

SECULAR PURPOSE

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INTRODUCTION

DOES the Constitution's prohibition of an "establishment of religion"¹ bar the government from enacting laws whose only justification is based on the tenets of some religion? For decades the Supreme Court has thought so, holding that, to be constitutional, a law must "have a secular legislative purpose."² But that may soon change. A growing faction of the Court, including the Chief Justice, may be ready to scrap the secular purpose requirement.

The doctrine cannot be discarded, however, without effectively reading the Establishment Clause out of the Constitution altogether. The result would be heightened civil strife, corruption of religion, and oppression of religious minorities. Since a religious justification is available for nearly anything that the state wants to do to anyone, discarding this requirement would eventually devastate many constitutional protections that have nothing to do with religion. And this terrible price will have been paid for nothing. Present doctrine already allows for what the doctrine's critics most value: state recognition of the distinctive value of religion. The state is already free to recognize the uniqueness of religion as a human concern, and the law does so by treating religion as something special in a broad range of legislative and judicial actions. What the state may not do—what the doctrine properly forbids it to do—is declare any particular religious doctrine to be the true one, or enact laws that clearly imply such a declaration of religious truth.

Critics of the doctrine raise four principal objections. First, the *rubber stamp objection* holds that nearly anything can satisfy the secular purpose requirement, because a secular rationale can be imagined for almost any law. Second, the *evanescence objection* claims that the "purpose" that the rule seeks either does not exist or is not knowable by judges. Who can know for certain what lawmakers had in mind when they enacted a statute? Third, the *participation objection* argues that the rule makes religious people

¹ U.S. Const. amend. I.

² *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

into second-class citizens by denying them the right to participate in the legislative process. Should a law to shelter the homeless be deemed unconstitutional, this objection asks, if religious people supported it for religious reasons? Fourth, the *callous indifference objection* holds that the secular purpose requirement, if taken seriously, would forbid the humane accommodation of religious dissenters, such as the exemption of Quakers from military service.

The secular purpose doctrine can, if properly interpreted, handle all of these objections. If the doctrine has a potentially fatal flaw, it is that no one has understood its basis adequately. Unless that basis is understood, the doctrine is indeed in trouble.

The secular purpose requirement follows directly from a principle at the core of the Establishment Clause: that government may not declare religious truth. Some laws plainly signify government endorsement of a particular religion's beliefs. These are the paradigmatic violations of the secular purpose requirement. An easy example is a statute that required public schools to post the Ten Commandments in every classroom, and thereby instructed students in "the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day."³ The purpose of the law, plain on its face, was to proclaim a certain idea of religious truth. That purpose was religious, not secular. The law could not have been upheld without permitting government to declare religious truth.

If the doctrine is defended in this way, all four objections fail. The first three objections may be disposed of easily. The answer to the rubber stamp objection is that it is sometimes clear what a law is saying, and what is being said may be a claim about religious truth. The evanescence objection also fails, because the secular purpose requirement looks to the end toward which the statute is plainly directed, rather than to the hard-to-discern subjective legislative intent. The answer to the participation objection is that the secular purpose requirement looks at legislative outcomes rather than political inputs, so that a statute's constitutionality is not impugned by the mere fact that some people supported it for religious reasons.

³ *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam).

The answer to the callous indifference objection is more complex, and it provides a window into the meaning of the Establishment Clause. A correct formulation of the secular purpose requirement helps to resolve a problem that has plagued First Amendment theory for decades: the apparent conflict between the Establishment Clause and the Free Exercise Clause of the First Amendment.

The root of the callous indifference objection is the claim that the secular purpose requirement flatly contradicts the Free Exercise Clause, which singles out religion as such for special protection. If the secular purpose requirement is understood to mean that government may never extend special favor to religion as such, then this criticism is sound. It is not logically possible for the Constitution both to be neutral between religion and nonreligion and to give religion special protection.

The proper response to this objection is to clarify the meaning of "secular purpose." If the logical objection is not to be fatal, then there must be some way of interpreting "secular purpose" so that it is at least possible for the government to give certain kinds of special treatment to religion. The answer, I will argue, is to understand "secular purpose" as forbidding any preference more specific than support for religion in general. Moreover, "religion-in-general" should in this context be understood to refer to the activity of pursuing ultimate questions about the meaning of human existence, rather than as any particular answer or set of answers to those questions. Thus understood, "religion" includes nontheistic religions such as Buddhism as well as nonreligions like atheism and agnosticism. If religion is understood at this abstract level, then government can favor religion, as religion, without declaring religious truth.

This way of understanding "secular" concededly makes the word into a term of art, and this is the greatest weakness of my argument. Law ought normally to correspond to ordinary language. My proposal does, however, have three important virtues. It avoids logical incoherence. It fits the case law well. And it provides a morally attractive approach to the relationship between religion and the state.

This response to the secular purpose problem has larger implications for First Amendment theory. Three questions dominate contemporary religion clause scholarship. First, should religiously

based exemptions from generally applicable laws be determined by the courts or the legislatures?⁴ Second, is it appropriate for citizens to seek to enact laws based on their religious beliefs?⁵ And third,

⁴ See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1304–06 (1994); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. Ark. Little Rock L.J. 555 (1998); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. Pitt. L. Rev. 75 (1990); The James R. Browning Symposium for 1994: *The Religious Freedom Restoration Act*, 56 Mont. L. Rev. 1 (1995); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 347–48 (1996); Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 Cardozo L. Rev. 565 (1999) [hereinafter Lupu, *The Case Against Legislative Codification*]; Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 Colum. L. Rev. 104 (1996) [hereinafter Lupu, *Uncovering the Village*]; William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 Case W. Res. L. Rev. 357 (1989–90) [hereinafter Marshall, *Against Free Exercise Exemptions*]; William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308 (1991) [hereinafter Marshall, *In Defense of Smith*]; Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115 (1992); Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. Contemp. Legal Issues 473 (1996) [hereinafter Sherry, *Enlightening the Religion Clauses*]; Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 Sup. Ct. Rev. 123 [hereinafter Sherry, *Lee v. Weisman*]; Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195 (1992); Symposium: *Reflections on City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 597 (1998); Symposium, *Religion in Public Life: Access, Accommodation, and Accountability*, 60 Geo. Wash. L. Rev. 599 (1992); Symposium, *State and Federal Religious Liberty Legislation: Is It Necessary? Is It Constitutional? Is It Good Policy?*, 21 Cardozo L. Rev. 415 (1999); Mark Tushnet, *“Of Church and State and the Supreme Court”*: Kurland Revisited, 1989 Sup. Ct. Rev. 373 [hereinafter Tushnet, *Of Church and State*]; Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. Rev. 117 [hereinafter Tushnet, *Rhetoric of Free Exercise*].

⁵ See, e.g., Robert Audi, *Religious Commitment and Secular Reason* (2000); Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993); Kent Greenawalt, *Private Consciences and Public Reasons* (1995); Kent Greenawalt, *Religious Convictions and Political Choice* (1988) [hereinafter Greenawalt, *Religious Convictions*]; Michael J. Perry, *Love and Power: The Role of Religion and Morality in American Politics* (1991); Michael J. Perry, *Religion in Politics: Constitutional and Moral Perspectives* (1997); John Rawls, *Political Liberalism* (1993); *Religion and Contemporary Liberalism* (Paul J. Weithman ed., 1997); David M. Smolin, *Regulating Religious and Cultural Conflict in Postmodern America: A Response to Professor Perry*, 76 Iowa L. Rev. 1067 (1991); Symposium, *Religiously Based Morality: Its Proper Place in American Law and Public Policy?*, 36 Wake Forest L. Rev. 217 (2001); Symposium: *The Role of Religion in Public Debate in a Liberal Society*, 30 San Diego L. Rev. 643 (1993); Sanford Levinson, *Religious Language and the Public Square*, 105 Harv. L. Rev. 2061 (1992) (book review).

may government directly fund religious activity, so long as the principle that determines who gets the funding is not itself religious?⁶ These questions are debated without much attention to the secular purpose problem, but they cannot be answered without addressing it.

The first question presupposes (what hardly anyone doubts) that it is appropriate for *someone* to enact exemptions. It also presupposes that it is possible to distinguish those cases in which special treatment of religion is required, as in church governance cases, from those in which it is forbidden. But how can these accommodations have a secular purpose? They seem flatly to contradict the secular purpose requirement. Such accommodations are therefore always susceptible to a charge of favoritism toward religion, while any failure to accommodate—or even deference to legislative decisionmaking about accommodation—is susceptible to a charge of indifference to the free exercise of religion. This debate is, in short, haunted by the callous indifference objection. A coherent response to that objection makes possible a coherent resolution of the accommodation debate. Religious exemptions can easily be consistent with the support of religion-in-general so long as the government does not discriminate among religious views when it provides such exemptions.

The second question is similarly haunted by the participation objection. There seems to be an irresolvable tension between the right of religious citizens to participate in politics and the right of religious minorities to be free from religious domination. Believers claim that they will be disenfranchised if they are forbidden to seek to have laws enacted on the basis of their religious beliefs. Reli-

⁶ See, e.g., Commentary: On School Vouchers and the Establishment Clause, 31 Conn. L. Rev. 803 (1999); Steven K. Green, Private School Vouchers and the Confusion Over “Direct” Aid, 10 Geo. Mason U. Civ. Rts. L.J. 47 (1999/2000); Steffen N. Johnson, A Civil Libertarian Case for the Constitutionality of School Choice, 10 Geo. Mason U. Civ. Rts. L.J. 1 (1999/2000); Michael W. McConnell, The Selective Funding Problem: Abortions and Religious Schools, 104 Harv. L. Rev. 989 (1991); Allan E. Parker, Jr. & R. Clayton Trotter, Hostility or Neutrality? Faith-Based Schools and Tax-Funded Tuition: A GI Bill for Kids, 10 Geo. Mason U. Civ. Rts. L.J. 83 (1999/2000); Kathleen M. Sullivan, Parades, Public Squares and Voucher Payments: Problems of Government Neutrality, 28 Conn. L. Rev. 243 (1996); Symposium: Education Reform at the Crossroads, 10 Geo. Mason U. Civ. Rts. L.J. 107 (1999/2000); Symposium on Law and Religion, 13 Notre Dame J.L. Ethics & Pub. Pol’y 239 (1999).

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gious minorities claim that laws with religious purposes exclude them from full citizenship. The reformulation of the secular purpose requirement that I develop here offers a way out of this impasse. Because the secular purpose requirement focuses on *what* government is saying rather than on *who* supported any particular law, the participation of the religious is unimpaired. The requirement will, of course, prevent some people from getting what they want in the political process, but any meaningful constitutional restriction will do that.

The question of neutrally allocated government funding for religious activities does not raise the secular purpose problem as directly as the other two questions do. That problem is now urgently relevant, however, because in *Mitchell v. Helms*,⁷ a four-justice plurality of the Supreme Court suggested that a valid secular purpose can validate a program that directly aids religious activities:

[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.⁸

Here, what is most relevant is not that the rubber stamp objection fails, but rather that it almost succeeds: Very few laws will fail the secular purpose requirement. Because the requirement is so weak, the *Mitchell* plurality is wrong to think that it could provide the answer to, for example, the school voucher question. The requirement can only do very limited (albeit important) work. To make that requirement the center of Establishment Clause analysis would in practice nearly read the clause out of the Constitution altogether.

The secular purpose doctrine also has implications beyond the religion clauses. The doctrine is necessary in order to preserve the integrity of other areas of constitutional law, notably the Fourteenth Amendment. Virtually every kind of discrimination that is “suspect” under the Fourteenth Amendment has been defended on religious grounds. If there were no secular purpose requirement, the

⁷ 530 U.S. 793 (2000).

⁸ *Id.* at 810 (plurality opinion) (citation omitted).

state could invoke divine will as a compelling justification for any discrimination that it chose to practice. Consider, for example, the recent case of *Romer v. Evans*,⁹ in which the Court invalidated a law that authorized any and all forms of discrimination against gays. Such discrimination could easily have been defended on religious grounds. Absent a secular purpose requirement, the Court would have had to choose between deferring to the state's claims about divine law or investigating and adjudicating those claims. The secular purpose doctrine spares the courts such dilemmas.

In short, contemporary constitutional law would be distorted unrecognizably if the secular purpose requirement were discarded. That requirement should remain a part of constitutional law.

Part I of this Article will describe the secular purpose doctrine and the objections that have been offered against it. It will then describe the counterarguments of Justice Sandra Day O'Connor, the only member of the Court who has responded to these objections, and show how Justice O'Connor's defense of the doctrine fails.

Part II will explain that there must be a secular purpose requirement, because government may not declare religious truth. This part will examine the idea that some laws are only intelligible within a particular sectarian tradition and thus implicitly declare religious truth. These are the paradigmatic violations of the secular purpose requirement. If the basis of the secular purpose requirement is understood in this way, then it is easy to answer most of the objections that have been raised against it.

Part III will address the deepest of the objections to the secular purpose requirement, which claims that it forces the government to treat religion with callous indifference. The answer, I will argue, is to define the secular purpose requirement as permitting government to favor religion in general, so long as its support does not violate the axiom that government may not declare religious truth.

Part IV will show that the theory of secular purpose that I offer fits the case law well. In particular, it will show how the theory of the Establishment Clause developed in Part III can explain the perennial puzzle of tax exemptions for churches. It will conclude by reexamining the secular purpose cases and showing how my ac-

⁹ 517 U.S. 620 (1996).

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count makes sense of most of them. The cases that the theory cannot defend, I argue, are in fact wrongly decided.

Part V will consider the implications of this argument for other areas of religion clause doctrine and for constitutional law generally.

I. THE DOCTRINE AND ITS DIFFICULTIES

A. *The Secular Purpose Doctrine*

The secular purpose doctrine is part of the Supreme Court's test for violations of the Establishment Clause of the First Amendment. In the case in which the test was announced, *Lemon v. Kurtzman*,¹⁰ the Court held that in order to withstand an Establishment Clause challenge, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive governmental entanglement with religion."¹¹ This Article defends only the first prong of the test, the secular purpose prong (which I will sometimes refer to simply as "the prong").

The Supreme Court has relied on the secular purpose prong four times to invalidate a state statute.¹² In *Epperson v. Arkansas*,¹³ the

¹⁰ 403 U.S. 602 (1971).

¹¹ Id. at 612–13 (citation and internal quotes omitted).

¹² Lower courts have also relied upon the secular purpose prong many times. See, e.g., *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996) (finding challenged practice invalid under all three prongs of *Lemon* test); *Washegesic v. Bloomington Pub. Sch.*, 33 F.3d 679 (6th Cir. 1994) (same); *Gonzales v. N. Township of Lake County, Ind.*, 4 F.3d 1412 (7th Cir. 1993) (finding challenged practice invalid under both secular purpose and effects prongs); *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1534 (11th Cir. 1993) (reversing summary judgment for city on secular purpose issue); *N.C. Civil Liberties Union Legal Fund v. Constangy*, 947 F.2d 1145 (4th Cir. 1991) (finding challenged practice invalid under all three prongs); *United Christian Scientists v. Christian Sci. Bd. of Dirs.*, 829 F.2d 1152 (D.C. Cir. 1987) (finding challenged law invalid under both secular purpose and effects prongs); *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985) (finding challenged law invalid under the secular purpose prong); *Forest Hills Early Learning Ctr. v. Lukhard*, 728 F.2d 230 (4th Cir. 1984) (reversing summary judgment for state on secular purpose issue); *ACLU of Ga. v. Rabun County Chamber of Commerce*, 678 F.2d 1379 (11th Cir. 1982) (finding challenged practice invalid under the secular purpose prong), modified, reh'g denied, 698 F.2d 1098 (11th Cir. 1983); *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038 (5th Cir. 1982) (finding challenged practice invalid under all three prongs); *Karen B. v. Treen*, 653 F.2d 897

Court struck down an Arkansas statute that prohibited the teaching of evolution in public schools and universities. The record contained “no suggestion . . . that Arkansas’ law [could] be justified by considerations of state policy other than [a desire to support] the religious views of some of its citizens.”¹⁴ The absence of a secular purpose was fatal to the law:

The overriding fact is that Arkansas’ law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.¹⁵

In *Stone v. Graham*,¹⁶ the Court invalidated a Kentucky statute that required public schools to post in each classroom a copy of the Ten Commandments, paid for by private contributions. Each copy was to have the following language in fine print at the bottom: “The secular application of the Ten Commandments is clearly seen in its [sic] adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”¹⁷ The Court summarily reversed the state courts’ decisions upholding the statute and found that, given that the Commandments were a sacred text that included unquestionably religious edicts (for example, avoiding idolatry),¹⁸ the principal purpose of the law was “plainly religious.”¹⁹

In *Wallace v. Jaffree*,²⁰ the Court declared unconstitutional an Alabama law which mandated a period of silence in public schools

(5th Cir. 1981) (finding challenged law invalid under the secular purpose prong), aff’d, 455 U.S. 913 (1982); *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 929–30 (3d Cir. 1980) (finding challenged practice invalid under all three prongs); *Hall v. Bradshaw*, 630 F.2d 1018 (4th Cir. 1980) (same); *Meltzer v. Bd. of Pub. Instruction*, 548 F.2d 559 (5th Cir. 1977) (finding “Christian virtue” statement invalid under both the secular purpose and effects prongs), rev’d en banc in relevant part for lack of standing, 577 F.2d 311 (1978); *Lowe v. City of Eugene*, 463 P.2d 360 (Or. 1969) (en banc) (finding challenged law invalid under the secular purpose prong).

¹³ 393 U.S. 97 (1968).

¹⁴ *Id.* at 107.

¹⁵ *Id.* at 103.

¹⁶ 449 U.S. 39 (1980) (per curiam).

¹⁷ *Id.* at 41 (quoting Ky. Rev. Stat. Ann. § 158.178 (Michie 1980)).

¹⁸ *Id.* at 41–42.

¹⁹ *Id.* at 41.

²⁰ 472 U.S. 38 (1985).

“for meditation or voluntary prayer.”²¹ The Court held that the law “was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose.”²² The statute’s principal sponsor had said that the bill’s only purpose was religious,²³ and no evidence to the contrary had been offered by the state.²⁴ Moreover, Alabama law already mandated a moment of silence for “meditation.”²⁵ The only conceivable purpose of the new law, therefore, was to endorse religion.²⁶ “The addition of ‘or voluntary prayer’ indicates that the State intended to characterize prayer as a favored practice.”²⁷

*Edwards v. Aguillard*²⁸ invalidated a Louisiana statute that mandated equal treatment for evolution and “creation science” in public schools. Neither theory was required to be taught, but if a teacher presented one theory, he was required to give equal attention to the other theory. The Court’s decision focused on three defects in the statute. First, the state had failed to identify a “clear secular purpose” for the law.²⁹ Second, as in *Epperson*, the Court noted the “historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution.”³⁰ Finally, the legislative history revealed a purpose “to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety.”³¹ The Court concluded that “because the primary purpose of the Creationism Act is to endorse a particular religious doctrine,”³² it was unconstitutional.

These four cases are far from typical. The cases in which the challenged statute survives the prong vastly outnumber those in which the Court invalidates the statute. Two examples show how

²¹ Id. at 40 (internal quotes omitted) (quoting Ala. Code § 16-1-20.1 (Supp. 1984)).

²² Id. at 56.

²³ Id. at 43, 56–57.

²⁴ Id. at 57.

²⁵ Id. at 58–59.

²⁶ Id.

²⁷ Id. at 60.

²⁸ 482 U.S. 578 (1987).

²⁹ Id. at 585.

³⁰ Id. at 590.

³¹ Id. at 592.

³² Id. at 594.

deferential the Court has sometimes been to the state's recitation of a secular purpose. When Sunday closing laws were challenged in *McGowan v. Maryland*,³³ the Court acknowledged that these laws originally had a religious purpose and that Sunday remains a day of religious significance to many citizens.³⁴ But the Court held that "[t]he present purpose and effect of most of [these laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals."³⁵ In *Lynch v. Donnelly*,³⁶ the Court rejected an Establishment Clause challenge to a municipality's inclusion of a traditional nativity scene as part of a larger display depicting various observances of the Christmas holiday. The Court held that "[t]he evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols."³⁷ In both cases, the state's justification for its law was a thin secular rationalization for an obviously sectarian action, but the rationalization was enough to satisfy the Court.

