific accommodations is whether "its greater effect [is] to permit religious practice to continue freely, or to induce people to switch to the accommodated religion"). Permitting the use of peyote for religious purposes is not a problematic accommodation. See note 92 *supra*.

doubt the psychology that lies behind this argument. I believe that many persons joined the Quakers in an effort to avoid the Vietnam war. These side effects, however unintended, are offensive to the values of the religion clauses. But violating liberty and equality values in such a severe way seems even more problematic.[293]

One intriguing feature about the conscientious objector example is that the statute favored minority religions like the Quakers over more powerful religious constituencies such as the Catholics and mainline Protestants. Commentators such as Ira Lupu have powerfully argued that permitting discretionary accommodation risks discrimination against minority religions.[294] The answer to such worries is that courts should extend the benefits of such legislation to minority religious groups.

Another concern frequently raised about such accommodation provisions is that they impose burdens upon others.[295] For example, *Thornton v. Calder*[296] invalidated a Connecticut statute guaranteeing workers an absolute right not to work on the day they observed as the Sabbath.[297] The Court was especially concerned about the sweeping character of the statute, concerned that it did not permit exceptions when honoring the Sabbath would cause a substantial economic burden on the employer or the imposition of significant burdens on other employees. Too be sure, some burdens in some circumstances could be undue (though it is not clear this was one of them).[298]

Significantly, the *Thornton* Court did not object to the state's concern with the interference with free exercise by private actors.[299] If it had, the religious aspect Title VII of the 1964 Civil

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[293] My contention, therefore, is that religious exemptions in this context should be constitutionally required. For the suggestion that such exemptions should be permitted, but not required, see McConnell, *supra* note 287, at 702.

[294] Lupu, *supra* note 5, at 586.

[295] For consideration of a wide range of circumstances, both religious and non-religious, in which burdens are imposed upon others because of autonomous choices together with a powerful argument for the virtue of supporting such choices, see Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, *in* REASONS AND VALUES (Philip Pettit, Samuel Scheffler, Michaels Smith, and Jay Wallace eds., Oxford University Press, Oxford: 2004, forthcoming).

[296] 472 U.S. 703 (1985).

[297] *Id.* at 707-08

[298] Regrettably, the Supreme Court has interpreted Title VII's "reasonable accommodation" of religion requirement to require very little of employers. Transworld Airlines v. Hardison, 432 U.S. 63 (1977); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1966).

[299] Justice O'Connor, joined by Justice Marshall, thought that permitting persons to take off work on the Sabbath constituted an endorsement of the Sabbath. I do not see why this law is any more of an endorsement than laws excusing believers from sanctions for ingesting peyote in a religious ceremony. Presumably, the law was passed mainly to support minority religions since the majority believers would typically have Sunday off. Even if,

Right Act would have been endangered.[300] To be sure, the Constitution does not protect free exercise against private interference. But the state has a substantial interest in protecting its citizens free exercise of religion just as it has in protecting them in a wide variety of other spheres. As Michael McConnell observes, "The legislature should have as much latitude to protect the exercise of religion that it has to protect other important values in life."[301]

2. Unacceptable Conformity with Equality: Equality in the Public School Classroom

If the complexity of the Establishment Clause means that some deviations from formal equality are permissible, it should not be surprising that compliance with formal equality should not be sufficient in other circumstances. Although conservatives have argued that exceptions should be permitted in favor of religion in particular legislative schemes, they have pressed the view that compliance with formal equality should otherwise be sufficient to meet Establishment Clause standards. Conservatives, for example, have been arguing for many years that school voucher programs should be deemed to meet constitutional standards under the Establishment Clause so long as the standards for their distribution do not discriminate against religious or non-religious schools. Thus, the equality theme loomed large when the Court decided the landmark case of

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however, the law benefitted majority believers in the exercise of their religious liberty, without more, the removal of an obstacle to religious practice should not be considered an endorsement.

