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And I Don't Care What It Is: Religious Neutrality in American Law

Andrew Koppelman*

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I. INTRODUCTION

The American law of freedom of religion is in trouble, because growing numbers of critics, including a near-majority of the Supreme Court, are ready to cast aside the ideal of religious neutrality. My book, *Defending American Religious Neutrality*,¹ defends the claim, which unfortunately has become an audacious one, that American religious neutrality is coherent and attractive. Here I will briefly describe its claims.

Two factions dominate contemporary discussion of these issues in American law. One, whom I will call the radical secularists, tend to regard the law of the Religion Clauses as a flawed attempt to achieve neutrality across all controversial conceptions of the good—flawed because it is satisfied with something less than the complete eradication of religion from public life. The other, whom I will call the religious traditionalists, think that any claim of neutrality is a fraud, and that law necessarily involves some substantive commitments. They claim that there is nothing wrong with frank state endorsement of religious propositions: if the state is inevitably going to take sides, why not this one? One side regards religion

* John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University. Copyright 2013, Harvard University Press. This Article is a part of Pepperdine University School of Law's February 2012 conference entitled, *The Competing Claims of Law and Religion: Who Should Influence Whom?*

1. ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (forthcoming Jan. 2013). The present article is adapted from the introduction to this book.

as toxic and valueless; the other is untroubled by the state's embrace of an official religion. Neither sees much value in the way American law actually functions.

Yet America has been unusually successful in dealing with religious diversity. The civil peace that the United States has almost effortlessly achieved has been beyond the capacities of many other generally well-functioning democracies, such as France, Germany, and Italy. Even if the American law of religious liberty were entirely incoherent, it might still be an attractive approach to this perennial human problem. There is, however, a deep logic to the law that its critics have not understood.

Prominent scholars of religion ridiculed President-elect Dwight Eisenhower's 1952 declaration: "Our [form of] government has no sense unless it is founded in a deeply felt religious faith—and I don't care what it is."² Eisenhower nonetheless revealed a deep insight into the character of American neutrality.

Contrary to the radical secularists, First Amendment doctrine treats religion as a good thing. It insists, however—and here it parts company with the religious traditionalists—that religion's goodness be understood at a high enough level of abstraction that the state takes no position on any live religious dispute. It holds that religion's value is best honored by prohibiting the state from trying to answer religious questions.

American religious neutrality has over time become more vague as America has become more religiously diverse, so that today (with the exception of a few grandfathered practices) the state may not even affirm the existence of God. This kind of neutrality is not the kind of neutrality toward all conceptions of the good that many liberal political theorists have advocated, but it is the best response to the enormous variety of religious views in modern America. It is faithful to the belief, held by the leading framers of the First Amendment, that religion can be corrupted by state support.³

Many aspects of present American law in this area are puzzling. Some kinds of official religion are clearly impermissible, such as official prayers and Bible reading in public schools.⁴ Laws such as a ban on the teaching of evolution are struck down because they lack a secular purpose.⁵ Yet at the same time, "In God We Trust" appears on the currency,⁶ legislative sessions

2. Both the statement and the ridicule are noted in Patrick Henry, "And I Don't Care What It Is": *The Tradition-History of a Civil Religion Proof-Text*, 49 J. AM. ACAD. RELIGION. 35, 36 (1981). Eisenhower's critics include Will Herberg and Robert Bellah. See *id.* at 38, 42, 44.

3. See Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009). This concern goes unmentioned in the opinions of Justices Scalia and Thomas, who claim to be originalists. See Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727 (2009).

4. See, e.g., *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963).

5. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968).

6. *History of 'In God We Trust,'* U.S. DEP'T OF THE TREASURY (Mar. 8, 2011, 9:43 AM), <http://www.treasury.gov/about/education/Pages/in-god-we-trust.aspx>.

begin with prayers,⁷ judicial proceedings begin with “God save the United States and this Honorable Court,”⁸ Christmas is an official holiday,⁹ and, of course, the words “under God” appear in the Pledge of Allegiance. Old manifestations of official religion are tolerated, while new ones are enjoined by the courts: the Supreme Court held in 2005 that an official Ten Commandments display is unconstitutional if it was erected recently, but not if it has been around for decades.¹⁰ There is confusion about faith-based social services, public financing of religious schools, and the teaching of “intelligent design.”

All this, I will argue, makes sense. The key is understanding the precise level of abstraction at which American law is neutral toward religion.

II. THE CHARACTER OF AMERICAN NEUTRALITY

Religious liberty in American law has for decades been understood in the language of neutrality. The decision barring official Bible readings in the public schools is only the most prominent example.¹¹ Neutrality is a ubiquitous theme in Establishment Clause decisions spanning more than half a century.¹² One prominent scholar has concluded that neutrality is “[p]erhaps the most pervasive theme in modern judicial and academic discourse on the subject of religious freedom.”¹³ For a brief period in the 1970s and early 1980s it appeared that the idea of neutrality would be a master concept of both the constitutional law of religion and liberal political philosophy more generally.

Its reign was short, however. It quickly came under attack on two grounds. First was the charge of incoherence: political theorists objected that any government must necessarily rely upon and promote some

7. See, e.g., *Opening Prayer*, OFFICE OF THE CHAPLAIN: U.S. HOUSE OF REPRESENTATIVES, <http://chaplain.house.gov/> (last visited Mar. 12, 2012).