B. Four Objections

The *Lemon* test has been criticized by many commentators, and "a majority of the Justices on the current Court have expressed dissatisfaction with the test and have advocated alternatives."³⁸ Some of this dissatisfaction focuses on the other prongs of the test, but the secular purpose requirement has not escaped criticism.

There are four persistent objections to the prong. The first objection asserts that the prong is a rubber stamp, and that anything can satisfy it. The second objection is that the prong is evanescent; the "purpose" that it seeks either does not exist or is not knowable by judges. The last two objections concede that the prong does some intelligible work, but argue that the work it does is destruc-

³³ 366 U.S. 420 (1961).

³⁴ *Id.* at 431.

³⁵ *Id.* at 445.

³⁶ 465 U.S. 668 (1984).

³⁷ *Id.* at 691.

³⁸ Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 12.2.3, at 987 (1997).

tive. The third objection claims that the prong improperly denies religious believers their right to participate in the lawmaking process. The fourth objection contends that the secular purpose requirement requires callousness toward religion by forbidding state recognition of religion or accommodation of religious dissenters. In this Section, I describe the four objections in greater depth.

The first objection, which I have called the rubber stamp objection, was succinctly stated by then-Justice William H. Rehnquist:

If the purpose prong is intended to void those aids to sectarian institutions accompanied by a stated legislative purpose to aid religion, the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion. Thus the constitutionality of a statute may depend upon what the legislators put into the legislative history and, more importantly, what they leave out.³⁹

If the prong is as weak as Chief Justice Rehnquist expresses here, then it accomplishes so little that it is not worth having it at all.

Justice Antonin Scalia has been the most forceful advocate of the second objection, which I have called the evanescence objection. He argues that the legislative purpose upon which the prong depends either does not exist or is not knowable by judges, because “discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task.”⁴⁰ Since the text of the Establishment Clause does not demand that judges undertake this task, Justice Scalia argues, they should discard at least this much of the *Lemon* test.

The third objection, which I have called the participation objection, argues that a law may lack a secular purpose, yet still be the

³⁹ *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting).

⁴⁰ *Aguillard*, 482 U.S. at 636 (Scalia, J., dissenting). No summary can do justice to Justice Scalia’s extensive and richly entertaining catalogue of difficulties. See *id.* at 636–40. Professor Laurence Tribe thinks there is a “tension” in Justice Scalia’s argument, because Justice Scalia argues that the prong requires examination of actual motives, but he also thinks that actual motives are impossible to discern. Laurence H. Tribe, *American Constitutional Law* § 14-9, at 1210 n.40 (2d ed. 1988). But when Justice Scalia argues that the prong turns on subjective motive, he is merely making a positivistic claim about the way in which the prong historically has operated. There is no tension between that claim and the normative claim that subjective motive ought not to be examined by judges.

product of a legitimate democratic process. The secular purpose prong, it argues, denies religious people their right to participate in politics. Thus Justice Scalia, dissenting in *Aguillard*, declared:

Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved.⁴¹

The political activism motivated by religious beliefs has made valuable contributions to American political life, as Justice Scalia pointed out:

[W]e do not presume that the sole purpose of a law is to advance religion merely because it was supported strongly by organized religions or by adherents of particular faiths. To do so would deprive religious men and women of their right to participate in the political process. Today's religious activism may give us the Balanced Treatment Act [invalidated in *Aguillard*], but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims.⁴²

⁴¹ *Aguillard*, 482 U.S. at 615 (Scalia, J., dissenting).

⁴² *Id.* at 615 (Scalia, J., dissenting) (citations omitted). Chief Justice Rehnquist has made a related point:

[I]f the purpose prong is aimed to void all statutes enacted with the intent to aid sectarian institutions, whether stated or not, then most statutes providing any aid, such as textbooks or bus rides for sectarian school children, will fail because one of the purposes behind every statute, whether stated or not, is to aid the target of its largesse. In other words, if the purpose prong requires an absence of *any* intent to aid sectarian institutions, whether or not expressed, few state laws in this area could pass the test, and we would be required to void some state aids to religion which we have already upheld.

Wallace, 472 U.S. at 108–09 (Rehnquist, J., dissenting).

Commentators have offered similar objections. Professor Stephen L. Carter has argued that the secular purpose requirement attempts “to erect around the political process a wall almost impossible to take seriously.” Carter, *supra* note 5, at 110. If the rule means that a law is unconstitutional if its supporters, or most of them, are religiously motivated, this “represents a sweeping rejection of the deepest beliefs of millions of Americans, who are being told, in effect, that their views do not matter.” *Id.* at 113. But Carter concludes that the Court cannot really mean what it has said, since “by some estimates, an absolute majority of the laws now on the books were motivated, at least in part, by religiously based moral judgments.” *Id.* at 111. The better interpretation of the prong, Carter argues, is that the courts should be satisfied

If the secular purpose requirement is understood to “forbid the legislature from making religiously-informed judgments, or basing legislation on the religiously-informed judgments of their constituents,”⁴³ this not only produces bizarre results but is also “an invitation to mischief—a not-so-subtle suggestion that those whose understandings of justice are derived from religious sources are second-class citizens, forbidden to work for their principles in the public sphere.”⁴⁴

The fourth and final objection, which I have called the callous indifference objection, is the deepest of the four, going to the foundations of Establishment Clause theory.⁴⁵ This objection holds that there is nothing wrong with laws that favor religion as such. While the participation objection focuses on the prong’s tendency to police the political process and argues the innocence of the types of process that the requirement would condemn, the callous indifference objection focuses instead on the outcome of lawmaking and claims that laws that explicitly single out religion for advantage are nonetheless permissible.

The callous indifference objection claims that the secular purpose prong, if taken seriously, would invalidate the specific religious accommodations that the Court has held permissible, and has sometimes even required, under the Free Exercise Clause. Thus Justice Scalia notes that “our cases indicate that even certain kinds of governmental actions undertaken with the specific intention of improving the position of religion do not ‘advance religion’ as that term is used in *Lemon*.”⁴⁶ Rather, the Court has held that government *must* act to advance religion when it discovers that its employees are inhibiting religion or that there is a valid free exercise claim, and that government *may* do so when it permissibly

by “any ‘political purpose’—that is, any goal the state legitimately is able to pursue.” *Id.* He does not say whether this purpose must be the actual purpose of the legislature, the purpose that appears on the face of the statute, the purpose that is evident from the statute’s operation in context, or something else.

⁴³ McConnell, *supra* note 4, at 144.

⁴⁴ *Id.*

⁴⁵ I draw the name from the Supreme Court’s opinion in *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (warning against a reading of the Constitution that would require “that the government show a callous indifference to religious groups”), quoted in *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

⁴⁶ *Aguillard*, 482 U.S. at 616 (Scalia, J., dissenting).

accommodates religion.⁴⁷ These cases reveal a deep incoherence at the heart of the Court's religion jurisprudence, since the *Lemon* test seems to forbid what the free exercise cases require.⁴⁸

Justice Scalia's point has been sharpened by Professor Michael McConnell, who argues that the secular purpose requirement "is right and proper," but worries about its application.⁴⁹ Thus, for example, a decision by the Forest Service to cancel a planned logging road through an ancient worship site sacred to Native Americans⁵⁰ would fail the prong: "All the secular criteria for building the logging road were satisfied; the only reason not to build the road would be that the Indians thought the sites to be holy. This manifestly religious reason for the Forest Service's decision would violate the first prong of the *Lemon* test."⁵¹ This result would be a far cry from the religious liberty that the First Amendment is supposed to guarantee.⁵²

C. Justice O'Connor's Defense of the Doctrine

Justice O'Connor is the only member of the Court who has responded to these criticisms. She has attempted to defend the prong by relying on the "endorsement" interpretation of *Lemon* that she has developed:

[T]he religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying

⁴⁷ Id. at 616–17 (Scalia, J., dissenting).

⁴⁸ See id. at 617 (Scalia, J., dissenting) ("We have not yet come close to reconciling *Lemon* and our Free Exercise cases, and typically we do not really try.").

⁴⁹ McConnell, supra note 4, at 128.

⁵⁰ That is, a decision to give the Native Americans what the Supreme Court denied them in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). In fact, that precise decision was made by Congress after the Court's decision. Eisgruber & Sager, supra note 4, at 1304 & n.115.

⁵¹ McConnell, supra note 4, at 131.

⁵² Id. at 129 ("To the extent that *Lemon*'s purpose prong requires the government to turn a blind eye to the impact of its actions on religion, on the implicit assumption that secular effects are all that matter, it is a recipe for intolerance.").

message to adherents that they are insiders, favored members of the political community.” Under this view, *Lemon*’s inquiry as to the purpose and effect of a statute requires courts to examine whether government’s purpose is to endorse religion and whether the statute actually conveys a message of endorsement.⁵³

This “endorsement test” has been “sporadically embraced by opinions for the Court,”⁵⁴ and the Court relied on it in the most recent case invalidating a law under the secular purpose prong.⁵⁵

In *Wallace*, Justice O’Connor concurred in the judgment, which invalidated a state “moment of silence” statute, and found that “[t]he relevant issue [was] whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.”⁵⁶ This interpretation of the prong answers the rubber stamp objection, Justice O’Connor argues, because courts are not as easily gulled as the objection assumes. Sometimes, it will be clear that a statute’s recitation of a secular purpose is a sham.⁵⁷ Jus-

⁵³ *Wallace*, 472 U.S. at 69 (O’Connor, J., concurring in the judgment) (citation omitted) (quoting *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring)).

⁵⁴ *McConnell*, supra note 4, at 147; see, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 592–93 (1989).

⁵⁵ *Aguillard*, 482 U.S. at 585, 587 (citing “the Establishment Clause’s purpose of assuring that Government not intentionally endorse religion or a religious practice” and holding that “[t]he purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion” (quoting *Wallace*, 472 U.S. at 75 (O’Connor, J., concurring in the judgment), and *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring))).

⁵⁶ *Wallace*, 472 U.S. at 76 (O’Connor, J., concurring in the judgment). The facts of *Wallace* are discussed supra notes 20–27 and accompanying text.

⁵⁷ Justice O’Connor’s argument responds directly to Chief Justice Rehnquist’s rubber stamp claim:

It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause’s purpose of assuring that government not intentionally endorse religion or a religious practice. It is of course possible that a legislature will enunciate a sham secular purpose for a statute. I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the *Lemon* inquiry into the effect of an enactment would help decide those close cases where the validity of an expressed secular purpose is in doubt. While the secular purpose requirement alone may rarely be determinative in striking down a statute, it nevertheless serves an important function. It reminds government that when it acts it should do so without endorsing a particular religious belief

tice O'Connor's approach also answers the evanescence objection, because, rather than inviting courts "to psychoanalyze the legislators,"⁵⁸ it looks to the objective meaning of the statute. The prong does not improperly police the legislative process, as the participation objection alleges, because it looks to outcome rather than process.

Justice O'Connor struggles, however, with the callous indifference objection. She acknowledges that accommodations of religion do not have a secular purpose: "[A] rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion."⁵⁹ The formula of state neutrality toward religion is unhelpful here: "It is difficult to square any notion of 'complete neutrality' with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an otherwise generally applicable obligation. A government that confers a benefit on an explicitly religious basis is not neutral toward religion."⁶⁰ The secular purpose prong thus seems to contradict a practice of religious accommodation that is harmonious with, and perhaps even required by,⁶¹ the First Amendment.

Justice O'Connor chalks this up to a tension within the First Amendment itself—a tension that had been acknowledged in earlier decisions of the Court. As she observed in *Wallace*: "It is obvious that either of the two Religion Clauses, 'if expanded to a logical extreme, would tend to clash with the other.'"⁶² The solution that she proposes is simply to make an exception to the Establishment Clause in cases in which government creates exemptions,

or practice that all citizens do not share. In this sense the secular purpose requirement is squarely based in the text of the Establishment Clause it helps to enforce.

Id. at 75–76 (O'Connor, J., concurring in the judgment).

⁵⁸ *Id.* at 74 (O'Connor, J., concurring in the judgment).

⁵⁹ *Id.* at 82 (O'Connor, J., concurring in the judgment).

⁶⁰ *Id.* at 82–83 (O'Connor, J., concurring in the judgment) (citation omitted) (quoting majority opinion).

⁶¹ Justice O'Connor thinks that religious accommodations are sometimes required by the Free Exercise Clause. See *Employment Division v. Smith*, 494 U.S. 872, 891–907 (1990) (O'Connor, J., concurring in the judgment).

⁶² *Wallace*, 477 U.S. at 82 (O'Connor, J., concurring in the judgment) (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668–69 (1970)).

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because “one can plausibly assert that government pursues Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion.”⁶³

D. How Justice O’Connor’s Defense Fails

Justice O’Connor’s defense of the secular purpose prong is a failure. Professor Steven Smith has shown that the endorsement test as Justice O’Connor has formulated it is incoherent, because the cultural meaning of arguably religious messages is likely to be ambiguous and contested. Any particular governmental action—the granting of conscientious objector status, for example—will or will not be thought to constitute illegitimate endorsement, depending on one’s view of whether it is appropriate for government to take that substantive action. Different people in society will have different views about the substantive issues, and their opinions about whether endorsement has occurred will follow from those substantive views. The endorsement test thus is parasitic on some substantive vision of what government actions are appropriate, and

⁶³ *Id.* at 83 (O’Connor, J., concurring in the judgment). Here is Justice O’Connor’s argument in full:

The solution to the conflict between the Religion Clauses lies not in “neutrality,” but rather in identifying workable limits to the government’s license to promote the free exercise of religion. The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute—that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief—courts should assume that the objective observer is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.

Id. (O’Connor, J., concurring in the judgment) (citation and internal quotes omitted).

the test, therefore, cannot be a substitute for that substantive vision.⁶⁴

If Smith is correct, then Justice O'Connor's defense of the secular purpose prong is defective at the core.⁶⁵ If endorsement has no objective status—if one's perception of endorsement or nonendorsement merely reflects one's culturally subjective position—then the prong has no referent. Smith's objection to the endorsement test is analogous to Justice Scalia's objection to the search for subjective legislative intent: The thing sought either does not exist or is not knowable.⁶⁶

Smith's critique resuscitates all four of the objections to the prong. The rubber stamp objection regains its vitality, because so long as *some* observer might think that a law has a secular purpose, this observer can claim to offer the objective perspective that Justice O'Connor seeks, and so to validate the challenged law. The evanescence and participation objections similarly survive so long as some people think that a law enacted by those with religious motives endorses its enactors' religion. As for the callous indifference objection, Justice O'Connor does not explain why an objective observer would not perceive endorsement of religion when religion receives special advantages that are not themselves required by the Free Exercise Clause.

Justice O'Connor argues that the requirements of the Establishment Clause should be relaxed when government grants religious exemptions,⁶⁷ but she has elsewhere suggested that the lifting of certain government-imposed burdens, such as a hypothetical exemption of profitmaking religious organizations from the Civil Rights Act of 1964, might violate the endorsement test.⁶⁸ Jus-

⁶⁴ See Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266 (1987); see also McConnell, *supra* note 4, at 148–51, 192–93 (expressing similar objections).

⁶⁵ See Smith, *supra* note 64, at 323 ("Because perspectives are in fact incurably diverse, a policy against creating perceptions that government has endorsed or disapproved of religion can provide no grounds for identifying one perspective, or one conception of neutrality, as correct.").

⁶⁶ See *supra* text accompanying note 40.

⁶⁷ See *supra* note 63 and accompanying text.

⁶⁸ *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 348–49 (1987) (O'Connor, J., concurring in the judgment). One can think of even clearer hypothetical examples, such as a statute exempting from the homicide laws a sect of Aztecs who wanted to perform unwilling human sacrifices.

tice O'Connor's answer to the callous indifference objection thus seems to be somewhat ad hoc and unprincipled. She admits that religious exemptions have no secular purpose, but arbitrarily carves out an exception (of unspecified scope) to the secular purpose prong in order to prevent the prong's operation from becoming too destructive.

McConnell objects that this attempt to reconcile accommodation and endorsement "is circular. If our reasonable observers know the 'values' underlying the Religion Clauses, and if those values are something other than endorsement and disapproval, what need have we of the endorsement test?"⁶⁹ Likewise, Smith argues that an attempt to modify the endorsement test in this way, by creating an exception for accommodations but forbidding all other forms of endorsement, is incoherent because "[f]ar from being mutually exclusive, 'accommodation' and 'endorsement' of religion are much more likely to coincide."⁷⁰

The exception seems to permit legislators to act out of concern for the religious convictions of their constituents, but not because the legislators believe that religion is true or beneficial.

Thus, the constitutionality of a measure helpful to religion would depend upon whether the legislators acted—and were perceived as having acted—because *they* believe in religion (in which case the measure would probably be considered an invalid endorsement), or because they believe *their constituents* believe in religion (in which case the measure would be a permissible accommodation).⁷¹

This distinction immediately revives the difficulties of ascertaining legislative intent, already noted by the evanescence objection. It is also untenable on a theoretical level:

In a representative democracy, legislators and citizens are not distinct and separate categories of persons. Legislators are themselves citizens, whose own interests and beliefs are presumably entitled to be counted. Even more importantly, legislators are commonly thought to be capable of representing their constituents because they share their constituents' beliefs

⁶⁹ McConnell, *supra* note 4, at 151.

⁷⁰ Smith, *supra* note 64, at 282.

⁷¹ *Id.* at 279.

and values. . . . [T]he question of whether the legislator has acted on the basis of her own beliefs or those of the citizens seems meaningless: It is precisely by acting upon her own beliefs that the legislator “represents” the beliefs and interests of her constituents.⁷²

If legislators are permitted to accommodate a religion because they agree with that religion’s beliefs, then we return to the rubber stamp objection: Government will have “a broad license to support religion under the guise of ‘accommodation.’”⁷³ But if such legislators’ intent invalidates an accommodation that would have been permissible if enacted by agnostics, then the participation and callous indifference objections arise once more:

[R]eligious legislators — or, for that matter, *anti*-religious legislators — would in effect be subject to a special disability because of their adherence or opposition to religious beliefs. This special disability would significantly burden the freedom of belief and expression of legislators — as well as penalizing their constituents. In practice, moreover, this construction would be virtually equivalent to a flat ban on accommodation, and would be subject to the same criticisms.⁷⁴

If Justice O’Connor’s defense of the secular purpose requirement is to be salvaged, it must be substantially reformulated. I now turn to that task.

II. THE NEED FOR A SECULAR PURPOSE REQUIREMENT

A. *An Establishment Clause Axiom*

Why should there be a secular purpose requirement at all? I would start with the following axiom: The Establishment Clause forbids the state from declaring religious truth.⁷⁵ This proposition

⁷² Id. at 280 (footnotes omitted).

⁷³ Id. at 280–81.

⁷⁴ Id. at 281 (footnotes omitted).

⁷⁵ In an earlier draft of this paper, I claimed that my argument was an elaboration of the following passage from Professor Kent Greenawalt:

A liberal society . . . has no business dictating matters of religious belief and worship to its citizens. It cannot forbid or require forms of belief, it cannot preclude acts of worship that cause no secular harm, it cannot restrict expression about what constitutes religious truth. One needs only a modest extension of these uncontroversial principles to conclude that a liberal society

has been well settled for decades. The classic formulation is the following excerpt from *Epperson v. Arkansas*,⁷⁶ and I shall hereafter refer to the principles stated therein as “the *Epperson* principles”:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.⁷⁷

So the First Amendment’s prohibition of “establishment of religion” is, among other things, a restriction on government speech. It means that the state may not declare articles of faith. The state may not express an opinion about religious matters. It may not encourage citizens to hold certain religious beliefs.⁷⁸

should not rely on religious grounds to prohibit activities that either cause no secular harm or do not cause enough secular harm to warrant their prohibition. Greenawalt, *Religious Convictions*, supra note 5, at 90–91. I now think that, because the word “dictating” in his first sentence is ambiguous, it is not clear that he is saying the same thing that I am saying. If “dictating” refers to government speech, then we are saying the same thing. But that word may instead refer to coercive law, so that the second sentence would be an exhaustive set of illustrations of the first sentence. This distinction is not relevant to Greenawalt’s purposes, but it is relevant to mine. In any case, my (mis?)reading of this passage was the seed from which this paper grew, and I am grateful to Greenawalt for starting me down this path. These matters were clarified by conversations with Steve Latham and Kent Greenawalt.