[300] Mark Tushnet does an admirable job of showing that there can be many hard cases under the accommodation principle, but this demonstration itself does not imperil the project of protecting religious liberty against the actions of private actors altogether. Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante),* 76 GEO.L.J. 1691, 1704-08 (1988). Tushnet also argues that accommodation does not easily follow from a republican or pluralistic conception of government. *Id.* at 1695-1701. The accommodation strand of religion law seems most closely tied to the liberty value. This presents no problem for actions at the state and local level who have general police powers. It could be thought to present problems at the federal level since the religion clauses confer no power upon the federal government (except through section Five of the Fourteenth Amendment). This could lead to questions of whether Congress can pass legislation under the commerce clause for non-commercial reasons. Assuming sufficient commercial reasons were not presented and only a tie to commerce were present, one might wonder why Congress could protect morals under the Mann Act, but not religious practice under acts like Title VII.

[301] *Id.* at 703. *Smith* also seems to make clear that the removal of burdens on religious activity ordinarily does not violate the Establishment Clause even the burdens do not violate the Free Exercise Clause. *Accord*, *Gillette*, 401 U.S. at 453: "Quite apart from the question whether the Free Exercise Clause might require some sort of exemption, it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes of conscience.'" One might argue that permitting the discretionary removal of burdens on free exercise places churches in a position of dependence that could have a chilling affect on their criticism of government. This, for example, has been a historic problem in Mexico. CHAND, *supra* note 152. In Mexico, however, basic freedoms were being denied which suggests a greater chilling effect. This makes it all the more important that Free Exercise doctrine err on the side of protecting religious freedom, so that the chilling effects associated with governmental discretion be minimized.

Zelman v. Simmons-Harris.[302] The case forced the Court to consider the constitutionality of Ohio's system of providing funds primarily to poor children to attend private schools. The overwhelming majority of recipient families used the funds to send their children to religious schools.[303] The system presented the Court with a hard choice: either accept substantial intrusions on serious Establishment Clause interests or invalidate an important effort to help poor children enmeshed in a failing urban public school system.

For the Court led by Chief Justice Rehnquist, however, it made no difference that the recipients of Cleveland's largesse were poor, nor did it matter that the public schools were in sorry condition.[304] For Rehnquist, it was enough that the program was formally neutral with respect to religion[305] and that the decisions of which schools to attend were the private and indlependent choice of the parents, not a decision of the state.[306] As a result of the private choice element, Rehnquist determined that no reasonable observer could believe that religious schools were endorsed by the state.[307] Similarly, Rehnquist found no purpose to advance religion.[308]

Since the Ohio program, at least on its face, was not designed to advance religion over non-religion or to favor one religion over another, the Court maintained that the program met Establishment Clause standards. As the dissents observed, this form of analysis is too fast; indeed, it is utterly impoverished. The difficulty is that other Establishment Clause values are in play. Vouchers in Cleveland forced many taxpayers to support religious ideologies that they opposed,[309] had unequal impact, favoring one religion in a substantial way, and ignored "the risk that religion can be neutralized, homogenized, and secularized when it participates in governmental

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[302] 122 S.Ct. 2460 (2002). For criticism of *Zelman,* see Gary Simson, *School Vouchers and the Constitution–Permissible, Impermissible, or Required?,* 11 CORNELL J.OF L.& PUB. POLICY 553 (2002).

[303] 96% of the voucher recipients used them in religious schools. *Id.* at 2470. For the claim that the Cleveland system severely impaired free exercise values, see Note, *They Drew a Circle That Shut Me In": The Free Exercise Implications of Zelman v. Simmons-Harris,* 117 HARV. L. REV. 919 (2004). But see Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions,* 72 U.CIN. L.REV. 151 (2004)

[304] These facts were mentioned in the opinion (*id.* at 2463, 2469), but they were not relevant to the outcome except to show that Ohio could not reasonably be understood to have the purpose of advancing religion (*id.*. At 2465) or to be endorsing religion. *Id.* at 2469.

[305] *Id.* at 2468.

[306] *Id.* at 2467-68.

[307] *Id.* at 2468-69.

[308] *Id.* at 2465.