8. *The Court and Its Procedures*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/procedures.aspx> (last visited Mar. 12, 2012).

9. *2012 Federal Holidays*, U.S. OFFICE OF PERS. MGMT., http://www.opm.gov/operating_status_schedules/fedhol/2012.asp (last visited Mar. 12, 2012).

10. *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 868–71 (2005).

11. See *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 218, 222, 225, 226 (1963).

12. See, e.g., *McCreary Cnty.*, 545 U.S. at 860, 874–81; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839–46 (1995); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985); *Walz v. Tax Comm’n*, 397 U.S. 664, 676 (1970); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947).

13. STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 77 (1995) [hereinafter SMITH, *FOREORDAINED FAILURE*]; see Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. POL. 633, 635–36 (2004) [hereinafter Koppelman, *Fluidity*].

contestable scheme of values, so neutrality is impossible.¹⁴ The charge of incoherence was also raised against the idea of neutrality in the Supreme Court's religion jurisprudence. This objection focused on a deep tension in the Court's position, between the idea that religion ought to be accommodated, and the idea that government should be neutral between religion and nonreligion.¹⁵

The idea of neutrality was also blamed for substantively bad results. A neutral state would be disabled from pursuing real goods, and so its citizens' lives would not be as good as they could be.¹⁶ Moreover, the requirement of state neutrality was deemed hostile toward religion, producing a "naked public square" in which the public is deprived of urgently needed moral resources.¹⁷

Today, the constitutional law of religion is in disarray, because a growing number of legal scholars and Supreme Court Justices are impressed by these claims. Steven D. Smith concludes that the quest for a neutral theory of religious freedom "is an attempt to grasp an illusion."¹⁸ Thomas Hurka declares that in political theory, "it is hard not to believe that the period of neutralist liberalism is now over."¹⁹

These criticisms grow out of a larger consensus that the American law of religious liberty makes no sense. It has been called "unprincipled, incoherent, and unworkable,"²⁰ "a disaster,"²¹ "in serious disarray,"²² "chaotic, controversial and unpredictable,"²³ "in shambles,"²⁴ "schizoid,"²⁵ and "a complete hash."²⁶

14. See, e.g., WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 92–94 (1991); SMITH, *FOREORDAINED FAILURE*, *supra* note 13, at 77–97.

15. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 616–18 (1987) (Scalia, J., dissenting); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 131 (1992).

16. GEORGE SHER, *BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS* (1997).

17. RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* (2d ed. 1986).

18. SMITH, *FOREORDAINED FAILURE*, *supra* note 13, at 96.

19. Thomas Hurka, Book Review, *George Sher's Beyond Neutrality: Perfectionism and Politics*, 109 ETHICS 187, 190 (1998).

20. Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 (1991); see also MARK V. TUSHNET, *RED WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 247 (1998) ("incoherent").

21. Vincent Phillip Muñoz, *Establishing Free Exercise*, FIRST THINGS, DEC. 2003, at 14 ("If conservative and liberal church-state scholars agree on one thing, it is that the Supreme Court's religious liberty jurisprudence is a disaster.").

22. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 149–50 (1991) ("It is by now notorious that legal doctrines and judicial decisions in the area of religious freedom are in serious disarray."); see also TUSHNET, *supra* note 20, at 247 ("The constitutional law of religion is 'in significant disarray.'" (quoting Stephen Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265, 303 (1982))).

23. Michael W. McConnell, *Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine*, in *LAW AND RELIGION* 63, 63 (Rex J. Ahdar ed., 2000).

24. This characterization marks a rare point where Christopher Eisgruber and Lawrence Sager converge with Justice Clarence Thomas. See *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting); Christopher L. Eisgruber & Lawrence G. Sager, *The*

The critics are mistaken. Neutrality is a valuable and useful idea. It works well as a master concept in the theory of the Religion Clauses. If the concept of neutrality is properly understood, it can resolve the deepest puzzles in contemporary religion jurisprudence. The critics of neutrality are right that the concept is indefensible when it is understood at the highest possible level of abstraction. Yet neutrality has a persistent appeal. Even the most sophisticated critics of neutrality acknowledge that modern political life requires some degree of abstraction away from controversial conceptions of the good. Almost no one regrets the state's refusal to take a position on the metaphysical status of the Eucharist. Neutrality's continuing power demands explanation.

The answer is that neutrality is available in many forms. The First Amendment stands for one such specification. That specification has done its work well.

There is, indisputably, a deep coherence problem in First Amendment law. The Court has interpreted the First Amendment to mean 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."²⁷ But the Court has also acknowledged that "the Free Exercise Clause, . . . by its terms, gives special protection to the exercise of religion."²⁸ Accommodation of religion as such is permissible. Quakers' and Mennonites' objections to participation in war have been accommodated since Colonial times. Other such claims are legion. Persons whose religions place special value on the ritual consumption of peyote or marijuana (or wine, during Prohibition) seek exemption from drug laws. Landlords who have religious objections to renting to unmarried or homosexual couples want to be excused from antidiscrimination laws.²⁹ Churches seeking to expand sometimes ask for exemptions from zoning or landmark laws. The Catholic church wants to discriminate against women when ordaining priests. Jewish and Muslim prisoners ask for Kosher or halal food. These

Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. CHI. L. REV. 1245, 1246 (1994).