⁷⁶ 393 U.S. 97 (1968).

⁷⁷ *Id.* at 103–04.

⁷⁸ The Court so held in *United States v. Ballard*, 322 U.S. 78 (1944):

“The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.” . . . The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man’s relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

Id. at 86–87 (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871)).

The axiom that the state may not declare religious truth is rooted in the underlying purposes of the Establishment Clause. Three reasons are typically given for disestablishment of religion; all of them support the restriction on government speech just described. One reason is civil peace: In a pluralistic society, we cannot possibly agree on which religious propositions the state should endorse. The argument for government agnosticism is that, unlike government endorsement of any particular religious proposition, it is not in principle impossible for everyone to agree to it.⁷⁹

A second reason for disestablishment is futility: Religion is not helped and may even be harmed by government support. Professor John Garvey notes that this principle has roots in the theological idea that “God’s revelation is progressive,” so that free inquiry will bring us closer to God.⁸⁰ The futility argument can also take the form of a sociological claim that state sponsorship tends to diminish respect for religion,⁸¹ or a skeptical claim that the state does not know enough to justify preferring any particular religious view.⁸²

Finally, there is an argument based on respect for individual conscience. This argument states that the individual’s search for religious truth is hindered by state interference.⁸³

The axiom that government may not declare religious truth entails restrictions on government conduct. It is a familiar point in

⁷⁹ Laycock, *supra* note 4, at 322.

⁸⁰ John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 *J. Contemp. Legal Issues* 275, 285 (1996).

⁸¹ See, e.g., Alexis de Tocqueville, *Democracy in America* 294–301, 442–49 (George Lawrence trans., J.P. Mayer ed., Anchor ed. 1969) (1835–40).

⁸² John Locke provided the earliest example of this claim:

The one only narrow way which leads to heaven is not better known to the magistrate than to private persons, and therefore I cannot safely take him for my guide who may probably be as ignorant of the way as myself, and who certainly is less concerned for my salvation than I myself am.

John Locke, *A Letter Concerning Toleration* 32 (William Popple trans., Patrick Romanell ed., Liberal Arts Press 1950) (1689). James Madison made the similar claim that the idea “that the Civil Magistrate is a competent Judge of Religious Truth” is “an arrogant pretension falsified by the contradictory opinions of Rulers in all ages.” James Madison, *A Memorial and Remonstrance*, in *Religious Liberty in a Pluralistic Society* 64, 66 (Michael S. Ariens & Robert A. Destro eds., 1996).

⁸³ These arguments are consistent with Professor David Novak’s claim, on which I take no position here, that a legal order must ultimately rely on the religious faith of its citizens in order to be able to reliably guarantee rights, including rights of religious liberty. See David Novak, *Law: Religious or Secular?*, 86 *Va. L. Rev.* 569 (2000).

free speech law that conduct which is not itself speech may nonetheless communicate a message and so be appropriately treated as speech.⁸⁴ This means that the Establishment Clause's restriction on government speech is also a restriction on symbolic conduct. If government cannot declare religious truth, then it cannot engage in conduct the meaning of which is a declaration of religious truth. It would be illegitimate, for instance, for a state to erect a crucifix in front of the state capitol. It would also be illegitimate for the state to carve, over the entrance of the capitol, an inscription reading "JESUS IS LORD" or "THE POPE IS THE ANTICHRIST."⁸⁵ The state simply is not permitted to take an official position on matters of religion.

Government, however, does more than just erect symbols. The most obvious way in which the government expresses an opinion is through the passage of legislation. In this arena, the government has available to it a particularly powerful type of symbolic conduct that is unavailable to other actors. Through legislation, the government can, and often does, express a point of view.

Suppose a statute is passed that makes it a crime for anyone to break the commandment to obey the Sabbath, as that commandment is understood by Orthodox Jews. That is, the law makes it a felony to operate machinery on the Sabbath, to drive a car, to turn on an electric appliance, or to make a telephone call, and the law applies to private as well as public conduct, so that one can violate it by turning on the television while one is alone at home.⁸⁶ There is

⁸⁴ See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990) (holding that the First Amendment protects the burning of the United States flag).

⁸⁵ Another example has been suggested by Justice Anthony M. Kennedy, albeit in a way that leaves uncertain what he thinks is problematic about the conduct he would forbid:

Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is *per se* suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.

County of Allegheny v. ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (footnote omitted). Justice Kennedy has sought to make coercion an indispensable element of an Establishment Clause claim. He has not explained, however, what is coercive about proselytization.

⁸⁶ On these prohibitions in Jewish law, see 14 *Encyclopaedia Judaica* 567 (1971).

no substantive constitutional right to do any of these things. The problem with this law lies in the message it contains: It implicitly asserts the correctness of the commandment to keep the Sabbath holy and of the Orthodox rabbis' interpretation of that sentence. It declares religious truth. Thus, the secular purpose requirement works as a corollary to the axiom with which I began. If government cannot declare religious truth, then it cannot use its coercive powers to enforce religious truth.

The argument that I have just set forth is obviously a close cousin of Justice O'Connor's endorsement test. Its focus, however, is different. Smith has observed that Justice O'Connor's endorsement test transforms the Establishment Clause from a prescription about institutional arrangements into a kind of individual right, a right not to feel like an "outsider[]." ⁸⁷ In my view, the Establishment Clause does not protect aggrieved, perhaps idiosyncratic, individuals; it is after all "primarily concerned with maintaining proper institutional relations." ⁸⁸ The question is not how outsiders feel about what the government is doing, but rather how the government itself is acting. Some government actions are tantamount to speech acts. They communicate. As Professor William Marshall has argued, "[i]t is the government's message that is critical, not the effects of that message." ⁸⁹ The question is what is being said. ⁹⁰

⁸⁷ Smith, *supra* note 64, at 300. Smith explains:

Under existing establishment doctrine, the evil to be prevented is improper governmental support for, or entanglement with, religion. Thus, the clause is primarily concerned with maintaining proper institutional relations. O'Connor's analysis, by contrast, reconceives the purpose of the establishment clause as individual rather than institutional. Her proposal aims to prevent . . . messages which make some citizens feel like "outsiders" because of their nonadherence to particular religious beliefs.

Id. at 299–300. In recent years, Justice O'Connor appears to have forgotten that this political alienation was the original concern of her endorsement test. She now makes that test turn on the perceptions of a fictitious "objective observer," who is unfazed by state actions that may intensely alienate many actual human beings. See Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 *Md. L. Rev.* 713, 717–26 (2001).

⁸⁸ Smith, *supra* note 64, at 299.

⁸⁹ William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 *Ind. L.J.* 351, 374 (1990–91). The argument I have presented here thus has a different basis than Professor Frederick Gedicks's defense of the secular purpose test. Gedicks argues that the purpose requirement relies on the principle of voluntarism, "the idea that private religious ordering should not be distorted by government support or influence." Frederick Mark Gedicks, *Motivation*,

Recall that Smith's core objection to the endorsement test is that Justice O'Connor's test is implicitly parasitic on some unspecified theory of what government can and cannot do. I have specified the theory upon which my modification of the endorsement test is parasitic. The secular purpose requirement, as I understand it, follows from the axiom that government may not declare religious truth. Forbidden endorsement, endorsement that violates the secular purpose requirement, is government action that declares religious truth.

B. Answering the Objections

If the secular purpose requirement logically follows from the requirement that government not formulate official answers to religious questions, then it is appropriately interpreted, and its application is appropriately guided, by that requirement. I will elaborate upon the operation of the test as I have reformulated it in the course of addressing the four objections to the requirement.

The answer to the rubber stamp and evanescence objections is that what government says is sometimes obvious on the face of the statute. Smith argues that if the test is interpreted as policing outcomes rather than legislative processes, it remains indeterminate, because "religious diversity in this country is sufficiently broad to ensure that almost anything government does will likely be seen by

Rationality, and Secular Purpose in Establishment Clause Review, 1985 *Ariz. St. L.J.* 677, 680. He goes on to say that "so long as government is rationally pursuing a legitimate secular goal in the least intrusive manner, the establishment clause does not specially insulate religion from the burdensome effects of a facially neutral governmental action." *Id.* at 683. However, as exemption proponents such as Professors Douglas Laycock and Michael McConnell (both of whom endorse voluntarism as Gedicks defines it) vigorously argue, a law can distort religious ordering even if it is not intended to do that. See Laycock, *supra* note 4; McConnell, *supra* note 4. The converse will also sometimes be true: A law intended to influence religion may fail in its purpose and be harmless.

The larger problem these objections point to is that the secular purpose prong does not look at the consequences of a law. But Gedicks's principle of voluntarism is all about consequences; it looks at law's impact on religion. Secular purpose is a poor proxy for nonsectarian impact. A defense of the secular purpose prong must rely on other grounds.

⁹⁰ The approach I am advocating avoids some strange consequences of Justice O'Connor's test, such as the implication, noted by Smith, that any offended person should have standing to challenge governmental action. Smith, *supra* note 64, at 299–300.

someone as endorsing or disapproving of a religious viewpoint or value.”⁹¹ The social meaning of a law may, however, be so clear that it swamps the diversity of perceptions, so that nearly any member of society will agree about what the law signifies. Consider state-imposed racial segregation of the kind that was declared unconstitutional in *Brown v. Board of Education*.⁹² What, precisely, was wrong with it? One might say that the problem was that the legislatures that imposed segregation were racially prejudiced, but this explanation seems to invite the evanescence objection; how can one possibly sum the intentions of all the legislators who voted for such laws?⁹³ Or one might say, as the Court did in *Brown*, that the problem lay in the perceptions of those affected by it: “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁹⁴ But *Brown*’s answer invites Smith’s objection: Whose perceptions count? Why is it not equally valid to say, as the Court had half a century earlier, that if blacks feel “that the enforced separation of the two races stamps the colored race with a badge of inferiority,” this result “is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it”?⁹⁵

Even without looking to the intent of those passing a law or the perceptions of those subject to it, sometimes the meaning of a state law is obvious. It cannot be inappropriate for judges to recognize what is obvious to everyone else. Professor Charles Black pointed out long ago that the proper response to the solemn assertion that segregated facilities did not declare the inferiority of blacks was

⁹¹ Id. at 291 (footnotes omitted).

⁹² 347 U.S. 483 (1954).

⁹³ The evanescence objection thus has some force in this context, but the participation objection has none. No one has a right to have their racist preferences counted in political decisionmaking, because a commitment to equality is the reason why preferences count at all. “We respect people’s choices because we respect people, not the other way around.” Robert E. Goodin, *Political Theory and Public Policy* 80 (1982). For elaboration of this point, see Andrew Koppelman, *Antidiscrimination Law and Social Equality* 17–24 (1996). Religious preferences are not excludable in this way, because religious preferences per se do not deny the equal value of persons.

⁹⁴ *Brown*, 347 U.S. at 494.

⁹⁵ *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

“one of the sovereign prerogatives of philosophers—that of laughter.”⁹⁶ This is, I think, sufficient answer to Smith’s objections. When the state argues that its law reflects a secular purpose, the appropriate response will sometimes be neither psychoanalysis of the legislature nor a survey of public opinion; laughter will suffice.

Questions at the margin of obviousness will turn on the range of meanings that natives of the culture can reasonably ascribe to the government action in question.⁹⁷ The Sabbath-keeping statute declares the authority of the Ten Commandments, and the theological correctness of the Orthodox Jewish interpretation of those Commandments, as clearly as if the government were to declare Orthodox Judaism the official religion. The question of explicit endorsement will turn on what native speakers of English think that, for example, “Jesus is Lord” means. There will be doubtful cases, and in such cases it makes sense to give the legislature the benefit of the doubt, as Justice O’Connor has suggested: “Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief ‘was and is the law’s reason for existence.’”⁹⁸ But the set of cases

⁹⁶ Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L.J.* 421, 424 (1960).

⁹⁷ The meaning that the natives do in fact ascribe to it is, of course, probative. See *Diamond & Koppelman*, *supra* note 87.

⁹⁸ *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O’Connor, J., concurring in the judgment) (quoting *Epperson*, 393 U.S. at 108). The mere fact that some citizens support a law for religious reasons will not, therefore, make a law unconstitutional:

Although neither a State nor the Federal Government can constitutionally pass laws which aid one religion, aid all religions, or prefer one religion over another, it does not follow that a statute violates the Establishment Clause because it happens to coincide or harmonize with the tenets of some or all religions. That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny.

Harris v. McRae, 448 U.S. 297, 319 (1980) (citations and internal quotes omitted). So, when a federal law restricting Medicaid funding for abortions was challenged on the basis that “it incorporates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences,” the Supreme Court responded that the statute “is as much a reflection of ‘traditionalist’ values towards abortion, as it is an embodiment of the views of any particular religion.” *Id.*

invalidated by such a test is not an empty set;⁹⁹ some laws will have *no* plausible secular purpose.¹⁰⁰

⁹⁹ Professor Smith briefly considers the sort of argument I have made here, and offers the following answer:

[T]o say that the perception must be that of a majority, or of some designated group of citizens, seems unacceptable. Such a standard, besides creating additional factual questions about what a majority perceives, would offend the central principle of Justice O'Connor's own test by establishing as definitive, and thereby endorsing, the religious viewpoint of a majority or other designated group while discounting the religious perspective of minorities or outsiders.

Smith, *supra* note 64, at 292. But the issue is not whether the majority regards the law as unconstitutional; the issue is whether the majority understands the law as endorsing a religious proposition, see Diamond & Koppelman, *supra* note 87, or more precisely whether it is unreasonable, in the social context in which the law is enacted, to interpret the law in any other way.

¹⁰⁰ The requirement that a law have a plausible secular purpose has recently been attacked, from opposite directions, by Professor Michael Perry and Professor Abner Greene.

Perry worries that such a requirement, if it is to have any teeth at all, gives judges too much discretion: "Authorizing (nondeferential) judicial inquiry into the 'plausibility' of the secular basis of a widely controversial moral belief comes perilously close to inviting judges to substitute their moral judgment for the moral judgment of legislators and other policymakers." Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 *Wm. & Mary L. Rev.* 663, 674 (2001). It is true that this is a danger, but it is an empirical question whether that danger actually tends to materialize when the doctrine is relied upon. All "slippery slope" arguments depend on empirical claims in this way. See Frederick Schauer, *Slippery Slopes*, 99 *Harv. L. Rev.* 361 (1985). I argue in Part IV that the Court has not in fact abused the power that the secular purpose doctrine gives it.

Greene thinks that the doctrine is too deferential, because a law with a plausible secular purpose might still have been enacted through a legislative process that was dominated by religious argumentation, and this fact may be apparent to nonbelievers. If that happens, Greene argues, the nonbelievers will rightly feel excluded from political participation. At the same time, Greene would permit the religious to seek to enact laws on the basis of their beliefs "if religious believers can translate their 'true' religious reasons successfully enough to make it appear to nonbelievers that the secular reasons are the real ones." Abner S. Greene, *The Incommensurability of Religion*, in *Law and Religion: A Critical Anthology* 226, 232 (Stephen M. Feldman ed., 2000). It is not clear what counts as successful translation. If the believers must show that their real motives were not religious, then they are disenfranchised to the extent that their motives demonstrably were religious—and this is true regardless of whether the law they have supported has a legitimate secular purpose. This test would make the support of religious citizens a sort of political poison that would invalidate otherwise innocuous laws. If, on the other hand, the question is whether persuasive secular reasons are articulable (regardless of the enactors' real motives), then the test collapses back into plausibility. At one point Greene suggests a third possibility: that the question is not whether the secular argument is plausible, but rather whether it is perceived by nonbelievers to be "made in good faith." *Id.* This approach would either

The evanescence objection does not apply to the prong as I have formulated it here, because my formulation does not rely on subjective legislative intent. Some commentators have responded to Justice Scalia's evanescence objection by noting that "the Court considers legislative purpose, despite the difficulty in ascertaining it, in other areas of constitutional law, such as in the requirement for proof of a discriminatory purpose to prove a race or gender classification when there is a facially neutral law."¹⁰¹ However, it is far from clear that the Court relies on subjective intent even in the area of discrimination. A purpose inquiry need not look to subjective motives; one can instead attempt to discern the objective purpose of the statute—the purpose that plainly appears from an examination of the face of the statute. Thus, at the same time that Justice Scalia writes that "discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task," he notes that "it is possible to discern the objective 'purpose' of a statute (i.e., the public good at which its provisions appear to be directed)."¹⁰² In part because of the difficulties that Justice Scalia catalogues, even in the discriminatory purpose cases, the Court tends to rely on objective rather than subjective legislative purpose.¹⁰³

require courts to accuse legislators of bad faith, which judges would rarely be inclined to do, see Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 *San Diego L. Rev.* 1163, 1164–65 (1978), or else require the more convoluted inquiry whether nonbelievers would accuse legislators of bad faith.

¹⁰¹ Chemerinsky, *supra* note 38, at 988; see also McConnell, *supra* note 4, at 143 ("[I]t would be unprincipled to abandon the purpose prong of the *Lemon* test on these grounds if the Court intends to inquire into legislative purpose in other contexts.").

¹⁰² *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting). Justice Felix Frankfurter once took a similar line:

You may have observed that I have not yet used the word "intention." All these years I have avoided speaking of the "legislative intent" Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not to be led off the trail by tests that have overtones of subjective design. We are not concerned with anything subjective. We do not delve into the mind of legislators or their draftsmen, or committee members.

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527, 538–39 (1947).

¹⁰³ Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 *Wm. & Mary Bill Rts. J.* 89, 103–11 (1997).

The answer to the participation objection is that the secular purpose prong looks at legislative outcomes rather than legislative inputs. In the discriminatory purpose cases, subjective intent is necessarily the very thing that the Court is searching for, because the whole point of the judicial inquiry is to police the legislative process for contamination by prejudice.¹⁰⁴ When the Court relies on objective purpose, it is using it as a proxy for the subjective legislative intent that is so hard to discern. But there is nothing wrong with a legislative process that is influenced by religious people, who, after all, are not second-class citizens. The basic premises of democracy condemn a political process in which the decisionmakers are racist, but not a political process in which some of the decisionmakers have religious views and allow those views to influence their political positions. A law's lack of a secular purpose is not a proxy for anything; it is the very thing sought.

Of course, the participation objection remains accurate insofar as the secular purpose requirement does prevent some religious people from getting what they want from the legislative process. But so does any other reading of the Establishment Clause. In fact, any constitutional provision that limits the range of permissible political outcomes prevents some people from getting what they want in the legislative process. This objection is similar to an argument that proved unpersuasive in *Romer v. Evans*.¹⁰⁵ In that case, the Colorado Supreme Court had invalidated a state constitutional amendment that prohibited any municipality from giving antidiscrimination protection to gay people. The Colorado court held that the amendment impaired gays' "right to participate equally in the political process," because it barred gay people "from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation."¹⁰⁶ Justice Scalia pointed out the difficulty with any argument of this sort:

[I]t seems to me most unlikely that any multilevel democracy can function under such a principle. For *whenever* a disadvantage is imposed, or conferral of a benefit is prohibited, at one of

¹⁰⁴ Koppelman, *supra* note 93, at 13–56; Koppelman, *supra* note 103, at 98–101.

¹⁰⁵ 517 U.S. 620 (1996).

¹⁰⁶ *Evans v. Romer*, 854 P.2d 1270, 1285 (Colo. 1993).