[309] Conkle, *General Theory, supra* note 6, at 1175: forcing individuals to advance religious views they reject is the "primary vice of government support for religious schools."

programs."[310] The risks of church/state interaction seem particularly acute in this context. Consider that about half of the children who attend private schools are in Catholic schools,[311] and those schools exist primarily to maintain or to increase the membership of the Church. If vouchers are constitutional, the Church would have an interest in using its political power in lobbying to acquire financial aid in the form of vouchers, to maintain their continued existence, and to affect the nature of the voucher program. Similarly, politicians would have an interest in extracting benefits with respect to the same issues. This just can't be the kind of relationship between church and state that is appropriate under the Establishment Clause. Of course, churches have lobbied politicians on issues like poverty, civil rights, the environment, and abortion. The state will inevitably be involved in issues upon which churches take a stand.[312] But church-state negotiations about the money that will go to help churches propagate theological doctrines in their schools seems quite different.[313] Negotiations about state money for proselytizing purposes involves substantial intrusion into the domain of religion [314] and improper use of the state for religious ends.[315]

I do not mean to argue that these considerations should necessarily be decisive.[316] Professors Berg and McConnell argue with some force that the rise of the welfare state puts

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[310] Conkle, *supra* note 1, at 22. Berg, *supra* note 145, at 1635-36 strongly argues that churches should make the decision whether to compromise. I hope to address this issue in further writing, but my view is that the argument assumes the churches will make good decisions in this area when the history indicates that Roger Williams and James Madison were on to something, ignores the civic values associated with the checking function of religion and the goal of nurturing civic virtue, and reads an important goal of the clauses out of the Constitution.

[311] The percentage has declined substantially over the years. Catholics accounted for 87 percent of private school enrollment; 64 percent in 1982. JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 81(Brookings Institution Press, Washington, D.C.: 1999).

[312]. For an expression of concern about the power of religious lobbies from a Madisonian perspective, see Hamilton, *supra* note 133, at 816-21. Though the power of religious lobbies is to be regretted in many contexts, I believe that religious lobbying in the U.S. has historically benefitted progressive politics. Shiffrin, *supra* note 86, at 1631, 1646-52.

[313]. Cf. Douglas Laycock, *The Benefits of the Establishment Clause,* 42 DEPAUL L.REV. 373, 381 (1992)(religion always part of politics, but theology, worship, and ritual, are beyond the scope of government); Daniel O. Conkle, *God Loveth Adverbs,* 42 DEPAUL L.REV. 339, 345-46 (1992)(distinguishing between wordly and spiritual matters in terms of political role of religions).

[314] Although Michael Perry supports the constitutionality of financial aid to religious schools and charities along with non-religious schools and charities (PERRY, *supra* note 135, at 3-19), he has observed that "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 government to get in bed with religion." Michael J. Perry, *Religion, Politics and the Constitution,* 7 J. CONTEMP. LEGAL ISSUES 407, 420 (1996).

[315] See Hamilton, note 133 *supra.*

[316] In fact, the majority also underestimates the religious freedom arguments in favor of vouchers. That government grants a free secular education to students puts religious education at a disadvantage. Some argue that this permits or mandates the existence of vouchers. See, e.g., Berg, *supra* note 27, at 705-06.

religious institutions in a less powerful position than they enjoyed at the founding and that funding is necessary to assure the conditions of religious freedom.[317] I only mean to suggest that the Establishment Clause analysis would have been more rich and rigorous if the full range of values had been considered and if the conflicts between Establishment values had been exposed and discussed. What I would like to discuss more fully is what might happen if a school board emboldened by *Zelman* proposed to bring religion into the public schools in a non-discriminatory way.

Suppose, for example, that a school board thinks that it is inappropriate to provide non-religious education without providing religious education. Imagine that it sets a couple of hours a week to permit priests, ministers, rabbis, other religious teachers[318] and nonreligious humanists[319] to enter the public schools to give religious or nonreligious ethical instruction, that students (with permission of parents at earlier ages) are free to enroll in the class of their choice, and that non-religious electives are available at the same hour.

A similar arrangement was declared unconstitutional by the Supreme Court in *McCullom v. Illinois*[320] in 1948, but it might be argued today that the school board was merely rectifying inequality. Notice precisely what would be at stake. It is already permissible to teach *about* religion in the public school curriculum.[321] The Constitution does not require that students be uninformed about the religious diversity of the American people. Schools are free to inform future citizens about the religious values and positions that inform many of the most controverted policy issues in the Republic. Moreover, there are clear circumstances in which religious proselytizing can take place in the public schools. For example, suppose a public school allows private organizations in the community to use its classrooms in the afternoons after school or other times when school is not in session. If the school is generally open to organizations, religious organizations may not be

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[317] McConnell, *supra* note 69, at 137, 161, 183-94; Berg, *supra* note 3.