25. Ronald Y. Mykkeltvedt, *Souring on Lemon: The Supreme Court's Establishment Clause Doctrine in Transition*, 44 MERCER L. REV. 881, 883 (1993).

26. Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577, 578 (1996). Most of these quotations are drawn from PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION*, at xii (2011).

27. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

28. *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981).

29. For a discussion of this specific issue, see Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125 (2006).

scruples have often been deferred to, and religious objectors have frequently been exempted from obligations that the law imposes on all others.

There is considerable dispute about whether the decision to accommodate ought to be one for legislatures or courts, but that debate rests on the assumption, common to both sides, that *someone* should make such accommodations. The sentiment in favor of such accommodations is nearly unanimous in the United States. When Congress enacted the Religious Freedom Restoration Act, which attempted to require states to grant such exemptions, the bill passed unanimously in the House and drew only three opposing votes in the Senate.³⁰ After the Supreme Court struck down the Act as exceeding Congress's powers, many states passed their own laws to the same effect.³¹

Many of those opposed to judicially administered accommodations, such as Supreme Court Justice Antonin Scalia, think that it is appropriate for such accommodations to be crafted by legislatures.³²

Each of these measures raises the same dilemma. If government must be neutral toward religion, then how can this kind of special treatment be permissible?

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. Call this *the free exercise/establishment dilemma*.

This apparent tension can be resolved. Begin with an axiom: The Establishment Clause forbids the state from declaring religious truth. A number of considerations support this requirement that the government keep its hands off religious doctrine. One reason why it is forbidden is because the state is incompetent to determine the nature of this truth. Another, a bitter lesson of the history that produced the Establishment Clause, is that the use of state power to resolve religious controversies is terribly divisive and does not really resolve anything. State involvement in religious matters has tended to oppress religious minorities. Finally, there is a consideration that is now frequently overlooked, but which powerfully influenced both the Framers and the Justices who shaped modern Establishment Clause doctrine: the idea that establishment tends to corrupt religion. Official religious pronouncements tend to produce religion of a peculiarly degraded sort. If

30. Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 160 (1997).

31. For a survey, see Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 211–12 & nn.368–73 (2004).

32. See *City of Boerne v. Flores*, 521 U.S. 507, 544 (1997) (Scalia, J., concurring in part) (“The issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases The historical evidence put forward by the dissent does nothing to undermine the conclusion we reached in *Smith*: It shall be the people.”).

the state gets to discern God's will, we will be told that God wants the re-election of the incumbent administration.

These considerations mandate a kind of neutrality. The state may not favor one religion over another. It also may not take a position on contested theological propositions.

It is however possible, without declaring religious truth, for the state to favor religion at a very abstract level.³³ *Texas Monthly v. Bullock*,³⁴ for example, invalidated a law that granted a tax exemption to theistic publications, but not atheistic or agnostic publications. Justice Brennan's plurality opinion said that a targeted exemption would be appropriate for publications that "sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life."³⁵ Justice Blackmun thought it permissible for the 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."³⁶ What is impermissible is for the state to decide that one set of answers to these questions is the correct set.

But the state can abstain from endorsing any specification of the best or truest religion while treating religion as such, understood very abstractly, as valuable. That is what the state in fact does. That is how it can accommodate religion as such while remaining religiously neutral. The key to understanding the coherence of First Amendment religion doctrine is to grasp the specific, vaguely delimited level of abstraction at which "religion" is understood.

What in fact unites such disparate worldviews as Christianity, Buddhism, and Hinduism is a well-established and well-understood semantic practice of using the term "religion" to signify them and relevantly analogous beliefs and practices. Efforts to distill this practice into a definition have been unavailing. But the common understanding of how to use the word has turned out to be sufficient. Courts almost never have any difficulty in determining whether something is a religion or not.

The list of reported cases that have had to define "religion" is remarkably short.³⁷ The reference I rely on here, *Words and Phrases*, is one of the standard works of American legal research, a 132-volume set collecting brief annotations of cases from 1658 to the present. Each case

33. See Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1677 (2005).

34. 489 U.S. 1, 1 (1989) (plurality opinion).

35. *Id.* at 16.

36. *Id.* at 27–28 (Blackmun, J., concurring).

37. *Id.*

discusses the contested definition of a word whose meaning determines rights, duties, obligations, and liabilities of the parties. Some words have received an enormous amount of attention from the courts. Two examples, *abandonment* and *abuse of discretion*, drawn at random from the first volume of this immense compilation, each exceed 100 pages.³⁸ Religion, on the other hand, takes up less than five pages.³⁹ The question of what “religion” means is theoretically intractable, but, as a practical matter, barely relevant. We know it when we see it. And when we see it, we treat it as something good.