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the higher levels of democratic decisionmaking (*i.e.*, by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection.¹⁰⁷

The participation objection, when directed against the secular purpose requirement as I have formulated it, is tantamount to a quarrel with constitutionalism in general, not with any particular version of it. Under even a modest view of the Establishment Clause, a petition to make Anglicanism the established church of the United States, or to make felonious the celebration of the Catholic Mass, will not be addressable by the legislature. This prohibition may restrict the ability of some citizens to get what they want in the political process.¹⁰⁸

C. Callous Indifference and the Apparently Self-Contradictory First Amendment

What about the callous indifference objection? This is the deepest objection, because it makes religion jurisprudence seem contradictory at its core. For this reason, however, the callous indifference objection also yields the most rewarding analysis. In order to answer it properly, we must reconsider the basic meaning of the religion clauses of the First Amendment. The text of the Amendment states that: “Congress shall make no law respecting an establishment of religion, or abridging the free exercise thereof.”¹⁰⁹ The part before the comma, the Establishment Clause, has been generally understood to state a rule that flatly contradicts the part after the comma, the Free Exercise Clause.

¹⁰⁷ *Romer*, 517 U.S. at 639 (Scalia, J., dissenting). Justice Scalia is right to deem this principle “ridiculous,” *id.* at 639 (Scalia, J., dissenting), and it was expressly repudiated by the Court, which declared that it affirmed the judgment “on a rationale different from that adopted by the State Supreme Court.” *Id.* at 626. For a discussion of the Court’s decision and how it avoids Justice Scalia’s objections, see Koppelman, *supra* note 103.

¹⁰⁸ Professor George W. Dent, Jr.’s critique of the secular purpose requirement in “Secularism and the Supreme Court”, 1999 *BYU L. Rev.* 1, seeks both to discard the prong on the basis of the participation objection, see *id.* at 56, and to affirm the prohibition on endorsing religious truth, see *id.* at 53. He does not appear to notice any tension between these two positions.

¹⁰⁹ U.S. Const. amend. I.

Begin with the Establishment Clause. The idea of neutrality was introduced into Establishment Clause jurisprudence at the same time that the clause was held applicable to the states.¹¹⁰ The Court declared that “[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”¹¹¹ The classic statement of this neutrality ideal is the *Epperson* principles.¹¹²

Now consider the Free Exercise Clause. It is not neutral between religion and nonreligion. It singles out religion for treatment more favorable than that given to nonreligion. The Court has acknowledged that “the Free Exercise Clause, . . . by its terms, gives special protection to the exercise of religion.”¹¹³

It is not logically possible for the government both to be neutral between religion and nonreligion and to give religion special protection. Some justices and many commentators have therefore regarded the First Amendment as in tension with itself. William Marshall’s formulation of the difficulty is typical:

Literally . . . the first amendment may be read as simultaneously requiring that religion be accorded no special treatment (the establishment clause) and that it be accorded deferential treatment (the free exercise clause). Even without a literal in-

¹¹⁰ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (stating that the First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers”).

¹¹¹ *Id.* at 15.

¹¹² See *supra* text accompanying note 77.

¹¹³ *Thomas v. Review Bd.*, 450 U.S. 707, 713 (1981); see also *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) (“[I]n one important respect, the Constitution is *not* neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not.”).

The privileged status of religion is somewhat diminished after *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that there is no right to religious exemptions from laws of general applicability. Even after *Smith*, however, religions retain some special protection that nonreligious beliefs do not share. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the Court struck down four ordinances that a city had enacted with the avowed purpose of preventing a Santeria church from practicing animal sacrifice. The laws, the Court held, violated the Free Exercise Clause of the First Amendment because their object was the suppression of a religious practice. *Id.* at 542, 547. The result would have been different if the law had targeted a club that did exactly what the Santeria did, not as part of a religious ritual, but because its members thought that killing animals was fun.

terpretation of these clauses, conflicting value decisions regarding state and religion are quite apparent. On the one hand there is the government's positive goal of non-promotion of religion; on the other is a positive value in the exercise of religion generally. The government, then, is forbidden by the Constitution to aid affirmatively the exercise of a right guaranteed by the Constitution.¹¹⁴

The Court has described its task as "to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."¹¹⁵ Justice O'Connor, we have seen, has quoted this language with approval.¹¹⁶

The trouble with this diagnosis is that it precludes a cure. There is no neutral course out of a contradiction. The Court's reading of the First Amendment, McConnell writes, "creates an irresolvable inconsistency in the Constitution, under which remedies for violation of one clause necessarily violate the other."¹¹⁷ The only way to reconcile the conflict is to revise one's understanding of the two clauses so that they no longer contradict each other.

One solution to the problem would be to say that the Free Exercise Clause states an exception to the Establishment Clause's rule. Unless it is somehow bounded, this exception would, however, threaten to swallow the rule altogether. As Justice O'Connor has observed, "judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an 'accommodation' of free exercise rights."¹¹⁸ Justice Scalia thinks that no principled solution to this problem can be divined from the cases: "While we have warned that at some point, accommodation may devolve into 'an unlawful fostering of religion,' . . . we have not suggested precisely (or even roughly) where that point

¹¹⁴ William P. Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 S. Cal. L. Rev. 495, 505 (1986).

¹¹⁵ *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970).

¹¹⁶ See *supra* text accompanying note 62. The same language was quoted with approval by the Court in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 760 n.4 (1973).

¹¹⁷ Michael W. McConnell, You Can't Tell the Players in Church-State Disputes Without a Scorecard, 10 Harv. J.L. & Pub. Pol'y 27, 35 (1987).

¹¹⁸ *Wallace v. Jaffree*, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring in the judgment).

might be.”¹¹⁹ Justice O’Connor proposes to cut this knot with her “objective observer” test, but, as we have seen, that test merely reproduces the problem, because it neither specifies nor offers any guidelines for determining what government can and cannot do to accommodate religion.

Another approach to reconciling the two clauses would be to define free exercise as minimally as possible. Even the narrowest definitions proposed would, however, forbid deliberate discrimination against religion. That in itself is a kind of special treatment. Most nonreligious beliefs do not and cannot receive such protection.¹²⁰ The Free Exercise Clause simply cannot be redefined in a way that is consistent with the broadest possible reading of the Establishment Clause.

It is therefore necessary to revise the scope of the Establishment Clause, but to do so with greater precision than Justice O’Connor’s suggestion provides. The most promising approach is to define the Establishment Clause (and therefore the secular purpose requirement) less abstractly than the Court has, in order to permit the special treatment of religion that is mandated by the Free Exercise Clause.

Among the members of the Supreme Court, Justice Scalia has pursued this strategy most assiduously. The solution he and others have proposed is to read both clauses at a much lower level of abstraction than the Court has read them. Justice Scalia, Chief Justice Rehnquist, and Justice Clarence Thomas have all suggested that the Establishment Clause should be read only to prohibit favoritism among sects, while permitting states to favor religion over irreligion.¹²¹

¹¹⁹ *Edwards v. Aguillard*, 482 U.S. 578, 618 (1987) (Scalia, J., dissenting) (citation omitted) (quoting *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 145 (1987)).

¹²⁰ See supra note 113 and accompanying text.

¹²¹ Chief Justice Rehnquist, noting the long history of public recognition of religious worship, has suggested that the Establishment Clause ought to be read in a more limited fashion than the Court has read it:

The Framers intended the Establishment Clause to prohibit the designation of any church as a “national” one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the “incorporation” of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that

This would entail scrapping the secular purpose requirement, but as we have seen, none of these Justices would regard that as a particularly great loss. Of this group, Justice Scalia has offered the clearest formulation of the alternative rule:

[O]ur constitutional tradition . . . rule[s] out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).¹²²

Justice Scalia's logic is powerful. He reasons as follows: The Free Exercise Clause singles out religion as such for special benefit. Therefore, it is not possible to coherently read the Establishment Clause as prohibiting the singling out of religion as such for special benefit. "What a strange notion, that a Constitution which *itself* gives 'religion in general' preferential treatment (I refer to the Free

Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

Wallace, 472 U.S. at 113 (Rehnquist, J., dissenting). On this basis, Chief Justice Rehnquist would permit a "generalized 'endorsement' of prayer." *Id.* at 114 (Rehnquist, J., dissenting). Justice Thomas also finds "much to commend" in "the view that the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 855 (1995) (Thomas, J., concurring). Justice Scalia has written that it is "far from an inevitable reading of the Establishment Clause that it forbids all governmental action intended to advance religion." *Aguillard*, 482 U.S. at 639 (Scalia, J., dissenting). Justice Scalia, with the concurrence of the Chief Justice and Justice Thomas, has lately reaffirmed his willingness to uphold anti-Darwinism laws of the kind that the Court has invalidated under the secular purpose doctrine, declaring his disdain for judicial action that relies on "the much beloved secular legend of the Monkey Trial." *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1255 (2000) (Scalia, Rehnquist, & Thomas, JJ., dissenting from denial of cert.).

It is not clear that all three of these Justices still hold all of these views, since some of these opinions were written some time ago. McConnell observes that Chief Justice Rehnquist "has not mentioned" his nonpreferentialism theory since he wrote his opinion in *Wallace* in 1985, and that he "may have abandoned it." McConnell, *supra* note 4, at 145. It is also notable that all three of these Justices, who had previously expressed skepticism about the secular purpose requirement, recently joined an opinion which would make that requirement a sufficient test of a law's constitutionality. See *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (plurality opinion) (permitting direct aid to a religious entity when program has a secular purpose and aid is allocated on the basis of secular criteria).

¹²² *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

Exercise Clause) forbids endorsement of religion in general.”¹²³ It must, then, be permissible for the government to favor religion as such. Accommodation, however, must not be sectarian; accommodations, if granted, must be extended evenhandedly to differing theisms. Thus Justice Scalia’s revision would free the Court’s reading of the religion clauses from self-contradiction.

Yet Justice Scalia’s solution will not work, because it discriminates against nontheistic religions. Even the Justices who most strongly repudiate the secular purpose doctrine do not think that the state may favor one religion over another.¹²⁴ Not all religions believe in “a benevolent, omnipotent Creator and Ruler of the world.” The Court held long ago that the Establishment Clause forbids government to “aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”¹²⁵ The Court noted that “[a]mong religions in this country, which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.”¹²⁶ Additionally, Hinduism is theistic, but it denies the unitary God that Justice Scalia presupposes. It is a nice question whether Buddhism is even farther than atheism is from religion as Justice Scalia understands it. Atheism at least is concerned about the existence of God and makes that question central to its self-definition. The Buddha did not even regard the existence

¹²³ *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia & Thomas, JJ., concurring in the judgment).

¹²⁴ Chief Justice Rehnquist thinks that the Establishment Clause forbids “asserting a preference for one religious denomination or sect over others.” *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting). Justice Scalia agrees: “I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others.” *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 748 (1994) (Scalia, J., dissenting). McConnell observes that the doctrine that the state may not discriminate among religions “has voluminous support in the history of the First Amendment, and I know of no First Amendment theorist who disputes it.” McConnell, *supra* note 4, at 146 n.143.

¹²⁵ *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

¹²⁶ *Torcaso*, 367 U.S. at 495 n.11. To say that Buddhism rejects theism is something of an overstatement. While Buddha had no interest in theological questions, see *infra* note 127, certain later varieties of Buddhism made theological claims, sometimes even assigning divine status to Buddha himself. For a general overview of these issues, see Masao Abe, *Buddhism*, in *Our Religions* 69 (Arvind Sharma ed., 1993).

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of God as a particularly interesting problem.¹²⁷ The contemporary United States is not a purely theistic nation; this country is home to 1,032,000 Hindus, 1,150,000 atheists, and 2,450,000 Buddhists.¹²⁸

In short, Justice Scalia's revised reading of the Establishment Clause is not neutral enough. It is out of sync with the reasons for the Establishment Clause considered earlier. Endorsing some citizens' beliefs and repudiating others, as his reading would do, would be politically divisive. Justice Scalia's reading of the clause supposes what the Establishment Clause rejects, that religion, or at least theism, benefits from governmental support. It bespeaks a lack of respect for citizens who are not theists. Justice Scalia's approach would permit government to declare religious truth. One wonders why, if the state is deemed incompetent with respect to theological matters, it is thought to be reliable when it takes on the intractable puzzle of God's existence.

Justice Scalia's proposed substitute for the secular purpose requirement is unacceptable. The failure of his attempt, however, does not in itself vindicate the doctrine. It remains to be seen whether the doctrine can be formulated in a way that is not itself vulnerable to the callous indifference objection.

III. THE GOOD OF RELIGION-IN-GENERAL

A. Requirements for a Reconstructed Doctrine

The *Epperson* principles, we have seen,¹²⁹ require "government neutrality between religion and religion, and between religion and nonreligion."¹³⁰ But this formulation is ambiguous. Does it mean (1) that government can never take any action favoring religion as such, or (2) that government cannot endorse religious beliefs, such

¹²⁷ He was utterly indifferent to such metaphysical issues. See Walpola Sri Rahula, *What the Buddha Taught* 13–14 (rev. ed. 1974). To the extent that Buddhism (at least in its original form, which survives as Theravada Buddhism) takes any position on the existence of God, it regards God as a projection of psychological needs that are themselves in need of taming. *Id.* at 51–52.

¹²⁸ These numbers are drawn from the *Britannica Book of the Year 801* (2001). They are impressive, but they also understate the astonishing religious diversity of the United States. See generally Sydney E. Ahlstrom's *A Religious History of the American People* (1972), a comprehensive survey that is already out of date by virtue of the rapid growth of non-Western religions since its publication.

¹²⁹ See *supra* text accompanying note 77.

¹³⁰ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

as the belief that God exists, or repudiate a view that denies those beliefs, such as atheism? It is commonly assumed that these are the same thing. They are not.

The attraction of the view that government can favor religion-in-general, so long as it does this in a nondiscriminatory way, is that this permits the various acknowledgements and accommodations of religion that nearly everyone agrees are constitutionally permissible. The problem is figuring out how this idea can be consistent with the axiom that government may not declare religious truth. The two ideas seem to be flatly contradictory, which is why some justices want to abandon the secular purpose requirement. These justices are on to something, but they go wrong when they naïvely identify religion-in-general with theism. There is another way.

The issue is the level of abstraction at which we define religion-in-general. What *is* religion, anyway? Why is Buddhism, for example, a religion, such that government may not endorse it or discriminate against it? Few modern readers would endorse the position of Henry Fielding's Mr. Thwackum, who denounced the "absurd errors and damnable deceptions" of "all the enemies to the true Church" and declared, "nor is religion manifold, because there are various sects and heresies in the world. When I mention religion I mean the Christian religion; and not only the Christian religion, but the Protestant religion; and not only the Protestant religion, but the Church of England."¹³¹ Mr. Thwackum's definition of religion is not abstract enough to be consistent with any conception of the *Epperson* principles. Yet how abstract should the definition be?

The levels-of-abstraction problem is a familiar one in constitutional law. For example, then-Professor Robert Bork criticized the entire American privacy doctrine on the ground that the Court's choice of the level at which to define the protected liberty was necessarily arbitrary. In the germinal privacy case *Griswold v. Connecticut*,¹³² which struck down a law prohibiting married couples (among others) from using contraceptives, the Supreme Court certainly did not adopt the very broad principle that "government may not in-

¹³¹ Henry Fielding, *The History of Tom Jones, A Foundling* 82 (Modern Library ed. 1940) (1749).

¹³² 381 U.S. 479 (1965).

terfere with any acts done in private,” but it is hard to explain why the principle should be defined as narrowly as “government may not prohibit the use of contraceptives by married couples.” Professor Bork asked:

Why does the principle extend only to married couples? Why, out of all forms of sexual behavior, only to the use of contraceptives? Why, out of all forms of behavior, only to sex? . . .

To put the matter another way, if a neutral judge must demonstrate why principle *X* applies to cases *A* and *B* but not to case *C* . . . , he must, by the same token, also explain why the principle is defined as *X* rather than *X minus*, which would cover *A* but not cases *B* and *C*, or as *X plus*, which would cover all cases, *A*, *B* and *C*.¹³³

Some constitutional interpreters have argued that the solution is to define rights as broadly as possible,¹³⁴ while others have relied on tradition to try to restrict their scope.¹³⁵ The latter strategy has elicited the persuasive rejoinder that tradition is too indeterminate for the task.¹³⁶

The problem of religious toleration is itself a levels-of-abstraction problem. Mr. Thwackum would claim that he is not discriminating among religions, because there is only one religion. Justice Scalia obviously would disagree. Thwackum’s view—call it *X minus*, because it is narrower than the Court’s understanding of religion—is too narrow, because it excludes some indisputable instances of religion. But Justice Scalia’s formulation has the same flaw.

At the same time that we try to avoid an overly narrow formulation, it is equally important to avoid overbreadth. “[I]f we are to understand the theory and principle of the Religion Clauses, we must know what differentiates ‘religion’ from everything else.”¹³⁷ If

¹³³ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 7 (1971).

¹³⁴ See Bruce Ackerman, *Liberating Abstraction*, 59 *U. Chi. L. Rev.* 317 (1992).

¹³⁵ See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion authored by Scalia, J.); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 149–50 (1990).

¹³⁶ See Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 97–117 (1991); J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 *Cardozo L. Rev.* 1613, 1615–16 (1990).

¹³⁷ McConnell, *supra* note 4, at 172.

religion is defined too abstractly, then everything is religion.¹³⁸ “Religion” disappears as an operative category if one reads the state’s obligation as being one of neutrality toward all contested ideas of the good, as some liberal political theorists have done.¹³⁹ Their version of protected liberty—call it *X plus*, because it includes much more

¹³⁸ Thus, Professor Jesse Choper has argued that the approach to defining religion suggested by some Supreme Court opinions, which looks to each person’s “ultimate concerns,” is anarchistic in its implications. Jesse H. Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses* 72 (1995). Professor Choper explains:

Because “ultimate concerns” pervade virtually all areas of ordinary government involvement, however, to grant them the special constitutional immunity of the [Free Exercise Clause] merely because they are strongly held—whatever the true importance of such beliefs to the individual or society as a whole—would severely undermine the state’s ability to advance the commonweal.

Id. Approaching the problem from the opposite direction, Professor Smith notes that some religious thinkers have argued that “the universe of values constitutes a dichotomy,” so that “[v]alues that are not religious are thus necessarily irreligious; individuals who do not embrace the faith thereby reject and oppose it.” Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 87 (1995). For such people, it is impossible for any government action to be neutral with respect to religion. Actions that do not expressly embrace their beliefs will be understood by them to be repudiations of those beliefs. This view is, of course, inconsistent with any attempt to disestablish religion. Disestablishment requires, at a minimum, that religion be differentiated from everything else. A theory of the Establishment Clause need not apologize for its inability to satisfy people who repudiate the whole idea of nonestablishment. Smith thinks that the existence of such views makes a theory of religious freedom impossible, but what is really impossible is the set of demands that he expects a theory of religious freedom to satisfy. The religion clauses reflect certain contestable commitments, but so (as Smith recognizes) does everything else.

¹³⁹ See Bruce A. Ackerman, *Social Justice in the Liberal State* 11 (1980); Ronald Dworkin, *A Matter of Principle* 191 (1985); Robert Nozick, *Anarchy, State, and Utopia* 312 (1974); John Rawls, *A Theory of Justice* 19 (1971). Several of these writers have reported that their theories are attempts to generalize from the idea of religious freedom. See, e.g., Bruce A. Ackerman, *Reconstructing American Law* 99 (1984); Rawls, *supra*, at 206 n.6, 220. As a general political theory, this view has come under heavy criticism, on grounds of both incoherence and normative unattractiveness. See, e.g., John Finnis, *Natural Law and Natural Rights* (1980); William A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (1991); Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (1993); Joseph Raz, *The Morality of Freedom* (1986); Michael J. Sandel, *Liberalism and the Limits of Justice* (2d ed. 1998); George Sher, *Beyond Neutrality: Perfectionism and Politics* (1997). If neutrality is to be defended, it must be defended at a lower level of abstraction. Once one abandons the exceedingly high level of abstraction proposed by these theorists, however, the idea of neutrality can stand for so many different political conceptions that it cannot resolve any actual controversy about religion or anything else. See Andrew Koppelman, *The Fluidity of Neutrality* (Oct. 2, 2001) (unpublished manuscript, on file with the Virginia Law Review Association).