[318]. I leave to the side the potentially difficult question of how to determine who can qualify as a religious teacher. For example, "70% of the imans in France are self-proclaimed.." *Special Report: Muslims in Europe*, THE ECONOMIST 21, 23 (August 10th-16th, 2002)

[319] For a case striking down a school district's program that permitted clergy to enter the schools for group counseling about civic values among other things on the ground that it favored religion over non-religion, see Doe v. Beaumont Independent School Dist., 173 F.3d 274, 287-89, 291-92 (1999)

[320] 333 U.S. 203 (1948). The program was applied in grades four through nine with weekly classes of thirty minutes in the lower grades and forty-five minutes in the higher grades. The instructors were employed by an interfaith council and were approved and supervised by the superintendent of schools. Only Catholics, Protestants, and Jews participated in the program. In some years there was no Jewish participation. *Id.* at 463-64.

[321]. See generally, Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching about Religion, Civic Education, and the Constitution,* 43 WM. & MARY L.REV. 1159 (2002). The board might argue that arguments are best evaluated by hearing their presentation by true advocates. John Stuart Mill, On Liberty [page number]

excluded even if they are engaged in proselytizing.[322] When a limited public forum has been opened, content discrimination is rarely permitted. In such a circumstance, the public school honors freedom of speech; it does not endorse religion.

On the other hand, if a school board in a predominantly Catholic community, approves a course in Catholicism taught by a practicing Catholic whose goal is to make Catholicism appealing, the arrangement would clearly exceed constitutional bounds. It is not the business of the public schools to endorse Catholicism. The example we are considering involves none of this. It does not endorse a particular religion as in *Allegheny County* and it does not endorse religion over non-religion. The school board would argue that it just gives religion a fair place at the table. If formal equality is the sole Establishment Clause value, the Board has a strong case. After all, the arrangement need not favor one religion over another,[323] and it does not favor religion over non-religion. Moreover, the size or existence of particular religious classes would depend not upon the decision of the state, but the decisions of numerous private actors. On *Zelman's* logic, no one could reasonably suppose that the state had endorsed any particular religion. Given that alternative non-religious classes are available, it would be unfair, according to the *Zelman* analysis, to accuse the state of being motivated by a religious purpose.

If *Zelman's* analysis is correct, the result in *McCullom* is open to question. And perhaps it should be. Public schools in England, Northern Ireland,[324] Spain,[325] Portugal, Italy, Germany, and Poland[326] typically teach religion.[327] Indeed, in Germany, children have a constitutional right to

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[322] Good News Club v. Milford Central School District, 121 S.Ct. 2093 (2001)(school district required to permit Christian prayer group in elementary school facilities when they had been open to non-religious groups); Lamb's Chapel v. Center Moriaches Union Free School District, 508 U.S. 384 (1983)(school district required to permit church to use facilities to show religious film series when facilities had been open to non-religious groups). For criticism of permitting religious exercises in the public schools, see Ruti Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess Do not Belong in the Public Schools,* 81 NW. U.L. REV. 174 (1986).

[323] There would invariably be non-neutrality of effect, but, at least in theory, the program could be open to those who wish to teach regardless of religious persuasion. *Zelman* produced inequality of effect, but the Court did not find this to be fatal. See note 303 *supra.*

[324] In Northern Ireland, the religious curriculum must be taught in those private schools that receive public funds. Catholic schools, the main class in this category, use the mandated religious curriculum, but add to it. The state run Protestant schools simply follow the curriculum without systematic additions. The Republic of Ireland has no state operated schools at the primary level, but it funds and regulates private schools, the overwhelming majority of which are Catholic schools. A contentious issue in those state funded schools is not whether religion should be taught but whether religion can be interwoven in the curriculum. The concern is that an integrated religious curriculum discriminates against religious objectors who have a right to be excused from religious instruction. FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT, *supra* note 324, at 348-49.

[325]. *Id.* at 384.