There is a limit to the state’s abstention from religious questions. As I already noted, there is a well-established tradition of ceremonial deism—such as “In God We Trust” on the currency. Only recently has anyone on the Court articulated a principle that purports to distinguish permissible from impermissible deism. Now the general rule seems to be that old forms of deism are grandfathered into constitutionality, but newer ones are unconstitutional. Thus, the Court recently held that an official Ten Commandments display is unconstitutional if it was erected recently, but not if it has been around for decades.⁴⁰ Justice O’Connor, concurring in a decision concerning the inclusion of the words “under God” in the Pledge of Allegiance, explicitly made the age of a ceremonial acknowledgement relevant to its constitutionality.⁴¹ She thought that constitutionality was supported by the absence of worship or prayer, the absence of reference to a particular religion, and minimal religious content. But the first of her factors was “history and ubiquity.”⁴² “The constitutional value of ceremonial deism turns on a shared understanding of its legitimate nonreligious purposes,” Justice O’Connor wrote. “That sort of understanding can exist only when a given practice has been in place for a significant portion of the Nation’s history, and when it is observed by enough persons that it can fairly be called ubiquitous.”⁴³ The consequence is to make old and familiar forms of ceremonial deism constitutional, but to discourage innovation.

This casual identification of God with the nation is hard to defend, and I am not eager to defend it. On the other hand, it is clearly not going away, so we ought to consider what can be said in favor of drawing the line here.

Two considerations are especially salient. The first is that ceremonial deism represented a common ground strategy—an effort, in its own time, to understand “religion” in an ecumenical and nonsectarian way. When these

38. See *Abandonment*, in 1 WORDS AND PHRASES 37–147 (2007); *Abuse of Discretion*, *id.* at 323–462 and, in the 2008 supplement, 8–25.

39. See *Religion*, in 36C WORDS AND PHRASES 153–57 (2002).

40. Compare *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005) (invalidating recently erected display), with *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding forty-year-old display).

41. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 39–44 (2004) (O’Connor, J., concurring).

42. *Id.* at 37.

43. *Id.*

elements of civil religion were put in place, the existence of God appeared to be the one aspect of religion that was to the various religious factions then dominant in American life. The continuation of this old settlement is not an effort by an incumbent administration to manipulate religion or a triumphalist effort to exclude outsiders. It simply perpetuates the background that is in place. It recognizes that people are invested, in some cases very deeply, in the status quo.⁴⁴

The second is that new manifestations are not at all ecumenical. Today, the invocation of theism, and specifically the erection of a Ten Commandments display, is an intervention in the bitterest religious controversies that now divide us. Douglas Laycock thinks that a lesson of O'Connor's opinion is that "separationist groups should sue immediately when they encounter any religious practice newly sponsored by the government."⁴⁵ That is precisely the right lesson for them to take. New sponsorship of religious practices is far more likely to represent a contemporaneous effort to intervene in a live religious controversy than the perpetuation of old forms.⁴⁶

An alternative proposed by some critics—of construing "traditional acknowledgement" broadly enough to include anything the state wants to do—would read the Establishment Clause out of the Constitution. Ceremonial deism has an effect on religion. It produces a culture in which many people feel that their religious beliefs are somehow associated with patriotism. This has the salutary effect of fostering civic unity and common moral ideals and tempering religious fanaticism. It also has the less attractive effect of encouraging self-righteous nationalism and the idea that whatever the United States does, however repugnant, is somehow divinely sanctioned.⁴⁷ However, neither of these effects is specifically aimed at by government when it perpetuates these rituals. Political manipulation, in that sense, is not occurring.

44. See Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228–29 (2003) (describing "status quo bias," the tendency of persons "to prefer the present state of the world to alternative states, all other things being equal").

45. Laycock, *supra* note 31, at 232.

46. As with the Ten Commandments, this can sometimes be true of the same text in different contexts. For example, placing "In God We Trust" on all American currency was a manifestation of generic ecumenism and anticommunism in 1956, but when Indiana in 2006 placed the same words on its license plates, it was taking sides in the culture wars. For a similar conclusion, see CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 147 (2007).

47. See also Jeffrey James Poelvoorde, *The American Civil Religion and the American Constitution*, in *HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM?* 141 (Robert A. Goldwin & Art Kaufman eds., 1987). For recent examples of the latter unattractive effect, see Andrew Koppelman, *Reading Lolita at Guantanamo*, 53 *DISSENT* 64 (2006).

So contemporary Religion Clause analysis is layered. An old abstract conception of religion, which in light of growing plurality is not nearly as abstract and uncontroversial as it used to be, is allowed to persist, but not to grow. By grandfathering the old 1950s civil religion and saying that it could proceed as far as it has and no further, the Supreme Court has essentially declared it immune from further tinkering. Ceremonial deism is secure, but it dwells in a walled city, safe but trapped. The new civil religion, on the other hand, is the primary generator of the law of religion in the United States today.

American neutrality's vagueness has much to be said for it. This is not an essay in comparative law, so I will merely note two regimes that have tried a different approach. France's insistence on a more uncompromising secularism has produced the notorious and apparently unending headscarf controversy, which has bitterly alienated not only Muslims, but also Jews and Sikhs.⁴⁸ Italy's attempt to evenhandedly fund all religions requires that each religion have some official leadership to receive and disburse the money. Because Italian-Muslims are in fact diverse and fragmented, the government finds itself in the embarrassing predicament of either refusing recognition to Islam or recognizing the largest faction, which represents only a small minority and is associated with anti-Semitism and violence.⁴⁹ By refusing official recognition of specific religions, either positive or negative, America has avoided these difficulties.