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than present doctrine protects—captures so much that it becomes inconsistent with the text of the First Amendment. If accommodation of religion is to be reconciled with the secular purpose requirement, this reconciliation must be done in a way that does not eliminate the distinctiveness of religion.

B. The Problem of Definition

Let us return to the premise that government may not declare religious truth. This premise is not inconsistent with the view that government can favor religion-in-general in the way that the Free Exercise Clause requires, because it is possible to favor religion-in-general without declaring religious truth. But how is religion-in-general to be defined?

That question is related to the familiar problem of how to define “religion” for constitutional purposes. Our difficulty is nonetheless distinct from the most familiar instances of that definitional problem, which involve the determination of whether a given belief or practice is religious. Our question is not whether this or that doubtful item falls under the umbrella, but rather whether the umbrella itself can be described in an inclusive yet determinate way. The best treatments of the definition problem have concluded that no dictionary definition of religion will do, because no single feature unites all the things that are indisputably religions. Religions just have a “family resemblance” to one another. In doubtful cases, one can only ask how close the analogy is between a putative instance of religion and the indisputable instances.¹⁴⁰

Reasoning by analogy has well-known limitations. Professor Ronald Dworkin has written that:

[A]nalogy without theory is blind. An analogy is a way of stating a conclusion, not a way of reaching one, and theory must do the real work. . . . Is burning your own flag more like making a speech on Hyde Park Corner or assaulting people with offensive insults? Is abortion more like infanticide or appendectomy? We

¹⁴⁰ See George C. Freeman, III, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 *Geo. L.J.* 1519 (1983); Kent Greenawalt, *Religion as a Concept in Constitutional Law,* 72 *Cal. L. Rev.* 753 (1984). For a recent, very capable critique and review of the literature, see Eduardo Peñalver, Note, *The Concept of Religion,* 107 *Yale L.J.* 791 (1997).

cannot even begin to answer these questions without a deep expedition into theory.¹⁴¹

The sort of theory that has been tried and has failed in this context is that of dictionary-like definition. That is not, however, the only sort of theory that could tell us what counts as religion for our purposes. Perhaps, instead of looking for a single common feature that unites all religions, we should ask what *purposes* the state can reasonably pursue, consistent with the prohibition on declaring religious truth. Here, what we are seeking is some teleological common ground: Does there exist some specifically religious human purpose *X*, such that the state could pursue it without taking any position concerning religious truth?¹⁴²

Professor John Finnis argues that, while people disagree about religious truth, no reasonable person can deny that:

[I]f there is a transcendent origin of the universal order-of-things and of human freedom and reason, then one's life and actions are in fundamental disorder if they are not brought, as best one can, into some sort of harmony with whatever can be known or surmised about that transcendent other and its lasting order.¹⁴³

This formulation is useful, but it is unfortunately theistic in its assumptions; it assumes that the question to be answered by religion is that of cosmic order. We have already seen, however, that some religions, such as Buddhism, are uninterested in the question of whether the Cosmos is orderly or has a "transcendent origin."¹⁴⁴ Better is Finnis's claim that:

[I]t is, at any rate, peculiarly important to have thought reasonably and (where possible) correctly about these questions of the origins

¹⁴¹ Ronald Dworkin, *In Praise of Theory*, 29 *Ariz. St. L.J.* 353, 371–72 (1997).

¹⁴² To preserve the family resemblance metaphor, one might ask whether it is possible to benefit all members of the family equally, without playing favorites among them.

¹⁴³ Finnis, *supra* note 139, at 89–90. I have quoted this formulation in the past with unqualified approval, which I now recant. See Andrew Koppelman, *Sexual and Religious Pluralism*, in *Sexual Orientation & Human Rights in American Religious Discourse* 215, 222 (Saul M. Olyan & Martha C. Nussbaum eds., 1998) [hereinafter Koppelman, *Sexual and Religious Pluralism*]; Andrew Koppelman, *Three Arguments for Gay Rights*, 95 *Mich. L. Rev.* 1636, 1649 (1997) (book review).

¹⁴⁴ I am grateful to Jim Whitman for raising this objection.

of cosmic order and of human freedom and reason—whatever the answer to those questions turns out to be, and even if the answers have to be agnostic or negative.¹⁴⁵

Finnis's sense of human priorities is recognizable, for example, in Friedrich Nietzsche's claim that "[t]he total character of the world . . . is in all eternity chaos—in the sense not of a lack of necessity but of a lack of order, arrangement, form, beauty, wisdom, and whatever other names there are for our aesthetic anthropomorphisms."¹⁴⁶ Nietzsche thought that God was dead, but he also thought that this was a matter of considerable importance. Religious activity can be understood as a complex field of responses to the human predicament as such. In ordinary language, even the decision to be an atheist is a religious decision.¹⁴⁷

One commonality among religions is that they all regard human life per se as in some way deeply flawed, and all offer a remedy for

¹⁴⁵ Finnis, *supra* note 139, at 89.

¹⁴⁶ Friedrich Nietzsche, *The Gay Science* 168 (Walter Kaufmann trans., Vintage Books 1974) (1887) [hereinafter Nietzsche, *The Gay Science*]; see also Friedrich Nietzsche, *Beyond Good and Evil* 66 (Walter Kaufmann trans., Vintage Books 1966) (1886) ("[T]he religious instinct is indeed in the process of growing powerfully—but the theistic satisfaction it refuses with deep suspicion.").

¹⁴⁷ See Laycock, *supra* note 4, at 336. Professor Douglas Laycock also notes that if atheism is not a religion for constitutional purposes, strange consequences follow: The Establishment Clause would not restrict endorsement of it, and government would be free to promote atheism in the same way that it has promoted many secular ideas, by teaching it in the schools, promoting it in the mass media, and subsidizing atheist organizations. *Id.* at 330. The point may seem fanciful in the American context, but it is sometimes alleged that some science teachers who teach Darwin's theory of evolution tell their students that the theory proves that God does not exist. The teaching of that conclusion would, in my view, violate the Establishment Clause.

Greenawalt has recently argued that Laycock's claim that atheism is a religion for constitutional purposes does not fit the original understanding of the Establishment Clause, its text, or precedent. Kent Greenawalt, *Diverse Perspectives and the Religion Clauses: An Examination of Justifications and Qualifying Beliefs*, 74 *Notre Dame L. Rev.* 1433, 1460–61 (1999). Greenawalt nonetheless agrees with Laycock's conclusion that government cannot endorse atheism. He proposes two possible bases for this conclusion. Under one, "[e]qual protection would require that negative assertions about religion be treated like positive ones." *Id.* at 1463. This argument fails, because unequal respect for beliefs is not the same as unequal respect for persons. See Andrew Koppelman, Akhil Amar and the Establishment Clause, 33 *U. Rich. L. Rev.* 393, 399–401 (1999). A second argument is that the religion clauses should be read as "barring the government from taking positions on religious questions." Greenawalt, *supra*, at 1463. This appears to me to be just what Laycock is saying, and it is what I am saying here.

what they take to be the universal human malady. Any religion, as Professor Keith Yandell observes, describes and attempts to respond to a fundamental problem it perceives to be common to all human beings.

A religion proposes a *diagnosis* (an account of what it takes the basic problem facing human beings to be) and a *cure* (a way of permanently and desirably solving that problem): one basic problem shared by every human person and one fundamental solution that, however adapted to different cultures and cases, is essentially the same across the board.¹⁴⁸

The problem to which religion as such responds cannot be defined more precisely than this:

Different religions offer differing diagnoses and cures. Given that criterion, there are a good many religions. The diagnosis that a particular religion articulates asserts that every human person has a basic nonphysical illness so deep that, unless it is cured, one's potential is unfulfilled and one's nature cripplingly flawed. Then a cure is proffered. The diagnosis and cure assume (or, if you prefer, entail) the essential structure of a religion's view of what there is, at least insofar as what there is has religious importance.¹⁴⁹

¹⁴⁸ Keith E. Yandell, *Philosophy of Religion: A Contemporary Introduction* 17 (1999) (footnote omitted). Yandell does not offer this as a definition of religion, and the definition that he does offer is too vague and all-encompassing to help us: "[A] religion is a conceptual system that provides an interpretation of the world and the place of human beings in it, bases an account of how life should be lived given that interpretation, and expresses this interpretation and lifestyle in a set of rituals, institutions, and practices." *Id.* at 16 (italics omitted). This definition seems overbroad, since it includes any coherent philosophy of life, religious or otherwise.

¹⁴⁹ *Id.* at 23 (footnote omitted). Thus, for example:

According to Christianity, our sickness is that we have sinned against God and the cure is that God provide forgiveness and restoration. According to Advaita Vedanta, the sickness is our ignorance of our being identical with Brahman and the cure is gaining this knowledge. According to Jainism, the sickness is that we think we are ignorant and dependent and the cure is learning that we are omniscient and existentially independent. According to Theravada Buddhism, our sickness is that we take ourselves to be enduring substances and the cure is learning that we are only transitory states.

Id. at 33–34. Yandell's very abstract description of Christianity is also true of Islam and, to some extent, Judaism, although the relationship between the universal problems of mankind and the special situation of Jews is a complex one in Jewish thought.

Religions differ in both their descriptions and their prescriptions. One can have the problem that Religion *A* diagnoses without having the problem that Religion *B* diagnoses, and the cure each proffers will not cure the disease that the other diagnoses. Each religion's implicit description of the world can be true without the other's description being true. Indeed, in some cases, the conditions that must exist for *A*'s diagnosis and cure to be correct cannot coexist with the relevant conditions for *B*.¹⁵⁰ The various major religions are united, however, in the universality of their prescriptions.¹⁵¹ Each religion makes claims on the adherents of all the others. All this is to say what is familiar, that the tension between the claims of different religions is profound. The state should not attempt to adjudicate these claims. But it can refrain from doing that without being indifferent to the good of religion-in-general.

C. Defining Religion-in-General

If there is a universal human problem, then it is a matter of some urgency to identify this problem and its cure. Religion-in-general is the set of activities that seek to address this universal human problem. The goal that the state may permissibly pursue is to be defined at this level of abstraction. The state may coherently single out for special favor the enterprise of seeking this universal remedy.

When courts have addressed the definitional question, they have increasingly converged on an approach much like the one that I have proposed here. The most influential authority on the question, Judge Arlin Adams of the United States Court of Appeals for the Third Circuit, has avoided the (demonstrably false) claim that there is any belief common to all religions, and instead has offered three indicia for deciding whether something is a religion:

¹⁵⁰ *Id.* at 32–34.

¹⁵¹ Yandell explains:

They take it that everyone lives in the same cosmos, has the same nature, and so is disjointed or warped in essentially the same way. From their perspective, to propose seriously that different persons have different religious problems at the deepest level is tantamount to suggesting that not all human beings are members of the same species. This suggestion is incompatible with at least most religious traditions, and there is little if any reason to think it true.

Id. at 55.

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.¹⁵²

The first of these indicia, Judge Adams holds, is the most important.¹⁵³

Judge Adams's definition has been criticized on the grounds that "it fails to distinguish religion from philosophical systems" and "focuses exclusively on the rational aspect of religion."¹⁵⁴ This selectivity of focus may indeed be problematic when adjudicating the status of particular religions. For our purposes, however, it is a virtue. My proposal is that we understand the secular purpose prong as forbidding the state from endorsing religious propositions. A content-based restriction on government speech is necessarily rationalistic, because speech that endorses propositions of fact or value is addressed to the rational faculties.¹⁵⁵ Moreover, an atheistic philosophy such as Nietzsche's does address man's nature and place in the universe. It would be inappropriate for the state either to endorse or to repudiate his claims.

¹⁵² *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981); see also *Malnak v. Yogi*, 592 F.2d 197, 207–10 (3d Cir. 1979) (Adams, J., concurring in the result) (developing and defending this test). "Other courts have followed Judge Adams's methodological framework, albeit with slight variation." Peñalver, *supra* note 140, at 801 (citing an example).

¹⁵³ *Africa*, 662 F.2d at 1033. Judge Adams wrote:

Traditional religions consider and attempt to come to terms with what could best be described as "ultimate" questions—questions having to do with, among other things, life and death, right and wrong, and good and evil. Not every tenet of an established theology need focus upon such elemental matters, of course; still, it is difficult to conceive of a religion that does not address these larger concerns. For, above all else, religions are characterized by their adherence to and promotion of certain "underlying theories of man's nature or his place in the Universe."

Id. (quoting *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969)).

¹⁵⁴ Timothy L. Hall, Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 *Tex. L. Rev.* 139, 171–72 (1982).

¹⁵⁵ It is true that religion "does not always take the form of questions asked about ultimate matters." *Id.* at 172. When this is true, however, the secular purpose requirement will be irrelevant. A religion must make claims about ultimate matters before the state can endorse those claims.

Thus understood, religion-in-general can hardly be identified with theism. On the contrary, it must include nontheistic religions such as Buddhism as well as atheism and agnosticism—in short, all belief systems that make ultimate claims about the meaning of human existence.¹⁵⁶

Religion-in-general is a distinctive thing even if it is understood as abstractly as I have proposed. The enterprise of discerning “[t]he total character of the world . . . in all eternity”¹⁵⁷ is distinct from the rest of human conduct, even though all the rest of human conduct may imply a stance toward these ultimate questions. The law takes no position on any theological question if it throws its weight in favor of this enterprise. The position of the state on religious questions is agnostic, but it is an interested and sympathetic rather than an indifferent agnosticism. It is, perhaps, what the Court means by “benevolent neutrality.”¹⁵⁸

Professor Garvey thinks that religious accommodations only make sense from the perspective of the believer. Garvey emphasizes that the argument for free exercise exemptions typically focuses on the special suffering that a person may face if asked to violate a religious duty. Only believers will receive the benefit of such exemptions, because only they have the characteristics on which the idea of religious exemption focuses. “The believer’s suffering is special precisely because she believes in heaven, hell, eternal life, and so on. The believer’s duties are more compelling just because they arise from God’s commands.”¹⁵⁹ It is, he writes, “really hard” to explain “why an agnostic would support special treatment for religious people who want to comply with a moral or ceremonial code.”¹⁶⁰ A partial explanation is that such accommodation avoids political strife, but there are other ways to keep the peace, particularly when the state is facing weak dissenters such as

¹⁵⁶ I have argued that no definition of religion can be satisfactory, yet it may be objected that I have just offered a definition: Religions are “belief systems that make ultimate claims about the meaning of human existence.” This formulation is too vague to be much use as a definition, however; to begin with, it is not clear what makes a claim “ultimate.” Its purpose is to gesture in the direction of what I mean by “religion” rather than to offer a precise definition.

¹⁵⁷ Nietzsche, *The Gay Science*, supra note 146, at 168.

¹⁵⁸ *Walz v. Tax Comm’n*, 397 U.S. 664, 676 (1970).

¹⁵⁹ Garvey, supra note 80, at 288.

¹⁶⁰ *Id.* at 289.

fringe groups or religious individualists who can be repressed at little political cost.¹⁶¹ “The best reasons for protecting religious freedom rest on the assumption that religion is a good thing.”¹⁶² And religion, for Garvey, means “a belief in a supreme being (God).”¹⁶³

Garvey is right that exemptions presuppose that religion is a good thing, but he reproduces Justice Scalia’s error by equating religion with theism. It is not clear that the state is taking the believer’s side on any theological question when it creates exemptions. Whether or not the state accepts the believer’s articles of faith, it may recognize the believer’s urgent and legitimate needs. There are, of course, nonreligious needs that are also urgent and legitimate,¹⁶⁴ but one need not hold any particular religious view in order to recognize that the religious need is a distinctive one and that the state can recognize it as such.¹⁶⁵ If this were not true, then

¹⁶¹ This solution, however, could never have been a viable one for modern liberals, whose reform efforts have for centuries been animated largely by a revulsion against cruelty. See Judith N. Shklar, *Ordinary Vices* 7–44 (1984).

¹⁶² Garvey, *supra* note 80, at 283.

¹⁶³ *Id.* It is not clear that this works as a basis for exemptions, since a believer faced with the choice between secular or divine punishment does not appear to suffer from much of a dilemma; nothing the state can do to him can be as bad as eternal torment. One might argue instead that duties to God have priority over duties to the state, but this priority only holds with respect to real rather than imagined duties to God. In order to apply this rationale, the state would have to decide what the true religion is and to exempt only that religion’s believers from generally applicable laws. That would entail, to say the least, a much narrower set of exemptions than Garvey hopes to defend. See Larry Alexander, *Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions*, 47 *Drake L. Rev.* 35, 41 (1998) (“[C]omplying with one’s conception of God’s duties is a good thing only if that conception is correct from whatever point of view counts as authoritative.”).

Garvey’s account of exemptions also focuses excessively on duty, which is not the central motive of all religious practices. Many and perhaps most people engage in religious practice out of habit, adherence to custom, or happy religious enthusiasm, rather than fear of divine punishment. Garvey concedes that not all exemptions rest on considerations of suffering and duty: “I realize that there are still cases (where we want to give protection) that fall outside the principles I have discussed. Consider, for example, forms of observance (like dress or dietary codes perhaps) that are religiously desirable, but neither required nor transcendently enforced.” Garvey, *supra* note 80, at 287 n.47. In fact, most religious activity probably falls within this “residual” category. Douglas Laycock, *The Remnants of Free Exercise*, 1990 *Sup. Ct. Rev.* 1, 25–26.

¹⁶⁴ This is emphasized in Eisgruber & Sager, *supra* note 4, at 1255.

¹⁶⁵ For example, in the same issue of the *Journal of Contemporary Legal Issues* in which Garvey makes the argument I have just cited, Laycock declares himself an agnostic immediately after presenting a ringing defense of religious liberty in general and free exercise exemptions in particular. Laycock, *supra* note 4, at 353.

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not only judicial but also legislative accommodations of religion would be invalid.¹⁶⁶

Smith claims that it makes no sense to say that the state may endorse a religion's goodness but not its truth. The distinction "may not even be conceptually coherent: Pragmatist philosophy denies the distinction between an idea's value and its truthfulness."¹⁶⁷ But even if the distinction is coherent, it is unworkable as a judicial test, Smith argues, because "there is no reliable way for a court to determine whether school prayer, or aid to parochial schools, or publicly sponsored nativity scenes, indicate that the religious ideas or causes they represent are 'true' or merely that such ideas or causes are 'good.'"¹⁶⁸

The answer to this formulation of the evanescence objection is that not everyone is a pragmatist philosopher. I can (even if a pragmatist cannot) think that religion is valuable while remaining agnostic about the truth of any particular instance of it. And if this is a coherent view, then it is possible for a court to ask whether any

Laycock rejects Garvey's claim that free exercise rights depend on the assumed goodness of religion, because he thinks that Garvey's claim contradicts "the core point of religious liberty . . . that the government does not take positions on religious questions." *Id.* at 313. Rather, Laycock thinks that the commitment to religious liberty follows from three secular propositions: (1) Government efforts to promote or suppress religious views have caused vast human suffering without achieving their goals; (2) beliefs about religion are often extraordinarily important to the individual; (3) beliefs at the heart of religion—beliefs about theology, liturgy, and church governance—are of little importance to the civil government. See *id.* at 316–18. These propositions do not, however, entail religious exemptions from generally applicable laws. Assuming that a generally applicable law is otherwise valid, it must reflect some concern that is legitimately important to civil government. When an exemption is sought, the government's interest must be weighed against the religious one and may sometimes be found to be outweighed by the religious interest. But that is not the same thing as saying that the government's interest has no weight at all. Laycock's theory does not explain why the religious interest is ever given enough weight to override legitimate government purposes.

¹⁶⁶ Professors Christopher Eisgruber and Lawrence Sager, who are admirers of legislative, but not judicial, accommodations of religion, do not grapple with this problem. Eisgruber & Sager, *supra* note 4. Neither does Gedicks. See Gedicks, *supra* note 4. First Amendment scholarship has for the past several years been dominated by a furious debate over whether such exemptions are appropriately granted by the courts or by legislatures or by both. I take no position here on that debate but am addressing only the logically prior question of whether it is permissible for any governmental actor to single out religious objectors for special exemption from generally applicable laws.