[326] According to the U.S. State Department, "Although the Constitution gives parents the right to bring up their children in compliance with their own religious and philosophical beliefs, religious education classes continue to be taught in the public schools at public expense. While children are supposed to have the choice between religious instruction and ethics, the Ombudsman's office states that in most schools ethics courses are not offered due

receive a religious education in the public schools.[328] Perhaps these countries have come to a better reasoned conclusion about the place of religion in the educational process.[329]

Perhaps, but there are substantial grounds for believing otherwise. First, formal equality in this circumstance promises to lead to substantial substantive inequality. Suppose the system is adopted in school districts in Mississippi, Utah, and Minnesota. Classes will be overwhelmingly Southern Baptist in some districts in Mississippi, Morman in some districts in Utah, and Lutheran in some districts in Minnesota. This inequality in itself is problematic.[330] But suppose such a proposal is enacted in a more heterogeneous district. It might be supposed that such a system could arguably serve an important multicultural purpose. A hallmark of public education is its commitment to educate children of all classes, races, and religions together.[331] This commitment to integrated education fosters autonomy, empathy, creativity and imagination, equality, respect and tolerance, social skills, justice, and democratic education.[332] Having children attend religious

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to financial constraints. Although Catholic Church representatives teach the vast majority of religious classes in the schools, parents can request religious classes in any of the religions legally registered, including Protestant, Orthodox, and Jewish religious instruction. Such non-Catholic religious instruction exists in practice, although it is not common, and the Ministry of Education pays the instructors. Priests and other instructors receive salaries from the State for teaching religion in public schools, and Catholic Church representatives are included on a commission that determines whether books qualify for school use." http://www.state.gov/g/drl/rls/irf/2001/5727.htm (Visited 5/27/03).

[327]. France is a conspicuous exception to this pattern. Religion is absent from the public schools and [the French constitution forbids giving state money to religions for any purpose (though tax benefits are provided to "long-established Christian churches and their Jewish counterparts)," "Special Report: Muslims in Europe," The Economist 21, 23 (August 10th-16th, 2002) not sure this latter part is right]. For many years, the Christian religion was taught in the Ontario public schools, but the Ontario Court of Appeal struck down the practice on the ground that it violated section two (a) of the Canadian Charter of Rights and Freedoms, guaranteeing freedom of conscience and religion. The court argued that the purpose and effect of the practice was to indoctrinate in the Christian faith and this was not saved by a provision exempting those who did not wish to participate. Canadian Civil Liberties Association v. Ontario (1990) 71 O.R. (2d) 341 (C.A.).

[328] For discussion of the nature and limits of this right, see Ingrid Brunk Wuerth, *Private Religious Choice in German and American Constitutional Law,* 31 VAND. J. TRANSNAT'L L. 1127, 1143-58 (1998).

[329] Charles Fried, *Five to Four: Reflections on the School Voucher Case,* 116 HARV. L. REV. 163, 184 (2002) regards the widespread support in foreign countries of private religious school to be an embarrassment to those who oppose vouchers. But, aside from the differences in culture, I would argue that support by governments for religion in public schools or for private religious schools can be considered embarrassing to those who oppose similar arrangements in the United States only if one does the analysis to determine how well the arrangements work in practice.

[330] TRIBE, supra note 6, at 1174.

[331] This was one of the main goals of the common school movement. MACEDO, *supra* note 262, 331, at 52-54.

[332] See generally Steven H. Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers,* 11 CORNELL J. OF L. AND PUB. POLICY 503 (2002).

classes in the public schools makes it more difficult to paper over difference, and arguably might foster genuine reflection and dialogue about the character of those differences and the extent to which there is unity in those differences. Students who attend to those differences on this line of thought need not abandon their faith tradition, but by empathic engagement with those of other traditions, may learn more about themselves and the traditions of which they are a part.[333]

Nonetheless, there is good reason to worry that segregated religious education in the schools would promote separatism, marginalization, and intolerance. Multicultural goals might better be achieved in the context of teaching about religions generally. In those contexts students are not formally marked out as separate, and dialogue can arise out the experience of subject matter taught to all. The presence of segregated religious education in the schools functions to emphasize difference in a visible way that would seem to lead students away from the recognition of unity in difference. This kind of state involvement is contrary to the goals of public schools and seems contrary to the toleration values embedded in the religion clauses of the first amendment. Moreover, the burden of these disadvantages could fall with particular weight on the children whose religions are small minorities in the district. In addition, as previously discussed there are good reasons to believe that some of the religious teaching in the schools would be contrary to public goals. That is, such teaching might be racist, sexist, homophobic, and more generally intolerant, *e.g.,* we are saved and they are not. The potential for stigmatization and denial of liberty are not inconsiderable.