III. MISSING THE POSSIBILITIES

My inquiry straddles two fields of study: law and political theory. When each of these disciplines addresses the law's treatment of religion, it cannot do its work well unless it is informed by the other. The difficulties that ensue from a failure to grasp the particularity of American practice are revealed in the work of two leading thinkers on opposite sides of the political spectrum: philosopher John Rawls and Justice Scalia. Neither of them appreciates the unique kind of neutrality instantiated in American law.

Rawls is the best-known exponent of a liberal theory that aims at neutrality toward all controversial conceptions of the good. He claimed that the "intuitive idea" of his theory was "to generalize the principle of religious toleration to a social form"⁵⁰

48. See generally JOHN R. BOWEN, *WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE* (2008).

49. See Andrew Koppelman, *The New American Civil Religion: Lessons from Italy*, 41 *GEO. WASH. INT'L L. REV.* 861, 872-74 (2010).

50. See JOHN RAWLS, *A THEORY OF JUSTICE* 206 n.6/180 n.6 rev. (1971; revised ed., 1999) [hereinafter *RAWLS, A THEORY OF JUSTICE*]; see also *id.* at 220/193 rev.. Other exponents of liberal neutrality have described their project in similar terms. See, e.g., BRUCE ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 99 (1984); GERALD F. GAUS, *JUSTIFICATORY LIBERALISM: AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY* 170 (1996); CHARLES LARMORE, *THE MORALS OF MODERNITY* 144 (1996).

A well-ordered society, for Rawls, “is a society all of whose members accept, and know that the others accept, the same principles (the same conception) of justice.”⁵¹ The aim is a stable basis for mutually respectful political life in a society that is profoundly divided about the good life. Political liberalism is first and foremost a response to a problem: “[H]ow is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?”⁵²

Rawls’s well-known answer is the original position and the decision procedure modeled in *A Theory of Justice*. That procedure generates a conception of justice that is designed to exclude from the outset controversial conceptions of the good. “Systems of ends are not ranked in value” in the original position, because the parties do not know their conceptions of the good.⁵³ Those conceptions of the good simply do not figure into reasoning about the justice of the basic structure of society.

Rawls evidently thinks that abstracting away from all controversial conceptions of the good life is the only reliable path to social unity. In modern societies, there is so much normative pluralism that the only overlapping consensus that is consistent with respectful relations is that constructed without any reference to the actual normative views of members of society. Political liberalism, he argues, should be freestanding, so that it “can be presented without saying, or knowing, or hazarding a conjecture about, what comprehensive doctrines it may belong to, or be supported by.”⁵⁴ “[T]he political conception of justice is worked out first as a freestanding view that can be justified *pro tanto* without looking to, or trying to fit, or even knowing what are, the existing comprehensive doctrines.”⁵⁵

Rawls aspires to “civic friendship,” in which we the citizens exercise power over one another on the basis of “reasons we might reasonably expect that they, as free and equal citizens, might reasonably also accept.”⁵⁶ Reasonable people understand that others will not accept their comprehensive views. “Putting people’s comprehensive doctrines behind

51. JOHN RAWLS, *A Kantian Conception of Equality*, in COLLECTED PAPERS 254, 255 (Samuel Freeman ed., 1999).

52. JOHN RAWLS, *POLITICAL LIBERALISM* 4 (expanded ed. 1996) [hereinafter RAWLS, *POLITICAL LIBERALISM*].

53. RAWLS, *A THEORY OF JUSTICE*, *supra* note 50, at 19/17 rev.

54. RAWLS, *POLITICAL LIBERALISM*, *supra* note 52, at 12–13.

55. John Rawls, *Reply to Habermas*, 42 J. PHIL. 132, 145 (1995). For similar formulations, see RAWLS, *POLITICAL LIBERALISM*, *supra* note 52, at xlvii; JOHN RAWLS, *The Idea of Public Reason Revisited*, in COLLECTED PAPERS 585 (Samuel Freeman ed., 1999) [hereinafter RAWLS, *Public Reason Revisited*]; JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 37, 188–89 (Erin Kelly ed., 2001).

56. RAWLS, *Public Reason Revisited*, *supra* note 55, at 579.

the veil of ignorance enables us to find a political conception of justice that can be the focus of an overlapping consensus and thereby serve as a public basis of justification in a society marked by the fact of reasonable pluralism.”⁵⁷ The path to actual civic friendship leads through reasonable terms of cooperation.⁵⁸

This approach may possibly work under certain circumstances, but they are likely to be as unusual as the circumstances in which it is safe to drive a car while blindfolded. If you want civic friendship, you need to learn what your fellow citizens think before you propose terms of cooperation. T.M. Scanlon explains why the strategy of surveying actual comprehensive views would not be satisfactory to Rawls. “It would be impossible to survey all possible comprehensive views and inadequate, in an argument for stability, to consider just those that are represented in a given society at a given time since others may emerge at any time and gain adherents.”⁵⁹ The history of American neutrality shows, however, that a consensus built around the convergence of a contingent set of actual views may last a long time.⁶⁰

Rawls is right that we should generalize from the practice of religious toleration. But before we can do that, we must understand the practice of religious toleration. A political philosophy informed by this history will be better able to think about how to achieve the aspiration that Rawls articulates so well.