¹⁶⁷ Smith, *supra* note 64, at 282.

¹⁶⁸ *Id.*

particular law goes beyond this and implicitly declares certain religious propositions to be correct.

The problems that religion addresses—the function that religion serves—are not intelligible only to theists. They are a universal human concern. The religious problem is a universal human problem. The religious need is a universal human need. The state can worry about whether religious needs are being met for the same reason that it can worry about whether its citizens are getting adequate food, clean water, and proper medical care.¹⁶⁹

Religion is a universal cultural phenomenon because suffering, evil, and death are universal human experiences. Marshall summarizes what anthropology teaches us about this cultural universal:

The human spirit is driven to understand its role in the cosmos. This drive is, in part, an aspect of humanity's desire for knowledge. Because humanity instinctively resists the idea that human existence is random or incomprehensible, it searches for meaning and order amidst chaos. Indeed, as sociologist Peter Berger has indicated, in times of crisis, humanity's need for meaning may become "even stronger than the need for happiness."¹⁷⁰

If religion is a fundamental and universal need, then government can seek to accommodate it while remaining completely agnostic about which religious propositions are true. It is the fact of the need, rather than the truth of any particular response, that is the reason for accommodation.

This formulation answers the callous indifference objection as well. It is possible for the state to favor religion-in-general as such, in all the ways that free exercise requires and that the Court has traditionally permitted, without declaring religious truth and so without violating the secular purpose prong.

Is this solution consistent with *Epperson's* requirement of "government neutrality between religion and religion, and between

¹⁶⁹ This, of course, does not necessarily imply that it is the state's job to provide any of these things. The state can try to ensure that children are raised in loving environments, but it cannot itself give love to children.

¹⁷⁰ William P. Marshall, *The Other Side of Religion*, 44 *Hastings L.J.* 843, 854–55 (1993) (footnotes omitted) (quoting Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* 58 (1967)).

religion and nonreligion”?¹⁷¹ It depends on what this requirement means. We have explored the definition of “religion” but have not yet analyzed its opposite, “nonreligion.” McConnell observes that “there is no identifiable entity that goes by the name of ‘nonreligion.’ Rather, there are an infinite number of ideas, highly disparate among themselves, that are not religious.”¹⁷² Thus he concludes that “a rigid insistence that religion be treated the same as ‘nonreligion,’ or the same as a secular analog, is pointless and incoherent. There is no single entity that meets the description of ‘nonreligion’ and there will always be more than one secular analog.”¹⁷³ In practice, however, the doctrine seems to regard “nonreligion” more narrowly and coherently, as the repudiation of conventional religious doctrines such as theism. So understood, what I propose is quite consistent with the doctrine, and it avoids McConnell’s otherwise sound charge of incoherence.

This way of understanding the word “secular” in the secular purpose requirement concededly makes the word into a term of art, and this is a weakness in my argument.¹⁷⁴ It is doubtful whether the goal of promoting religion in general, even if it is understood as abstractly as I am proposing, is a *secular* purpose as that term is ordinarily understood. Law ought normally to correspond to ordinary language. My proposal does, however, have three important virtues. It avoids the logical incoherence that has plagued the jurisprudence of the religion clauses. Its approach to the relationship between religion and the state is morally attractive. And, as I shall now argue, it fits the case law well.

¹⁷¹ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

¹⁷² Michael W. McConnell, *The Problem of Singling Out Religion*, 50 *DePaul L. Rev.* 1, 31 (2000).

¹⁷³ *Id.* at 42.

¹⁷⁴ On the other hand, as I noted earlier, ordinary language suggests that the decision to become an atheist is a religious decision. Ordinary language seems to be confused on this point, which perhaps diminishes its authority in this area.

IV. DOES THE THEORY FIT THE CASES?

A. *The Boundaries of Accommodation: The Case of Tax Exemptions*

The understanding of the Establishment Clause that I have offered here can address some perennial theoretical conundrums in the law of accommodation. Consider the puzzle of tax exemptions for churches. Professor Marshall observes that “despite the Court’s protestations on this point, tax exemptions constitute state sponsorship of religion.”¹⁷⁵ Such exemptions are often justified in light of the community service that some churches sometimes perform,¹⁷⁶ but the Court did not rely on this rationale in *Walz v. Tax Commission*,¹⁷⁷ which upheld an exemption statute that had no community service requirement.

Walz involved a provision in the New York Constitution that provided a tax exemption for “real or personal property used exclusively for religious, educational or charitable purposes.”¹⁷⁸ The Court upheld the law because of the breadth of the exemption, which included “a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.”¹⁷⁹ *Walz* thus suggests that religious exemptions are permissible if the exemptions are part of a broader class.¹⁸⁰ I will refer to this rule as the “breadth principle.”

¹⁷⁵ Marshall, *supra* note 114, at 501 (suggesting also that “if religious leaders could choose to uphold either tax exemptions, prayer in schools, or aid to parochial education, the vote for exemptions would be virtually unanimous”).

¹⁷⁶ See Erika King, *Tax Exemptions and the Establishment Clause*, 49 *Syracuse L. Rev.* 971, 981–83 (1999). The objection to this justification is fairly obvious:

[O]f course, if tax exemptions are conceived and intended as a quid pro quo, then one must at least confront the possibility that the prohibition on direct cash outlays to churches extends to this sort of arrangement, that perhaps the government may not enter into such arrangements with religious entities to perform tasks it chooses not to do (or may not do) itself.

Id. at 1008.

¹⁷⁷ 397 U.S. 664 (1970).

¹⁷⁸ *Id.* at 666–67 (quoting N.Y. Const. art. 16, § 1).

¹⁷⁹ *Id.* at 673.

¹⁸⁰ See also *Tex. Monthly v. Bullock*, 489 U.S. 1, 14–15 (1989) (plurality opinion) (holding that Texas’s sales tax exemption for religious faith periodicals lacked sufficient breadth to pass scrutiny under the Establishment Clause); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973) (invalidating grants to

What is the basis of the breadth principle, and just what does it require? There are two possible interpretations of the principle. Neither of them means that government cannot favor religion as such, nor that the New York law was not favoring religion as such.

On the first interpretation, benefits to religion are an incidental effect of a policy that makes no reference whatsoever to religion. The classic example is police and fire protection for churches. Such protection certainly benefits the churches, and may even benefit core religious activities, as when it is given to religious articles that have only religious uses. This interpretation does not, however, describe the law challenged in *Walz*, which benefited religion specifically *as* religion. Some, but not all, property held by religious entities is used for charitable or educational purposes. The New York law exempted from taxation even religious property that served no charitable or educational purpose.¹⁸¹

The second interpretation of the principle holds that it is permissible to specifically benefit religion, so long as the benefit to religion is one item on a list that includes nonreligious elements. Then-Justice Rehnquist embraced that reading in *Mueller v. Allen*,¹⁸² in which the Court upheld a tax deduction for parents of parochial school children. The deduction, Justice Rehnquist wrote, “is only one among many deductions.”¹⁸³ He noted that deductions could also be taken for medical expenses and charitable contributions.¹⁸⁴

This reading of the breadth principle makes the principle ridiculously easy to satisfy. Any deduction, no matter how sectarian, can easily be placed on a laundry list with a few others. A statute could exempt from taxation “alpaca farms, Andrew Koppelman’s home, and Catholic churches” and satisfy Justice Rehnquist’s test. Here we are back to the rubber stamp objection. Why make the state go

religious schools and contrasting the exemption in *Walz*, which “was not restricted to a class composed exclusively or even predominantly of religious institutions”).

¹⁸¹ For this reason, it will not do to argue that religions get tax exemptions because they are nonprofit organizations. See, e.g., Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 *Yale L.J.* 299, 342–45 (1976); John M. Swomley, *The Impact of Tax Exemption and Deductibility on Churches and Public Policy*, 22 *Cumb. L. Rev.* 595 (1991–92). Such an argument cannot explain why “religion,” rather than “nonprofit organization,” is the operative category for the exemption.

¹⁸² 463 U.S. 388 (1983).

¹⁸³ *Id.* at 396.

¹⁸⁴ *Id.*

through this charade? Any test that is so easy to get around is not worth the bother of having in the first place. Such a test cannot be the law.¹⁸⁵

On either reading, then, the breadth principle does not help us to understand why the New York law was permissible.¹⁸⁶ Professor Marshall is correct: “The organization in *Walz* received the tax benefit solely because it was a religious institution.”¹⁸⁷

The fact that religion as such had been singled out for benefit in *Walz* was indignantly emphasized by Justice Scalia’s dissent in *Texas*

¹⁸⁵ Chief Justice Rehnquist is no fool. He evidently relied on this strained test because there was no other way to distinguish *Nyquist*, 413 U.S. 756, which had invalidated a system of tax benefits for parents who sent their children to nonpublic schools. Then-Justice Rehnquist had dissented from *Nyquist*, and he continued to regard it as a bad decision. Since the escape hatch he created in *Mueller* is large enough to drive a truck through, it certainly succeeds in limiting the effects of *Nyquist*.

¹⁸⁶ A third possibility has been suggested by Erika King, who thinks that tax benefits should be available for religious entities when the religious entity is similarly situated to other entities receiving the same tax treatment. She quotes with approval Justice John Marshall Harlan’s declaration that “the critical question is whether the scope of legislation encircles a class so broad that it can be fairly concluded that [all groups that] could be thought to fall within the natural perimeter [are included].” King, *supra* note 176, at 1030 (quoting *Welsh v. United States*, 398 U.S. 333, 357 (1970) (Harlan, J., concurring in the judgment)) (alteration in original). The critical question for her is “whether there exist other entities who are *relevantly* similar (given the legislature’s purpose or given the logical and fair radius of the exemption), such that exempting them would serve effectively the same purpose and *thereby* avoid any implicit preferencing of religion over non-religion.” *Id.* at 1031. Even if the concept of a “natural perimeter” makes any sense, though, it is unlikely that one can be found here; as noted earlier, there is no such thing as “nonreligion.” See *supra* note 173 and accompanying text. King’s rule does not comport well with the majority’s holding in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), and she acknowledges that “no obvious party lays claim to an equal exemption” in that case. King, *supra* note 176, at 1032.

¹⁸⁷ Marshall, *supra* note 114, at 501 n.38. This fact renders problematic McConnell’s preferred interpretation of the endorsement test, under which government “favoritism or preference” for religion would be prohibited. McConnell, *supra* note 4, at 156. A tax exemption for which only religions qualify does “prefer religion . . . over the alternatives.” *Id.* at 157 (internal quotes omitted).

Another basis for permitting exemptions that has been suggested in some of the Court’s opinions is the distinction between a tax exemption and a subsidy. See Edward A. Zelinsky, Are Tax “Benefits” Constitutionally Equivalent to Direct Expenditures?, 112 Harv. L. Rev. 379, 392–99 (1998) (collecting cases). This distinction is crude, however. It would invalidate permanent entitlement programs to which religious entities are incidental beneficiaries, while it would tolerate tax exemptions that are functionally equivalent to direct outlays, such as “a one-time economic development tax abatement designed to attract an out-of-state religious entity to relocate.” *Id.* at 425.

Monthly v. Bullock,¹⁸⁸ which invalidated a statute that provided a sales tax exemption only for religious publications. The challenge to the statute in *Walz*, Justice Scalia claimed, “was in all relevant respects identical” to the one in *Texas Monthly*.¹⁸⁹ He derided as “incomprehensibl[e]”¹⁹⁰ the rationale offered in the *Walz* concurrence by Justice William J. Brennan, Jr., who also wrote the plurality opinion in *Texas Monthly*, that religious organizations were appropriately favored by the legislature for the secular reason that they “uniquely contribute to the pluralism of American society by their religious activities.”¹⁹¹ The claim was incomprehensible, Justice Scalia argued, “because to favor religion for its ‘unique contribution’ is to favor religion as religion.”¹⁹²

The opinions that made up the majority in *Texas Monthly*, however, do not entail the impermissibility of favoring religion as such, if religion is understood as broadly as I have proposed. Both opinions emphasized the fact that only theistic publications, but not atheistic or agnostic publications, would receive the benefit of the exemption.¹⁹³ Justice Harry Blackmun thought it permissible for the

¹⁸⁸ 489 U.S. 1 (1989).

¹⁸⁹ *Id.* at 33 (Scalia, J., dissenting).

¹⁹⁰ *Id.* at 37 (Scalia, J., dissenting).

¹⁹¹ *Walz*, 397 U.S. at 689 (Brennan, J., concurring).

¹⁹² *Texas Monthly*, 489 U.S. at 37 (Scalia, J., dissenting).

¹⁹³ Justice Brennan’s plurality opinion, joined by Justices Thurgood Marshall and John Paul Stevens, stated that:

[I]f Texas sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life, then a tax exemption would have to be available to an extended range of associations whose publications were substantially devoted to such matters; the exemption could not be reserved for publications dealing solely with religious issues, let alone restricted to publications advocating rather than criticizing religious belief or activity, without signaling an endorsement of religion that is offensive to the principles informing the Establishment Clause.

Id. at 16 (plurality opinion). Justice Harry Blackmun, with whom Justice O’Connor joined, concurred in the judgment, drawing the line in a similar way:

The Free Exercise Clause suggests that a special exemption for religious books is required. The Establishment Clause suggests that a special exemption for religious books is forbidden. . . .

. . .

Perhaps it is a vain desire, but I would like to decide the present case without necessarily sacrificing either the Free Exercise Clause value or the Establishment Clause value. It is possible for a State to write a tax-exemption statute consistent with both values: for example, a state statute might exempt the sale not only of religious literature distributed by a religious organization

state to favor human activity that is specially concerned with “such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong.”¹⁹⁴ What is impermissible is for the state to decide that one set of answers to these questions is the correct set. That is what Texas’s selective support for theism did. My conception of the state’s power to promote religion-in-general therefore yields prescriptions very different from those of Justice Scalia or Chief Justice Rehnquist. To take the most prominent cases, my understanding would prohibit official prayers at school or state-sponsored religious displays, because such activities endorse theism.

One way in which my proposal may seem to fit poorly with existing law is that it might seem to tolerate direct government subsidies for religious activities as such, so long as these subsidies are available to all religions. It is settled in First Amendment law that such subsidies are impermissible.¹⁹⁵ For more than fifty years, the law has been that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”¹⁹⁶ My formulation does not, however, conflict with this case law. To see why, we must consider the scope of the prohibition on funding and define it with more precision than the Court has done.

Taken literally, the formulation just quoted cannot be correct. It would prohibit police and fire protection of churches, because such protection certainly does support their activities. I would suggest that the prohibition be understood narrowly, to prohibit government funding of religious activities *as such*. The prohibition, thus

but also of philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong. Such a statute, moreover, should survive Press Clause scrutiny because its exemption would be narrowly tailored to meet the compelling interests that underlie both the Free Exercise and Establishment Clauses.

Id. at 27–28 (Blackmun, J., concurring in the judgment). Justice Blackmun thought it relevant that the Texas statute could not plausibly be read to exempt “the sale of atheistic literature distributed by an atheistic organization.” Id. at 29 (Blackmun, J., concurring in the judgment).

¹⁹⁴ Id. at 27–28 (Blackmun, J., concurring in the judgment).

¹⁹⁵ I am grateful to Kent Greenawalt for calling my attention to this problem.

¹⁹⁶ *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

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understood, need not extend to government support of religious activities where the basis of support is some nonreligious aspect of the activity, such as “student publication,” “school,” or “building on fire.” The Court is moving toward this position, if indeed it is not already there.¹⁹⁷

A narrow reading of the prohibition against subsidizing religious organizations is not inconsistent with the idea that government may favor religion-as-such. The most persuasive justification for the prohibition of subsidies is that no subsidy could possibly achieve the requisite neutrality among religions. Were government to attempt to *fund* religion-as-such, it would have to pick and choose whom to fund, and this would inevitably lead to discrimination among religions.¹⁹⁸ But this is not true of other benefits that go to religion-as-such—tax exemptions, for instance. Even with such exemptions in place, “the church must raise privately every cent that it spends.”¹⁹⁹ The state does not decide what proportion of funds will go to different religious groups.²⁰⁰

¹⁹⁷ See *Mitchell v. Helms*, 530 U.S. 793, 813 (2000) (plurality opinion); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 *Notre Dame J.L. Ethics & Pub. Pol’y* 375 (1999); Ira C. Lupu, *The Lingering Death of Separationism*, 62 *Geo. Wash. L. Rev.* 230 (1994).

¹⁹⁸ This can also be true of certain exemptions, however. See *supra* note 159 and accompanying text. Similar considerations may weigh against state funding of religious activity, even when it occurs under a wholly secular rubric. See Marci A. Hamilton, *Free? Exercise*, 42 *Wm. & Mary L. Rev.* 823 (2001); Marci A. Hamilton, *Power, The Establishment Clause, and Vouchers*, 31 *Conn. L. Rev.* 807 (1999) [hereinafter *Hamilton, Power*].

¹⁹⁹ *Walz*, 397 U.S. at 690 n.9.

²⁰⁰ Professor Charles Taylor argues that the Supreme Court’s interpretation of nonestablishment is not the only formula that could be consistent with liberal principles, and that funding of, for example, religious schools “on a fair basis” might be equally justifiable. Charles Taylor, *Modes of Secularism, in Secularism and its Critics* 31, 52 (Rajeev Bhargava ed., 1998). But the latter formula cannot be reconciled with American religious history, in which new sects are constantly erupting out of old ones. On this point, see generally Ahlstrom, *supra* note 128. The First Amendment, as Professor Robert Cover has observed, is a formula for Babel. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 17 (1983). Any effort by government to fund religions “on a fair basis” would require it to pick winners and losers in the competition for funding.

B. The Boundaries of Establishment: Back to the Secular Purpose Cases

If we look again at the secular purpose cases in light of the endorsement test as I have reformulated it, we end up not very far from the law as the Court has declared it. There are a few places where I would come out in a different place than the Court has, but that may reflect my different appraisal of the relevant facts, rather than any disagreement about the pertinent legal principles. This result should be unsurprising, since the ambition of this paper is a conservative one. I am defending the status quo and attempting to show the rationality of the legal doctrine we now have.

The anti-Darwinism statute at issue in *Epperson v. Arkansas*²⁰¹ was properly invalidated, because it reflected state endorsement of the Christian fundamentalist view that the book of Genesis is literally true. So understood, *Epperson* is a remarkably easy case.²⁰² Justice Hugo Lafayette Black, who would have invalidated the statute for vagueness, thought that the law might not be an endorsement of Christianity:

It may be instead that the people's motive was merely that it would be best to remove this controversial subject from its schools; there is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools.²⁰³

But if the secular purpose requirement can be satisfied by legislators' secular desire to mollify their constituents' religious sensibilities, then this exception could easily swallow the rule.²⁰⁴ Even a bill establishing a church might in some circumstances be enacted by agnostic legislators hoping to avoid being voted out of office. Once more, the question is not whether the legislators had secular motives, but whether the law itself endorses a religious proposition.

²⁰¹ 393 U.S. 97 (1968). The facts of this case are summarized *supra* text accompanying notes 13–15.

²⁰² See *id.* at 109 (The statute in *Epperson* is obviously “an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read.”).

²⁰³ *Id.* at 112–13 (Black, J., concurring); see also McConnell, *supra* note 4, at 149 (citing this argument with apparent approval).

²⁰⁴ See *supra* notes 70–71 and accompanying text.

The secular purpose that then-Justice Rehnquist thought validated the law in *Stone v. Graham*²⁰⁵ was education: “[T]he Ten Commandments have had a significant impact on the development of secular legal codes of the Western World,” and “[c]ertainly the State was permitted to conclude that a document with such secular significance should be placed before its students, with an appropriate statement of the document’s secular import.”²⁰⁶ The trouble with this argument is its understatement. The Ten Commandments were not merely “placed before” the students; they were posted in every classroom in every grade, from kindergarten through high school. Probably no other document was so ubiquitous. Any religious text could be presented as merely being integrated into the curriculum in light of its secular significance. Mandatory bible reading was once successfully defended on that basis.²⁰⁷ This argument could not have been accepted in *Stone* without willful blindness.²⁰⁸ *Stone* is another easy case.