These concerns are not rescued by substantial state interests. The strongest argument for access of religious leaders sounds in equality.[334] It is sometimes argued that the public schools teach a religion, namely secular or ethical humanism. If this were true, the argument might continue, equal access for other religions should be required.[335] The difficulty with the argument structured in this fashion is that the premise is simply wrong. The doctrine of secular or ethical humanism, according to this argument, holds that no God exists. God, from this account of the secular humanist is simply be a superstition.[336] So understood, it seems clear that no public school in

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[333] For reflections about this process, see DAVID TRACY, THE ANALOGICAL IMAGINATION: CHRISTIAN THEOLOGY AND THE CULTURE OF PLURALISM 405-55 (The Crossroad Publishing Co., New York: 2002)

[334] In the absence of a specific showing, there is no general right of access to the public school curriculum. To be sure, religious leaders may be permitted in the schools in some circumstances. If a public high school permits community groups to use its classroom in the late afternoon, free speech doctrine requires that groups be admitted on a content-neutral basis. Thus, religious groups must be admitted along with non-religious groups even if the public school maintains that their admission violates the Establishment Clause. On the other hand, permitting religious leaders into the schools during class time does not create the same kind of public forum because any such program would not be opened to public groups at large.

[335] This argument is ordinarily employed to justify the funding of vouchers to religious schools.

[336] Some secular humanists be agnostic or even might hold that God exists, but would argue that a belief in God is not important for the conduct of life. The public schools also do not teach these variations of secular humanism.

America teaches any such thing. Moreover, the public school bureaucracy including masses of school teachers is filled with a substantial portion of religious believers.[337] Indeed, if any school did teach agnosticism or atheism, the Establishment Clause would clearly be violated. The remedy would be an injunction against the teaching, not a requirement of access for those with other views.

A better way of making this argument would stress that the failure to mention God in the public schools communicates a message of secular humanism[338] and discourages religion.[339] One might argue that the public schools contributed to religious life for most of our history, but the Supreme Court ended all this by excluding prayer from the schools. In support of this contention, one might point to the slow, but steady rise of non-believers in the United States.[340] On the other side, the failure to mention God in the public schools can also be seen for what it is: an acceptance of the separation of church and state. Moreover, outside the public school curriculum, religious clubs flourish; moments of silence exist at the outset of classroom days; prayer groups frequently meet before the beginning of school. At the same time God is absent from the public school curriculum, sociologists marvel at the religious character of the American people. Moreover, there are grounds to doubt the extent to which the public schools have played a significant role in religious socialization. It is hard to believe, for example, that the existence of a ritualized prayer at the outset of a school day had any substantial spiritual effect.

Indeed, assuming that it is worthwhile for the state to promote religion, one could reasonably wonder how much would be accomplished by the small amount of classroom time involved in such programs? The European experience would suggest not much. Of course, it is all a matter of perspective. Perhaps in Spain religious participation would be even lower if religion were not taught in the public schools; perhaps religiosity in the United States would be even higher if religion were taught in the public schools. Moreover, perspective matters on how many personal conversions count as a success. From the perspective of many religions, every soul counts. Forty conversions might be a success. From the perspective of government, we are supposing that religiosity of the people as a whole matters in a democratic society. From a civic perspective, affecting the views of only forty students would not be worth pursuing. But government has to adopt a civic perspective, not a religious perspective, and from the perspective of public goals,

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[337] Smith, *supra* note 17, at 174.

[338] Fundamentalist Christians in particular think that this is unfair to them. And this is right in the sense that the system can not be justified in terms that any reasonable person would accept. Stanley Fish, *supra* note 30, at 2256, 2257 n. 4. On the other hand, if Christian fundamentalists achieved what they want the system would be unfair to others in exactly the same sense. Our choice is to determine which unfair system is better. *Cf. id.* at 2256: "The only real question is whether the unfairness is the one we want."