Justice Scalia is also concerned about the terms of cooperation in a pluralistic society. He thinks that the answer is a generalized monotheism: “[N]othing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek.”⁶¹ Such a broad monotheism is also a solution to the free exercise/establishment dilemma. The way out of that dilemma is to relax the requirements of disestablishment: “[O]ur constitutional tradition . . . ruled 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).”⁶²

57. JOHN RAWLS, *THE LAW OF PEOPLES* 32 (1999).

58. That the aim is to contain disagreement within a framework of mutual respect is particularly clear in T.M. Scanlon, *The Difficulty of Tolerance*, in *TOLERATION: AN ELUSIVE VIRTUE* 226–39 (David Heyd ed., 1998), which is cited with approval in RAWLS, *Public Reason Revisited*, *supra* note 55, at 588 n.42.

59. T.M. Scanlon, *Rawls on Justification*, in *THE CAMBRIDGE COMPANION TO RAWLS* 164 (Samuel Freeman ed., 2003).

60. This critique of Rawls is elaborated in Andrew Koppelman, *The Limits of Constructivism: Can Rawls Condemn Female Genital Mutilation?*, 71 *REV. POL.* 459, 460 (2009).

61. *Lee v. Weisman*, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting).

62. *Id.* at 641.

This revision would free the Court's reading of the Religion Clauses from self-contradiction. But it does not work, because it discriminates among religions. Scalia frankly acknowledges that ceremonial theism would entail "contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs."⁶³ Yet he once wrote: "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."⁶⁴

Not all religions believe in "a benevolent, omnipotent Creator and Ruler of the world."⁶⁵ 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."⁶⁶ The membership of the latter has been steadily growing in the United States.

Scalia is driven to this thin state-sponsored religious discrimination because he thinks that there is no other coherent answer to the free exercise/establishment dilemma, and no other way to foster civic unity. His desire to bring coherence to this area of the law is admirable. But he does not appreciate the fluidity of neutrality.

The civic friendship to which Rawls aspires, the reconciliation of free exercise and establishment to which Scalia aspires, can be, indeed already is being, achieved, but on different terms than either of them imagines.

IV. IS AMERICAN NEUTRALITY GOOD?

My analysis of modern Religion Clause doctrine only goes part of the way toward answering the critics. I have thus far addressed the incoherence objection, but there remains the allegation of normative unattractiveness. Here there are two sets of objections from different directions. One objection is that this conception is hostile to religion and opposed to its flourishing. The other is that this conception is *too* friendly to religion, and that it is unfair for the state to give religion as such special treatment.

Objections to American law's singling out of religion come from two directions. One view is that the law is too secular. The state ought to be able to endorse religious ideas that many citizens share: there should be prayer in schools, official religious ceremonies, perhaps even more specific endorsement of, say, Christianity.

63. *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

64. *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 748 (1994) (Scalia, J., dissenting).

65. *Lee*, 505 U.S. at 641.

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

In order to address this claim, one must consider the substantive scope of the Establishment Clause. That requires an examination of its purposes. A core impetus for disestablishment, I already noted, is the idea that religion is corrupted by state support, and flourishes without it.⁶⁷ Those who are eager to live in a religion-friendly nation should reflect on the evidence that the regime they are attacking already gives them what they want.

Most of the philosophical literature attacks the regime from a different direction: claiming that the separation of church and state in America is too *weak*, that the regime should not be treating religion as a good at all. (This may have something to do with the fact that academic philosophy departments are dominated by liberal secularists.) This would rule out any significance for the corruption argument, which presumes religion as a value that needs protection from state interference.

I have elsewhere addressed different versions of this claim: that there is nothing valuable about religion as such;⁶⁸ that this value is appropriately re-described as “conscience;”⁶⁹ that the goodness of religion is too controversial to be an appropriate basis of political (much less judicial) decision in a diverse society (this is Rawls’s objection);⁷⁰ that even if religion is good, it is unfair to privilege it over other, equally valuable human concerns.⁷¹ I cannot repeat those arguments here. Instead I will explain why, as a general matter, it is reasonable for American law to treat religion as a good. Then I will consider the appropriate role of religious influence on politics and law.

The question is not whether religion, generically, is good. That question is profoundly unanswerable. In societies in which religious understanding and practice are implicated in most if not all of social life, such as ancient Sumerians or modern Brooklyn Hasidim, there *is* no secular world that stands apart from the transcendent cosmic order.⁷² For those who live in such a framework, life without religion is no more possible than life without carbon atoms.⁷³ Their religion gives them a language and practices that make sense of their lives, but can also be a source of pain and confusion that makes difficult lives worse; these effects cannot be disentangled.⁷⁴

67. See *supra* note 3 and accompanying text.

68. Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961 (2010) [hereinafter Koppelman, *Praise Thee*].

69. Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 215 (2009).

70. See *supra* note 50 and accompanying text.

71. See Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571.

72. PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 112–21 (Anchor ed. 1969).

73. See generally *id.*

74. See, e.g., ROBERT A. ORSI, “Mildred, Is It Fun to Be a Cripple?” *The Culture of Suffering in Mid-Twentieth Century American Catholicism*, in *BETWEEN HEAVEN AND EARTH: THE RELIGIOUS WORLDS PEOPLE MAKE AND THE SCHOLARS WHO STUDY THEM* 19 (2005).

Our question is whether, in the United States, it is appropriate for the state to treat religion as if it is good. The basis for doing so is in part the peculiar nature of the religion-based claims that find their way to the courts *here*.