The plausibility of the state’s proffered secular justification is context-dependent. The objective approach to legislative purpose does not confine the Court’s attention to the four corners of the statute. The context in which the law was enacted is an objective fact about it, and one that the court may properly take into account in discerning the law’s purpose.²⁰⁹ Thus, Professor Frederick Gedicks observes that the states’ actions in *Epperson* and *Stone* were so contextually strange that they cannot plausibly be justified in terms of ordinary curricular decisionmaking.²¹⁰

*Wallace v. Jaffree*²¹¹ is the least defensible of the secular purpose decisions. This is the secular purpose opinion that relied most heavily upon the legislative history of the law in question. I have

²⁰⁵ 449 U.S. 39 (1980) (per curiam). The facts of this case are summarized supra text accompanying notes 16–19.

²⁰⁶ *Stone*, 449 U.S. at 45 (Rehnquist, J., dissenting).

²⁰⁷ See Ariens & Destro, supra note 82, at 150–65.

²⁰⁸ There is also the intractable problem, not discussed by the Court, of deciding which sect’s version of the Ten Commandments is to be posted. Steven Lubet, *The Ten Commandments in Alabama*, 15 *Const. Comment.* 471, 474–76 (1998).

²⁰⁹ As the Court did (with Justice Scalia voting with the majority!) in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 525–28, 535–40 (1993). See also Koppelman, supra note 103, at 107–09 (discussing the role of context in *Lukumi*).

²¹⁰ Gedicks, supra note 89, at 700–01.

²¹¹ 472 U.S. 38 (1985). The facts of this case are summarized supra text accompanying notes 20–27.

argued that it is never appropriate to rely on such history to find a lack of secular purpose, but the history that the Court relied on in *Wallace*—prominently, the post-enactment statements of a single legislator²¹²—was barely relevant.²¹³ The Court also relied on objective evidence, such as the addition of the word “prayer” to the statute.²¹⁴ There was, however, a persuasive secular reason for this addition: “clarifying that silent, voluntary prayer is not *forbidden* in the public school building.”²¹⁵ There had been considerable confusion about the meaning of the Court’s decisions with respect to school prayer, leading to horror stories that had become familiar by the time the law was enacted. President Bill Clinton noted in a widely-publicized speech several years later that “some students in America have been prohibited from reading the Bible silently in study hall. Some student religious groups haven’t been allowed to publicize their meetings in the same way that nonreligious groups can. Some students have been prevented even from saying grace before lunch.”²¹⁶ The statute can easily be understood as making it clear that students are not acting improperly if they use the moment of silence in order to pray.

*Edwards v. Aguillard*²¹⁷ is another evolution case, but it is harder to decide than *Epperson* because, while a benign explanation is possible, it is uncertain whether that explanation is credible. Any legal distinction will have hard cases at the boundaries, and the secular purpose prong is no exception. Justice Scalia thought that the legislature was entitled to regard creationism as “a collection of

²¹² *Wallace*, 472 U.S. at 43, 56–57.

²¹³ *Id.* at 65 (Powell, J., concurring); *id.* at 77 (O’Connor, J., concurring in the judgment); *id.* at 86–87 (Burger, C.J., dissenting).

²¹⁴ *Id.* at 58–59.

²¹⁵ *Id.* at 88 (Burger, C.J., dissenting). Justice Byron White observed that:

[A] majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer. But if a student asked whether he could pray during that moment, it is difficult to believe that the teacher could not answer in the affirmative. If that is the case, I would not invalidate a statute that at the outset provided the legislative answer to the question “May I pray?”

Id. at 91 (White, J., dissenting).

²¹⁶ William J. Clinton, Remarks at James Madison High School in Vienna, Virginia (July 12, 1995), in 31 Weekly Compilation of Presidential Documents 1220, 1225 (1995).

²¹⁷ 482 U.S. 578 (1987). The facts of this case are summarized *supra* text accompanying notes 28–32.

educationally valuable scientific data that has been censored from classrooms by an embarrassed scientific establishment,” which supported on scientific grounds “the theory that the physical universe and life within it appeared suddenly and have not changed substantially since appearing.”²¹⁸ Justice Lewis F. Powell, Jr. thought it impermissible for state officials “to pick and choose among [scientific theories] for the purpose of promoting a particular religious belief,”²¹⁹ but it was disputed in this case whether the legislature’s purpose was to promote Christianity or to offer what it regarded as the most persuasive scientific information. Professor Christopher Eisgruber thinks it possible that the inclusion of creationism in the curriculum “permits students to call into question both scientific and religious orthodoxy” and that judges should not leap to the conclusion that creation science lessons will become the occasion for disguised proselytization.²²⁰ On the other hand, Professor Stephen Carter thinks that the poor scientific evidence for creationism demonstrates that it is “at heart, an explanation for the origin of life that is dictated solely by religion.”²²¹ Carter concludes that religious motivation makes a constitutional difference and that the teaching of creationism improperly endorses a particular religious belief.²²² This debate is not resolvable in abstraction from the facts. Since the purpose of the legislative regime is difficult to discern from the face of the statute, the Court should have allowed evidence to be taken on the secular plausibility of the statute, rather than allowing the matter to be disposed of by a motion for summary judgment before trial.²²³

²¹⁸ *Aguillard*, 482 U.S. at 611, 612 (Scalia, J., dissenting).

²¹⁹ *Id.* at 604 (Powell, J., concurring).

²²⁰ Christopher L. Eisgruber, *Madison’s Wager: Religious Liberty in the Constitutional Order*, 89 *Nw. U. L. Rev.* 347, 397 (1995).

²²¹ Carter, *supra* note 5, at 169.

²²² *Id.* at 178.

²²³ See *Aguillard*, 482 U.S. at 581–82. Perhaps the best argument for the result the Court reached is that suggested by Justice White: The district court and the court of appeals below had both construed the statute to be religious in purpose, and “[w]e usually defer to courts of appeals on the meaning of a state statute, especially when a district court has the same view.” *Id.* at 609 (White, J., concurring in the judgment).

Laws that target homosexuality for special disadvantage are another such puzzle. Justice Blackmun suggested that laws that prohibit homosexual sodomy lack a secular purpose. *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting). The problem presented by such laws is whether the moral convictions they reflect,

If *Aguillard* was too skeptical of the proffered secular purpose, *McGowan v. Maryland*²²⁴ was too credulous. The bland recitation of secular purposes that might have influenced some fictional legislature in some fictional country other than ours, such as a desire to provide “a uniform day of rest for all citizens,”²²⁵ does not decide the question. The problem is analogous to the tendency in the 1950s, noted by Charles Black, to perceive racial discrimination “in terms of what might be called the metaphysics of sociology: ‘Must Segregation Amount to Discrimination?’”²²⁶ Black’s comment remains instructive:

That is an interesting question; someday the methods of sociology may be adequate to answering it. But it is not our question. Our question is whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid.²²⁷

The question is what, in the cultural context in which it is enacted, a law signifies. A California court stated the obvious more than a century ago: “[T]he intention which pervades the whole act is to enforce, as a *religious institution*, the observance of a day held sacred by the followers of one faith, and entirely disregarded by all the other denominations within the State.”²²⁸

Christmas nativity displays present the hardest case of all. Would a government that favored religion as such, while remaining scrupulously neutral with respect to any contested religious proposition,

which are surely religious in origin, can plausibly be regarded as freestanding moral convictions separable from their religious basis. Koppelman, *Sexual and Religious Pluralism*, supra note 143. Attempts to translate religious objections to homosexual conduct into secular arguments have been a conspicuous failure. See Andrew Koppelman, *The Gay Rights Question in Contemporary American Law* 72–93 (forthcoming 2002).

²²⁴ 366 U.S. 420 (1961). *McGowan* is summarized supra text accompanying notes 33–35.

²²⁵ *McGowan*, 366 U.S. at 445.

²²⁶ Black, supra note 96, at 427.

²²⁷ *Id.*

²²⁸ Ex parte Newman, 9 Cal. 502, 505 (1858). For an exhaustive survey of possible secular justifications of the Sunday laws, which concludes that none of the justifications are persuasive, see Gedicks, supra note 89, at 694–97.

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sponsor such displays? McConnell has argued that the answer is yes. If government really wants to avoid interference with private religious ordering, then the public cultural sphere should mirror not secularism, but “the state of public culture in the non-government-controlled sector.”²²⁹ McConnell continues:

If the aspects of culture controlled by the government (public spaces, public institutions) exactly mirrored the culture as a whole, then the influence and effect of government involvement would be nil: the religious life of the people would be precisely the way it would be if the government were absent from the cultural sphere. In a pluralistic culture, this is the best of the possible understandings of “neutrality,” since it will lead to a broadly inclusive public sphere, in which the public is presented a wide variety of perspectives, religious ones included. If a city displays many different cultural symbols during the course of the year, a nativity scene at Christmas or a menorah at Hannukah is likely to be perceived as an expression of pluralism rather than as an exercise in Christian or Jewish triumphalism.²³⁰

In many parts of the United States, however, government speech that mirrors “the state of public culture in the non-government-controlled sector” will be overwhelmingly Christian. McConnell wants to permit inclusiveness and prohibit triumphalism, but given his criteria for inclusiveness, the two categories of governmental conduct will sometimes collapse into one another.

²²⁹ McConnell, *supra* note 4, at 193.

²³⁰ *Id.* McConnell would allow the states wide discretion in this area. He writes that: Courts should not encourage the proliferation of litigation by offering the false hope that perfect neutrality can be achieved through judicial fine-tuning. Judicial scrutiny should be reserved for cases in which a particular religious position is given such public prominence that the overall message becomes one of conformity rather than pluralism. Certainly they should not allow official acts that declare one religion, or group of religions, superior to the rest, or give official sponsorship to symbols or ceremonies that are inherently exclusionary. Particular care should be taken where impressionable children are involved. But courts should be cautious about responding to particular contestable issues in isolation. It is impossible to tell whether a particular event, symbol, statement, or item is an indication of diversity or of favoritism if it is viewed without regard to wider context.

Id. at 193–94 (footnote omitted).

This difficulty reveals a deeper problem with McConnell's theory of religious liberty. McConnell would read the religion clauses to "protect against government-induced uniformity in matters of religion."²³¹ The baseline for the question of whether government is inhibiting or inducing religious practice is "the hypothetical world in which individuals make decisions about religion on the basis of their own religious conscience, without the influence of government."²³² But this hypothetical world not only does not exist—it cannot be imagined. All religious choices are always already made in a political context. Even hermits in the wilderness got there by a process of socialization that led them to their religious convictions. There is nothing neutral about religious exemption; it is not coherent to say that when the Native American church sought exemption from the peyote laws, it "was not asking government for 'advancement'; it was asking to be left alone."²³³ Selective exemption from generally applicable laws *is* advancement. If the peyote laws were repealed altogether, then religious users would be placed on the same footing as nonreligious users of the drug; but when an exemption is enacted only for religious users of the drug, it is religion that is advanced. When government sponsors a nativity scene, it is not merely mirroring the culture; it is placing its own power and prestige behind Christianity.

McConnell worries that if the public sphere were stripped of religious symbols, this "would have a profoundly secularizing effect on the culture."²³⁴ And it is true that a completely secularized public sphere would look very different from the world we have now; to begin with, Los Angeles and San Francisco would have to change their names. This consequence is politically unthinkable, and little would be gained by such a revolution.

The better answer is to acknowledge the bland "*de facto* establishment of religion"²³⁵ that prevails in the United States. It is true that its religious significance is substantially drained by its antiquity and familiarity, but Professor Mark Tushnet is right that "[t]hese

²³¹ Id. at 194.

²³² Id. at 169.

²³³ Id. at 139.

²³⁴ Id. at 189.

²³⁵ Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 11 (1965).

practices plainly have religious purposes, and no good is done by pretending . . . that the ordinary understanding of ‘purpose’ somehow allows a holding that the practices do not have religious purposes.”²³⁶ In the area of government practice that incorporates religious elements, Professor Marshall observes, “the Court has upheld every practice reviewed with some colorable claim to historical acceptance.”²³⁷ This is precisely because the Court is concerned about the symbolic meaning of government actions, and “an adjustment for ‘cultural heritage’ was built into the establishment equation and became a part of the relevant frame of reference from which endorsement or non-endorsement would be perceived.”²³⁸

The “de facto establishment” should be understood as an exception to the Establishment Clause, confined to public rituals of long standing whose religious content is sufficiently bland.²³⁹ Some aspects of the de facto establishment, such as the names of cities and the placement of “In God We Trust” on the currency, have become drained of religious significance in the minds of many Americans.²⁴⁰ Professor Richard Fallon also notes the anger and resentment that judicial rejection of these practices would arouse, and argues that institutional self-interest probably plays a role in insulating these practices from Establishment Clause challenge.²⁴¹

Have I just given away the store? I do not think so. The exception is one that in its nature cannot allow the creation of new instances.²⁴² In addition, it has never been held to apply to the pub-

²³⁶ Mark V. Tushnet, Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses, 27 Wm. & Mary L. Rev. 997, 1004 (1985–86).

²³⁷ Marshall, *supra* note 114, at 544–45.

²³⁸ *Id.* at 532.

²³⁹ There are some such rituals, such as the Good Friday holiday, whose blandness is uncertain and may vary from one specific statute to another. In such cases, it is appropriate for the courts to engage in a very fact-specific inquiry. See Justin Brookman, Note, The Constitutionality of the Good Friday Holiday, 73 N.Y.U. L. Rev. 193 (1998).

²⁴⁰ Some federal judges are included in this group. For example, in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970), the court upheld the imprinting of “In God We Trust” on the nation’s coins, currency, and official documents. The court held that the motto is “patriotic” and “ceremonial” and “has no theological or ritualistic impact.” *Id.* at 243.

²⁴¹ Richard H. Fallon, Jr., *Implementing the Constitution* 54–55 (2001).

²⁴² In *Hall v. Bradshaw*, 630 F.2d 1018 (4th Cir. 1980), the court noted that ceremonial references to the Deity on coinage and the like

lic schools, where the dangers of religious imposition are generally agreed to be the strongest (and where the secular purpose requirement has had the greatest impact).

Religious holiday displays are more problematic. The Court has not regarded them as part of the de facto establishment, and they are by now anything but innocuous in their impact. Is it possible for such displays to avoid preferences among religions? McConnell derides the Court's "three-plastic animals rule" which, he thinks, suggests that religious displays are only permissible if they are surrounded by dreadful holiday kitsch.²⁴³ He draws this inference from the last two crèche cases decided by the Court. In *Lynch v. Donnelly*,²⁴⁴ a majority of the Court permitted a nativity scene that was surrounded by a Santa Claus house, reindeer, candy-striped poles, a Christmas tree, carolers, figures of a clown, an elephant, a teddy bear, hundreds of colored lights, a banner stating "Seasons Greetings," and a "talking" wishing well.²⁴⁵ But in *County of Allegheny v. American Civil Liberties Union*,²⁴⁶ the Court declared unconstitutional a nativity scene standing alone.

McConnell's attack on the doctrine does not discuss the other holding of *Allegheny*, which upheld a menorah accompanied by a Christmas tree and a sign saluting liberty.²⁴⁷ The decisions are at least consistent with a per se rule permitting a display that unambi-

may be treated as "grandfathered" exceptions to the general prohibition against officially composed theological statements. Present at the very foundations, few in number, fixed and invariable in form, confined in display and utterance to a limited set of official occasions and objects, they can safely occupy their own small, unexpandable niche in Establishment Clause doctrine. Their singular quality of being rooted in our history and their incapacity to tempt competing or complementary theological formulations by contemporary agencies of government sufficiently cabin them in and distinguish then [sic] from new, open-form theological expressions published under the aegis of the state.

Id. at 1023 n.2. The other point that can be made on behalf of "grandfathering" is that any deviation from the norm that it tolerates cannot be very dangerous, because the supposed dangers have not yet materialized. The current balance of power between church and state "is not the only acceptable balance that might be struck, but it is acceptable at this stage in history, because the earmark of an inappropriate balance—tyranny by either church or state—is not evident." Hamilton, Power, *supra* note 198, at 826.

²⁴³ McConnell, *supra* note 4, at 127.

²⁴⁴ 465 U.S. 668 (1984). The opinion is quoted *supra* text accompanying note 37.

²⁴⁵ *Lynch*, 465 U.S. at 671, 699.

²⁴⁶ 492 U.S. 573 (1989).

²⁴⁷ *Id.* at 613–21.

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guously celebrates pluralism by collecting the symbols of more than a single religion together. It would not seem to be enough for the Court to invoke McConnell's "mirroring the culture" standard by noting that almost everyone in town is Christian; the pluralistic message would have to be a clear part of the display. Another, and perhaps more refined, approach might be to examine the actual symbolic impact of the display. Is the challenged display actually understood by a significant subset of its audience to declare religious truth?²⁴⁸ If it is, then there is an Establishment Clause violation. This approach to the problem would often require courts to consider survey data and to decide what weight to give to that data. This approach would raise obvious difficulties, but it might still be an improvement over the current regime, in which the judges' own, possibly idiosyncratic, perceptions of endorsement have dispositive weight. But that is another story.²⁴⁹

The Court's approach may be the least damaging one that is politically feasible, but it is not costless. The state's involvement with religion, bland as it is, still has a degrading effect. The birth of Christ becomes just one more cultural stimulus for you to go shopping. The price of admission for Judaism is the Christianization of its calendar: The relatively minor holiday of Chanukah is elevated to centrality because it occurs around Christmas.²⁵⁰ One of the central evils that the Establishment Clause seeks to avoid is thus repeatedly permitted to occur. The mild de facto establishment of religion that the Court tolerates is not one that the religious should be pleased about.

V. WHAT IT MEANS FOR THE REST OF THE LAW

In the Introduction, I noted that three questions dominate contemporary religion clause scholarship. First, should religiously based

²⁴⁸ Because this is the central question, even laws that make overtly religious classifications and require adherence to religious law can, in unusual circumstances, satisfy the secular purpose requirement. See, e.g., Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices With Religious Significance*, 71 S. Cal. L. Rev. 781 (1998) (discussing laws that penalize fraud in the labeling of products as kosher and laws that require divorcing Orthodox Jewish husbands to give their wives a *get*, which under Jewish law permits the wife to remarry).

²⁴⁹ This approach is explored in Diamond & Koppelman, *supra* note 87.

²⁵⁰ See *Allegheny*, 492 U.S. at 645–46 (Brennan, J., dissenting).

exemptions from generally applicable laws be determined by the courts or the legislatures? Second, is it appropriate for citizens to seek to enact laws based on their religious beliefs? And third, may government directly fund religious activity, so long as the principle that determines who gets the funding is not itself religious?

The debate over accommodation of religion is primarily about means rather than ends. Nearly everyone agrees that it is permissible for the state to accommodate those who have religious objections to generally applicable laws.²⁵¹ That is to say, nearly everyone seems to feel the force of the callous indifference objection and to intuit that there must be some way around it. The debate is over whether the accommodations should be made by legislatures or courts. And the respective factions divide over which branch of government is more likely to strike the correct balance between the state's interests and the burden on religion. Some distrust legislatures.²⁵² Some distrust courts.²⁵³ Still others want to rely on both.²⁵⁴ This Article cannot resolve this question, but it can say something about what an answer would look like.

What may be singled out for accommodation is religion, the quest for ultimate meaning—something different from “conscience,”²⁵⁵ which is both broader than religion (because one's firm beliefs may have nothing to do with any ultimate question) and narrower (because much religious activity is not understood to be

²⁵¹ But see Gedicks, *supra* note 4; Gey, *supra* note 4; Sherry, *Enlightening the Religion Clauses*, *supra* note 4; Sherry, *Lee v. Weisman*, *supra* note 4.

²⁵² See Lupu, *The Case Against Legislative Codification*, *supra* note 4; Lupu, *Uncovering the Village*, *supra* note 4.