[339] James Davison Hunter, *Religious Freedom and the Challenge of Modern Pluralism*, *in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 68-73 (James D. Hunter & Os Guiness eds., 1990). K

[340] As I have already suggested, it is hard to believe that the absence of school prayer could account for this rise. See note 198, 255 *supra* and accompanying text.

evidence that religion in the schools has substantial effects is hard to come by.[341] There does not seem to be evidence that would outweigh the Establishment Clause concerns. Perhaps even more to the point, in the end, the issue is not whether children get religious instruction; the issue is whether they get it in the schools. If children do not get religious instruction in the public schools, they can get religious education in their churches, mosques, or temples. Indeed, the Court in *Zorach v. Clausen*[342] upheld released time programs that could, if properly structured, mitigate, but not liquidate, the Establishment Clause concerns. Regrettably, the program upheld in *Zorach* was doubly defective. First, the program in essence suspended the duration of the school day by not holding classes for those who were not released, and instead requiring them to stay in study hall.[343] Justice Jackson characterized this as a "temporary jail for those who will not go to church."[344] Hyperbolic as this may be, the failure to provide elective classes seems to take the program beyond accommodation into using the compulsory machinery of the state to encourage religion.[345] Similarly, the *Zorach* program provided that teachers were to receive written reports from churches to confirm attendance.[346] This too seems to cross the line. Excusing students on religious grounds is one thing; using state machinery to enforce religious attendance is quite another.[347] Nonetheless, released time programs not containing the objectionable features of *Zorach* strike me as a

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[341]. Beit-Hallahmi & Argyle's reading of the literature suggests that "[t]he effects of religious education appear to be quite weak." *Supra* note 192, at 109. They report somewhat greater effects in Catholic schools. *Id.* at 109-110. Others argue that the most important religious education occurs in early childhood. "Some religious groups, adopting the premises of modern education, speak of education as if it began at age five or six. While supposedly concentrating on the children, they neglect the most formative time in children's lives. In a religious community, five or six years of age is rather late for learning the important attitudes and rituals of a religious life." Gabriel Moran, *Religious Education After Vatican II, in* OPEN CATHOLICISM: THE TRADITION AT ITS BEST 154 (David Efroymson & John Raines eds., The Liturgical Press, Collegeville, Minn. 1997).

[342] 343 U.S. 306 (1952).

[343] *Id.* at 309.

[344] *Id.* at 324.

[345] For commentary, see Lupu, *supra* note 90, at 743).

[346] 343 U.S. at 308 (Jackson, J., dissenting).

[347] On the other hand, the Court stated that there was "no indication that the public schools enforce attendance at religious schools by punishing absentees from the released time programs for truancy." *Id.* at 311 n. 6. It is not clear what the Court thought the attendance reports were to be used for or what effect they had. Justice Jackson opined that, "The greater effectiveness of this system over voluntary attendance after school hours is due to the truant officer who, if the youngster fails to go to the Church school, dogs him back to the public schoolroom." *Id.* at 324. The Court did conclude that the teacher could appropriately make efforts to confirm that the student was not a truant. Justice Black dissenting maintained that the "sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery. That this is the plan, purpose, design and consequence of the New York program cannot be denied. The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools. Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids." *Id.* at 317.

reasonable compromise. Although the concerns about secular or ethical humanism have been overstated, the underlying equality concern is legitimate. The state is paying students to be educated in a non-religious way. Accommodation to the equality concern in this manner allows parents to use time for their children for religious education in a religious atmosphere. To be sure, the accommodation may cause some stigmatization, but stigmatization would likely be more serious if the children removed themselves to segregated classrooms on public school premises. Of course, the released time solution is not perfect, but no solution can be perfect when the values of the religion clauses conflict with each other.

Conclusion

The attempt to explain the religion clauses by reducing their support to a small set of values - most commonly equal liberty - is too narrow. The Free Exercise clause is supported by five values: (1) It avoids the cruelty of forcing an individual to do what he or she is conscientiously obliged not to do or to penalize an individual for responding to an obligation of conscience;[348] (2) It preserves respect for law and minimizes violence triggered by religious conflict;[349] (3) It combats religious discrimination;[350] (4) It promotes political community;[351] and (5) It protects the personal and social importance of religion.[352] The failure to appreciate this is not only of theoretical importance, but also of pragmatic importance. If free exercise is too be given its full weight in a constitutional balance, the full range of values needs to be considered.