By the time any claim does that, it has passed through two filters that inevitably eliminate many religious forms. The first is that the most toxic kinds of religion cannot exist on American soil: because they cannot obey the basic rules of criminal law, they must change or die. The other (which is in part a consequence of the first) is that most manifestations of religion in the United States generate no legal or political claims.

Some religious beliefs are obviously bad, both in themselves and specifically for a free society. Early liberalism had to do a job on religion in order to make it into something that could exist in a liberal state. For instance, the now neglected second half of Hobbes's *Leviathan* tried to show that Christianity, properly understood, did not require religious wars and persecutions.⁷⁵ Hobbes's project has been a huge success. The kind of destructive religion that he worried about is nearly extinct in the contemporary United States.⁷⁶ Any religious group that tried, for example, to violently crush nonadherents would itself quickly be crushed.⁷⁷

And then there is the second filter. American law is concerned only with the goodness of that subset of religion that is protected from corruption by the Establishment Clause or is the basis of valid free exercise claims. Religions that demand state enforcement are not treated as good by the American regime. Most religious activity violates no law and so receives no judicial attention, positive or negative. The law must decide which (if any) state entanglements with religion ought to be avoided, and which (if any) religious claims the state should, can, or must accommodate. With respect to establishment, our question is whether religion is likely to be better if it is not (or, if you prefer, worse if it is) linked to the power of the state. With respect to free exercise, our question is whether the practice of accommodating religious claims is likely to make people's lives better.

75. THOMAS HOBBS, *LEVIATHAN* 409-715 (C.B. MacPherson ed., 1968) (1651).

76. When Eisenhower declared, "Our form of government has no sense unless it is founded in a deeply felt religious faith, and I don't care what it is," he less famously made clear in the next sentence that he was not talking about just any religion at all: "With us of course it is the Judeo-Christian concept but it must be a religion that all men are created equal." Henry, *supra* note 2, at 36, 38.

77. Under the contemporary state and federal RFRAs, a religion demanding, say, the killing of nonadherents would be entitled to judicial scrutiny of the burden that the homicide laws place upon its exercise. That burden would nominally be invalid unless necessary to a compelling interest. To that extent, even this religion would be treated as presumptively valuable. These laws so obviously survive such scrutiny that no one has bothered to test them.

So why should we think that religion (even thus filtered) deserves this kind of solicitude? Why think that it plays a good role in people's lives? There are two kinds of answers. One assumes *arguendo* that the religious beliefs in question are mistaken and then asks whether they nonetheless have value. The other makes no such assumption.

The basic social function of religion, Peter Berger observed long ago, is one of a distinctive kind of legitimation. It gives people's lives and social roles an ultimate ontological status, giving them a cosmic, sacred frame of reference that can be the source of "an ultimate sense of rightness, both cognitively and normatively."⁷⁸

This way of putting matters sounds conservative, but the point applies equally to the roles of social critic, reformer, and revolutionary. One may object that this is epistemically culpable: there is no basis for any confidence that anything in the world ultimately is validated by a transcendent frame of reference.⁷⁹ We just have to learn to live without any ultimate sense of rightness. But this is also a kind of faith: there is no basis for confidence in the *rejection* of a transcendent frame of reference, either. The old agnostic point, that a finite being cannot know an infinite one, cuts both ways. How can you *know* that there is no transcendent frame?⁸⁰ What epistemic warrant is there for that bold claim? It is likewise possible to be a strong religious adherent while fully acknowledging one's lack of epistemic certainty.⁸¹

What is really indispensable is hope.⁸² There is no epistemic warrant to assert with confidence that the religious person's hope is groundless. If this is true—and the arguments for agnosticism are familiar—then the insistence upon the contrary is itself a culpably false belief. Hope, by definition, involves an absence of sufficient evidence. It is not necessarily connected to acceptance of propositions.

We know that religion is not indispensable to intelligibility: many individuals, and even a few national cultures, function perfectly well without it.⁸³ But the ability to do without religion is a late and peculiar historical formation. Modern humanism is itself shot through with quasi-religious

78. BERGER, *supra* note 72, at 37.

79. See Koppelman, *Praise Thee*, *supra* note 68, at 979–81.

80. I have always been fond of the following two-line joke:

Q. Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

A. If I knew the truth, the whole truth, and nothing but the truth, I would *be* God.

81. See, e.g., JOSEPH CARDINAL RATZINGER, INTRODUCTION TO CHRISTIANITY 40–41 (J.R. Foster, trans., rev. ed. 2004).

82. Paul Tillich's description of God as one's "ultimate concern," which the Supreme Court quoted with approval in *United States v. Seeger*, 380 U.S. 163, 187 (1965), goes on to say that the deep concern of which he speaks should perhaps be called "hope, simply hope." PAUL TILlich, THE SHAKING OF THE FOUNDATIONS 59 (1948).

83. See generally PHIL ZUCKERMAN, SOCIETY WITHOUT GOD: WHAT THE LEAST RELIGIOUS NATIONS CAN TELL US ABOUT CONTENTMENT (2008).

longings and even rituals.⁸⁴ For many people, liberation from their religious beliefs would produce only anomie and despair. The avoidance of such states is an appropriate object of positive appraisal. So is the capacity to articulate at least some of the enormous range of *élans* and experiences that resist expression in secular discourse.⁸⁵ For many people, hope takes a religious form, and it would be hard for them to imagine it in any other way.