²⁵³ See, e.g., Eisgruber & Sager, *supra* note 4; Marshall, *Against Free Exercise Exemptions*, *supra* note 4; Marshall, *In Defense of Smith*, *supra* note 4; Tushnet, *Of Church and State*, *supra* note 4; Tushnet, *Rhetoric of Free Exercise*, *supra* note 4.

²⁵⁴ Laycock, *supra* note 4; McConnell, *supra* note 4. A hybrid approach is suggested by Professor Eugene Volokh, who argues, I think persuasively, that decisions about accommodation should be made by courts but should be subject to legislative revision. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 *UCLA L. Rev.* 1465, 1474–76 (1999).

²⁵⁵ Ira C. Lupu, *The Trouble With Accommodation*, 60 *Geo. Wash. L. Rev.* 743 (1992); Rodney K. Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wanderings of a Wayward Judiciary?*, 43 *Case W. Res. L. Rev.* 917 (1993); Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little “Conscience”*, 1996 *BYU L. Rev.* 645. The weaknesses of this approach are elaborated in Eisgruber & Sager, *supra* note 4, at 1268–70.

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compelled by divine command²⁵⁶). Preferential treatment for conscientious objections that are based on perceptions of ultimate meaning does not violate the Establishment Clause, because one can single out the quest for ultimate meaning without declaring religious truth.²⁵⁷ The question of who should impose exemptions,

²⁵⁶ Laycock, *supra* note 163, at 24–26.

²⁵⁷ The most thoughtful opponents of religion-specific accommodation are Christopher Eisgruber, Lawrence Sager, and Brian Barry. Eisgruber and Sager compare the case of Sergeant Goldman, whose faith required him to wear a yarmulke that was not part of the army uniform, see *Goldman v. Weinberger*, 475 U.S. 503 (1986), with the hypothetical Sergeant Collar, who has a rare skin disorder that prevents him from wearing a tie that is part of the army uniform. Goldman's claim to exemption, they argue, cannot be favored over Collar's without unfairly privileging religion over other deep and valuable human commitments. Eisgruber and Sager, *supra* note 4, at 1264–65. They nowhere acknowledge, however, that this claim is inconsistent with present law, which honors Goldman's claim while rejecting Collar's. (They do note that Goldman's claim was rejected by the Supreme Court but subsequently granted by Congress. See *id.* at 1304 & n.117.) This asymmetry does not unfairly "privilege[] religious commitments over other deep commitments that persons have." *Id.* at 1255. Perhaps Collar's claim is as compelling as Goldman's—some human concerns may be just as valuable as the quest for ultimate meaning—and perhaps the reason claims like Collar's have been ignored is that he (if anyone like him exists) is too atypical to warrant legislative notice. But this is just to say that religion is a category that may be relevant to legitimate legislative purposes. Legal categories are almost always somewhat over- and underinclusive. Some 15-year-olds are better drivers than some 18-year-olds, but a minimum driving age is not unconstitutional. Justice Oliver Wendell Holmes remarked long ago that "the machinery of government would not work if it were not allowed a little play in its joints," and that equal protection involves "not a geometrical equation between [a party and other similarly situated individuals] but whether the difference does injustice to the class generally, even though it bear hard in some particular case." *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501 (1931).

Barry argues that religious accommodations are only justified under a combination of very precise conditions that are rarely satisfied all together. It must be important to have a rule generally prohibiting conduct of a certain kind because, if this is not so, the way in which to accommodate minorities is simply not to have a rule at all. At the same time, though, having a rule must not be so important as to preclude allowing exceptions to it. We are left with cases in which uniformity is a value but not a great enough one to override the case for exemptions.

Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* 62 (2001). This analysis exaggerates the frequency of the need for uniformity. Many laws, such as military conscription, taxes, environmental regulations, and antidiscrimination laws will accomplish their ends even if there is some deviation from the norm they set forth, so long as that deviation does not become too great. Barry does not seem to notice that rules typically do have exceptions, though he later acknowledges that most liberal states with religious minorities do accommodate them. See *id.* at 169. (Exemptions from generally applicable laws are only one possible kind of religious

then, depends on the empirical question—a question that is far beyond the scope of the present Article—whether the judiciary or the legislature can be better trusted to carve out exemptions in a way that is neutral with respect to theological propositions.

I have also helped to address the second question, which we can now see turns on a variant of the participation objection.²⁵⁸ The debate over the role of religion in politics seems interminable, because of the apparently irresolvable tension between the right of religious citizens to participate in politics and the right of religious minorities to be free from religious domination. The reformulation of the secular purpose requirement that I develop here offers a way out of this impasse. Because the secular purpose requirement, properly understood, focuses on what government is saying, rather than the process by which decisions are arrived at, the doctrine allows religious participation to any degree, so long as that participation does not produce the forbidden result. The same result would be prohibited if it were reached by the state for nonreligious reasons—say, if incumbents cynically wanted the masses to think that God supported their re-election.

accommodation. See Eugene Volokh, *Intermediate Questions of Religious Exemptions: A Research Agenda with Test Suites*, 21 *Cardozo L. Rev.* 595 (1999).

Moreover, even when the purposes of a law seem to demand uniformity, those purposes may have to yield to other, competing purposes. When one decides how to craft a rule, the distinctive good of religion provides a reason to consider the law's adverse impact on the exercise of religion. That good will compete with, and need to be balanced against, whatever end the legislation seeks to promote.

Finally, the idea that exceptions are anomalous does too much work in Barry's analysis. Frederick Schauer has shown that "there is no logical distinction between exceptions and what they are exceptions to, their occurrence resulting from the often fortuitous circumstance that the language available to circumscribe a legal rule or principle is broader than the regulatory goals the rule or principle is designed to further." Frederick Schauer, *Exceptions*, 58 *U. Chi. L. Rev.* 871, 872 (1991). The question of whether to exempt Quakers from military service, for example, arises only because the idea of military service does not, in the English language, automatically exclude religious pacifists. If Schauer is right, then a general argument against exceptions makes little sense.

²⁵⁸ It is also possible that the evanescence objection is raised by this problem, in the following way. Legislative purpose is not knowable, but the secular purpose requirement demands that one treat it as if it were knowable, so that courts tend to hunt through the legislative history for any guilty trace of participation by religious people—and any such trace will then invalidate the law. (Arguably this is what happened in *Wallace v. Jaffree*, 472 U.S. 38 (1985). See *supra* text accompanying notes 211–216.) Thus the evanescence objection and the participation objection can work in tandem, as they typically do in the opinions of Justice Scalia.

The third question is that of funding, as raised by, for example, school vouchers. The secular purpose requirement cannot provide a satisfactory answer to this problem. Vouchers do have a secular purpose, of course, and if the plurality in *Mitchell v. Helms*²⁵⁹ garners one more vote, a new Supreme Court decision could be conclusive on the constitutionality of vouchers and of many other forms of state support for religion.²⁶⁰ The plurality proposes that:

[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.²⁶¹

This Article cannot offer a solution to the problem of government funding of religion, but it has established that the answer provided by the *Mitchell* plurality is too weak to accomplish the purposes of the Establishment Clause. Recall that the rubber stamp objection *almost* succeeds. Our inquiry has shown that the secular purpose requirement is an exceedingly weak constraint, one that will hardly ever be violated.²⁶² And this means that, if one wants an Establish-

²⁵⁹ 530 U.S. 793 (2000) (plurality opinion).

²⁶⁰ As this Article goes to press, the Court has agreed to hear three consolidated cases considering the school voucher question. See *Zelman v. Simmons-Harris*, 122 S. Ct. 23 (2001) (mem.) (granting cert.); *Hanna Perkins School v. Simmons-Harris*, 122 S. Ct. 23 (2001) (mem.) (granting cert.); *Taylor v. Simmons-Harris*, 122 S. Ct. 23 (2001) (mem.) (granting cert.).

²⁶¹ *Mitchell*, 530 U.S. at 810 (plurality opinion) (citation omitted).

²⁶² Justice David Souter's criticism of the plurality's proposed rule thus appears sound:

Adopting the plurality's rule would permit practically any government aid to religion so long as it could be supplied on terms ostensibly comparable to the terms under which aid was provided to nonreligious recipients. As a principle of constitutional sufficiency, the manipulability of this rule is breathtaking. A legislature would merely need to state a secular objective in order to legalize massive aid to all religions, one religion, or even one sect, to which its largess could be directed through the easy exercise of crafting facially neutral terms under which to offer aid favoring that religious group. Short of formally replacing the Establishment Clause, a more dependable key to the public fisc or a cleaner break with prior law would be difficult to imagine.

Id. at 901 n.19 (Souter, J., dissenting).

ment Clause that works as a real check against religious triumphalism, one must look elsewhere.²⁶³

Finally, the secular purpose requirement protects the integrity of every area of constitutional law, because the law might be radically transformed if overtly religious considerations were a permissible basis for state decisionmaking. Much that is not now permissible would become permissible if religious justifications could be offered. In particular, there would be little left of the Fourteenth Amendment, since most forms of discrimination that the amend-

²⁶³ The limited usefulness of the secular purpose requirement is still more apparent if one looks at other areas of First Amendment doctrine. William Marshall has noted a number of well-settled ways in which laws that have a secular purpose and do not single out religion for special treatment may nonetheless violate the First Amendment:

The Establishment Clause's prohibition of state funding of institutions or organizations is unique to religion. There is no comparable limitation on government funding of nonreligious groups and activities.

...

... [T]he nonentanglement principle recognized in *Larkin v. Grendel's Den* and other cases is also religion-specific. In *Larkin*, the Court invalidated a provision which gave a church the right to veto the grant of a liquor license to an establishment within a five-hundred-foot radius on the grounds that the relationship between church and state generated by the statute amounted to impermissible entanglement. There would be little constitutional objection, however, if a similar right was granted to a secular institution.

... [R]eligion is the unique beneficiary of the rule which limits how far the state may intrude into internal church doctrinal disputes. Although the Court has not made clear whether the specific constitutional provision underlying the rule is the Free Exercise Clause, the Establishment Clause, or some combination of both, the Court has held that the state is not empowered to decide matters of church doctrine. No similar rule bars the state intervention into the internal doctrine of nonreligious groups.

Finally, there are constitutional restrictions that inhibit the state's ability to determine the bona fides of particular religious claims that do not apply to nonreligious claims. In *United States v. Ballard* the Court held that in a mail fraud prosecution in which the defendants had represented themselves as divine messengers, the jury could not decide that a fraud occurred based upon its own disbelief of the defendants' religious claims. The determination of whether the defendants' claims were true was held to be beyond the competence of the Court, because allowing judicial fact finders to engage in the determination of religious bona fides would threaten the abilities of persons to believe what they choose—no matter how incredulous those beliefs may be to others.

William P. Marshall, *What is the Matter With Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 *Ind. L.J.* 193, 201–02 (2000) (citations omitted).

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ment forbids have at one time or another been defended on religious grounds.²⁶⁴

The recent case of *Romer v. Evans*²⁶⁵ did not rely on the secular purpose prong of *Lemon* or even mention the Establishment Clause, but it is nevertheless highly pertinent to the present discussion. *Romer* struck down an amendment to the Colorado Constitution (referred to on the ballot as “Amendment 2”), which provided that neither the state nor any of its subdivisions could prohibit discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”²⁶⁶ The amendment, Justice Anthony M. Kennedy’s opinion for the Court observed, “has the peculiar property of imposing a broad and undifferentiated disability on a single named group.”²⁶⁷ This singling out was unusual, and called for “careful consideration to determine whether [the Colorado amendment was] obnoxious to the [federal] constitutional provision.”²⁶⁸ The state defended the amendment by citing “respect for other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality.”²⁶⁹ The state also cited “its interest in conserving resources to fight discrimination against other groups.”²⁷⁰

²⁶⁴ See Forrest G. Wood, *The Arrogance of Faith: Christianity and Race in America from the Colonial Era to the Twentieth Century* (1990) (documenting religious justifications for race discrimination); After Patriarchy: *Feminist Transformations of the World Religions* (Paula M. Coe et al. eds., 1991) (documenting religious justifications for sex discrimination); *Homosexuality and World Religions* (Arlene Swidler ed., 1993) (documenting religious justifications for antigay discrimination).

²⁶⁵ 517 U.S. 620 (1996).

²⁶⁶ The full text of the amendment follows:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Colo. Const. art. II, § 30b, cited in *Romer*, 517 U.S. at 624.

²⁶⁷ *Romer*, 517 U.S. at 632.

²⁶⁸ *Id.* at 633 (quoting *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37–38 (1928)) (internal quotes omitted).

²⁶⁹ *Id.* at 635.

²⁷⁰ *Id.*

The amendment, however, was “[n]ot confined to the private sphere,”²⁷¹ and it seemed to “deprive[] gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.”²⁷² Such a universal license to discriminate against gays “would compound the constitutional difficulties the law creates.”²⁷³ In short, “[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them.”²⁷⁴

The Court thus felt compelled to “conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”²⁷⁵ The broad disability imposed on a targeted group

raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. “[I]f the constitutional concept of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”²⁷⁶

Daniel Crane observes that the motivation for Amendment 2 was largely religious.²⁷⁷ Yet the Court refused to recognize this Biblical view as a legitimate reason for a law, instead equating it with bare hostility. Crane argues that this was a major and indefensible shift in equal protection jurisprudence. The earlier “bare animosity” cases that the Court cited in *Romer* involved laws whose purposes—“[a]n unthinking, knee-jerk dislike of hippies, the children of illegal aliens, and the mentally retarded”²⁷⁸—were very different from the religious motivations of Amendment 2’s supporters.

²⁷¹ Id. at 629.

²⁷² Id. at 630.

²⁷³ Id.

²⁷⁴ Id. at 635.

²⁷⁵ Id.

²⁷⁶ Id. at 634 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)) (alterations in original). I defend *Romer* at length elsewhere. See Koppelman, *supra* note 103.

²⁷⁷ Daniel A. Crane, Faith, Reason, and Bare Animosity, 21 Campbell L. Rev. 125, 146 (1999) (“More often than not, the amendment’s supporters couched their arguments in explicitly religious language, relying principally on Biblical passages condemning homosexuality.”).

²⁷⁸ Id. at 162 (footnotes omitted).

Those earlier classifications “were irrational in the sense that they lacked any mooring in a comprehensive view of the public good.”²⁷⁹ Amendment 2, on the other hand, reflected a coherent, religiously-based view of morality. The bare animosity principle of *Romer* “insists that the religious translate their views into non-religious terms when presenting public policy justifications for classifications disadvantaging groups of individuals,” he observes.²⁸⁰ Even then, the Court may not be persuaded by the translation and may invalidate the law because of its religious purpose. The result, Crane asserts, is to disenfranchise the religious.²⁸¹

Crane’s objection fails, but it sheds valuable light on the secular purpose requirement. The objection fails because the right to participation cannot be as absolute as Crane would make it. As noted earlier, any constitutional restriction is a constraint on participation, since any such restriction entails that citizens may not work together to pass the laws it forbids. Crane is correct that, if religious claims are excluded from constitutional argument, this exclusion may affect the outcome even in cases that do not mention the secular purpose requirement. Were his objection accepted, it would certainly have been easy for the Court to uphold Amendment 2. The opinion could have been very short: “The Amendment is legitimate because it reflects the electorate’s rational view that homosexual conduct is an abomination before God. See Leviticus 18:22; Leviticus 20:13; Romans 1:26–27.” But an opinion of that sort is unimaginable, and for good reason.²⁸²

If the state were not limited to secular purposes, the effects would be so far reaching that constitutional law would be unimaginably different from what it is now. Consider the case of *Loving v. Vir-*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 169.

²⁸¹ *Id.* at 156 (“If the right to participate in public deliberation makes one a citizen, it is not too difficult to see that a rule prohibiting a class of residents from seeking legal sanction for their religiously informed preferences has the effect of denying citizenship to members of that class.”).

²⁸² Some judges have explicitly invoked sectarian teachings as a basis for their decisions. See Scott C. Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 *Ind. L.J.* 433, 475–77 (1993) (citing cases). But such behavior is not to be found in modern majority opinions of the U.S. Supreme Court, and it is inappropriate in any American court.

ginia,²⁸³ in which the Court invalidated the prohibition of interracial marriages. The trial judge had upheld the law on frankly religious grounds:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.²⁸⁴

Religious arguments had often been made on behalf of these laws, and indeed on behalf of the subordination of blacks generally.²⁸⁵ The Supreme Court did not even pause to consider whether the trial court had correctly understood God's intentions. Instead, it invalidated the law because it was "designed to maintain White Supremacy,"²⁸⁶ and because the purpose of the statute thus "violat[e] the central meaning of the Equal Protection Clause."²⁸⁷ Without the secular purpose requirement, the Court could not have delivered the opinion it did.

Suppose there were no doctrine restricting a law's legitimate purposes to secular purposes. What then would the *Loving* court's options have been? I see only two, neither of them attractive. On the one hand, the court could defer to the state's determination of what divine law required. Even if the state were required to show a

²⁸³ 388 U.S. 1 (1967).

²⁸⁴ *Id.* at 3 (quoting trial court opinion).

²⁸⁵ See, e.g., *Green v. State*, 58 Ala. 190, 195 (1877) ("And surely there can not be any tyranny or injustice in requiring both [races] alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct."); *State v. Gibson*, 36 Ind. 389, 404 (1871) ("The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures.") (quoting *West Chester & Philadelphia Railroad Co. v. Miles*, 55 Pa. 209, 213 (1867)); *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 869 (1878) ("The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion."). On the ubiquity of religious arguments for white supremacy, see generally Wood, *supra* note 264.

²⁸⁶ *Loving*, 388 U.S. at 11.

²⁸⁷ *Id.* at 12.

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compelling state interest, compliance with God's ordinances would appear to be as compelling an interest as one could imagine. In that case, the statute would have been upheld, as would every other racially discriminatory statute that might come before the Court.

On the other hand, the Court could have undertaken its own theological inquiry (or remanded the question for trial), perhaps relying on the expert opinions of philosophy professors to decide whether God exists, on theologians to determine whether Christianity is the true religion, on Biblical scholars to determine whether racist interpretations of Biblical sources are sound, and so forth. The Court could then have invalidated the statute if and only if it concluded that the state had not correctly understood the will of God.²⁸⁸ Courts would face similar problems any time an invasion of constitutional rights is given a religious justification. Reference to divine law is, of course, a classic justification for sex discrimination.²⁸⁹ Biblical justifications might be offered for whipping convicts. And so forth.

The secular purpose requirement insulates the Court from such dilemmas. If government may not declare religious truth, then the Supreme Court may not declare religious truth. When the Court attempts to discern a rational basis for a law, it may not cite Biblical revelation as the basis that it is seeking. It must look elsewhere. And if it cannot find a rational basis elsewhere, then it must invalidate the law. This procedure does ignore religious arguments, but the price of taking those arguments into account would be exceedingly high.

CONCLUSION

The secular purpose test is not the product of a misguided misinterpretation of the Establishment Clause. It is closely tied to the clause's core purposes. It is not a rubber stamp that any law can satisfy. The purpose it seeks to discern exists and is knowable. It

²⁸⁸ Professor Peter Cicchino has shown that courts are faced with the same dilemma when the state attempts to defend a statute on the basis of bare assertions of public morality. Peter M. Cicchino, Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?, 87 Geo. L.J. 139 (1998).

²⁸⁹ See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring in the judgment).

does not make religious people into second-class citizens by denying them the right to participate in the legislative process. It does not require a callous indifference to religion. But the case for the secular purpose requirement goes beyond the purposes of the Establishment Clause. Religious justification is a powerful thing. If there were no restraints on the ability of the state to rely on such justifications, then the state could invoke such justifications whenever it wanted to override any constitutional constraint. Such justifications are by their nature so powerful as to override any countervailing constraint, for what could be more important than carrying out the will of God?

A world without the secular purpose requirement would be so strange as to be nearly unrecognizable. Either the mere invocation of religious reasons would suffice to override any constitutional constraint, or courts would have to become theologians and attempt authoritatively to declare the divine will. The secular purpose requirement should remain the law.