The attempt to reduce the religion clauses to equal liberty is even less convincing with respect to the Establishment Clause. The Establishment Clause is supported by seven values: (1) It protects religious liberty including the protection of taxpayers from being forced to support religious ideologies to which they are opposed;[353] (2) It stands for equal citizenship without regard to religion;[354] (3) It protects against the destabilizing influence of having the polity divided along religious lines;[355] (4) It promotes political community;[356] (5) It protects the autonomy of the state to

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[348] See text accompanying notes to *supra*..

[349] See text accompanying notes to *supra*..

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[351] See text accompanying notes to *supra*..

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[353] See text accompanying notes to *supra*..

[354] See text accompanying notes to *supra*..

[355] See text accompanying notes to *supra*..

[356] See text accompanying notes to *supra*..

protect the public interest;[357] (6) It protects churches from the corrupting influences of the state;[358] and (7) It promotes religion in the private sphere.[359]

The attempt to reduce the Establishment Clause to equal liberty works well in a case where the government appropriates religious symbols to celebrate Christmas as it did in *Allegheny County*. Moreover, the liberty value explains why government sponsored prayer does not belong in the schools, and it can explain why government can prevent impingement of free exercise by private employers. But the values of equality and liberty do not help in explaining why it is permissible to put "In God We Trust" on the coins. They do not explain why government can engage in action that contradict the doctrines of specific religion such as the teaching of evolution in the schools. Nor can they explain the complexity of the question of whether government can provide aid to private religious schools or permit religion in the schools on a formally equal basis. Such aid or permission advances religious liberty and treats religions equally. But it forces taxpayers to support religions to which they are conscientiously opposed; it in many regions will support a dominant religion; and it ignores that the provision of aid creates a dependency of church on the state that can dull its moral witness and weaken or modify its religious commitments.

The reasons for the attempt to simplify religion clause analysis are undoubtedly complex. Of course, a part of the simplification project is result oriented. If one favors vouchers, for example, it makes things more difficult if the values of the clauses range beyond equal liberty or if the conceptions of liberty or equality are problematized. But the drive to simplify analysis often goes beyond the likely consequences. There is an aesthetic appeal to analysis[360] that proceeds as if it were a form of legal geometry.[361] Moreover, there is a psychological appeal to security in having firm foundations.[362] And there is an appeal to the rule of law in avoiding the kind of messiness and discretion that follows when values come into conflict. There is a sense of rationality, objectivity, and integrity accompanying a method that minimizes subjectivity.[363] Moreover, there is the appeal

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[357] See text accompanying notes to *supra*..

[358] See text accompanying notes to *supra*..

[359] See text accompanying notes to *supra*..

[360] See CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 113 (2001)(criticizing the aesthetic fallacy).

[361] Cf. John Rawls, A Theory of Justice 121: "We should strive for a kind of moral geometry with all the rigor that this name connotes." Of course, the drive toward proofs satisfying the ideals of geometry is not just aesthetic. (see generally, Thomas C. Grey, *Langdell's Orthodoxy,* 45 U.PITT.L.REV. 1, 16 (1983)), but the aesthetic aspect is not trivial, see SHIFFRIN, *supra* note 84, at 121.

[362] *Cf.* Noonan *supra* note 30, at 300: "There is a praiseworthy desire to maintain intellectual consistency. There is a longing in the human mind for repose, for fixed points of reference, for absolute certainty. There is alarm about the future . . . ."

[363] See generally, *id.* at 120-28.

to fairness that pulls toward an ideal of formal equality.

In the end, however, the simplification project can not be endorsed. It asks too much of theory in a context where theory has little resolving power. Theory can help to reveal the factors that should be relied upon to resolve problems in concrete contexts, and theory can help explain why particular problems are difficult. But the power of theory to dictate results in concrete contexts often runs out. Then we must rely on prudential judgment to make decisions and on practical experience to revise those decisions when they fail to work on the ground.[364] It makes for a messier world, but it is the world in which we live.

[364] Cf. ROBERTO UNGER, KNOWLEDGE AND POLITICS 288 (1975).