Many of the most progressive movements in American government, from abolitionism through the civil rights movement, have been grounded in religious considerations. Today, religion is a powerful constraint on the tendencies toward economic and political inequality in contemporary America.⁸⁶ Religious organizations tend to foster civic and political participation and skills, particularly among the less wealthy.⁸⁷ Religious affiliation also correlates with voting rates.⁸⁸ The effects are particularly striking among African-Americans, whose churches are more effective than white churches in educating and mobilizing members.⁸⁹ American churches also provide social services that mitigate material inequalities, such as soup kitchens, homeless shelters, shelters for victims of domestic violence, medical and dental clinics, and hospitals.⁹⁰ The experience of volunteering for such institutions may itself have a politicizing effect.⁹¹

Surveys of religious individuals further documents the secular benefits of religion. Religious people are more likely to do volunteer work; more likely to contribute their money to charity; more likely to be involved in their communities.⁹² They are also happier.⁹³

Thus far we have considered only the secular benefits of religion—goods that are manifest even if one stipulates that there is no transcendent reality and that religion is bunk. But what if it is not? Openness to that possibility gives yet another reason for the state to treat religion as good.⁹⁴

84. *See generally* REGINA MARA SCHWARTZ, *SACRAMENTAL POETICS AT THE DAWN OF SECULARISM: WHEN GOD LEFT THE WORLD* (2008); CHARLES TAYLOR, *A SECULAR AGE* (2007).

85. *See generally* JÜRGEN HABERMAS ET AL., *AN AWARENESS OF WHAT IS MISSING: FAITH AND REASON IN A POST-SECULAR AGE* (Ciaran Cronin trans., 2010); STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* (2010).

86. PAUL J. WEITHMAN, *RELIGION AND THE OBLIGATIONS OF CITIZENSHIP* 37–66 (2002).

87. *Id.* at 42–44.

88. *Id.* at 41.

89. *Id.* at 46.

90. *Id.* at 49.

91. *Id.* at 41–66.

92. ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 443–89 (2010).

93. *Id.* at 443–92.

94. PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* 83, 86 (2011).

“Religion,” then, denotes a cluster of goods, including salvation (if you think you need to be saved), harmony with the transcendent origin of universal order (if it exists),⁹⁵ responding to the fundamentally imperfect character of human life (if it is imperfect),⁹⁶ courage in the face of the heartbreaking aspects of human existence (if that kind of encouragement helps),⁹⁷ a transcendent underpinning for the resolution to act morally (if that kind of underpinning helps),⁹⁸ contact with that which is awesome and indescribable (if awe is something you feel),⁹⁹ and many others.

But the goodness of religion does not entail that the state ought to try to resolve religious questions. There is another approach, instantiated by the Court’s declaration in *Engel v. Vitale*¹⁰⁰ that under the Establishment Clause, “religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.”¹⁰¹

V. WHAT KIND OF INFLUENCE?

I will close by focusing on the topic of this conference, *The Competing Claims of Law and Religion: Who Should Influence Whom?*

The question focuses on what 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.¹⁰² Believers claim that they will be disenfranchised if they are forbidden to seek to have laws enacted on the basis of their religious beliefs. Religious minorities claim that laws with religious purposes exclude them from full citizenship.

The reformulation of religious neutrality that I have developed here offers a way out of this impasse.

Religious people have a full right to participate in democratic politics. It is no accident that the vogue of theorizing, trying to show that it was immoral and disrespectful to make religious arguments about political matters, immediately followed the Presidential election of 1980, when the religious right first became a potent force in American politics.¹⁰³ These

95. JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS 89–90 (1980).

96. See KEITH E. YANDELL, PHILOSOPHY OF RELIGION: A CONTEMPORARY INTRODUCTION 17–34 (1999).

97. See generally PAUL TILLICH, THE COURAGE TO BE (1952).

98. See IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON (Mary Gregor ed. & trans., Cambridge University Press 1997) (1788); IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE (Theodore M. Green & Hoyt H. Hudson trans., Harper 1960) (1794).

99. See RUDOLF OTTO, THE IDEA OF THE HOLY (John W. Harvey trans., 2d ed. 1950).

100. 370 U.S. 421 (1962).

101. *Id.* at 431–32 (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785)).

102. See Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 92–93 (2002) [hereinafter Koppelman, *Secular Purpose*].

103. Beginning in the 1980s, Americans became increasingly hostile to the involvement of religious leaders in politics, and this hostility was strongest among those who did not identify with any religion. PUTNAM & CAMPBELL, *supra* note 92, at 120–21.

claims elicited a bitter response from religious thinkers, who argued that such a limitation on public discourse would deprive politics of important moral resources and deny them the right to state what they believe. This response, which has made little impression on liberal theorists, gives rise to a puzzle: why did the liberals converge on and keep producing new articulations of a proposal, in the name of social unity and comity, that was so widely received as an insult? How could so many brilliant people have been so rhetorically clumsy?

Norms of civility may, paradoxically, be the reason. It is impolite to challenge someone else's religious beliefs. Religion is private. Even if you think your neighbor believes really stupid stuff, it's not nice to say so. He can go to his church. You go to yours. Don't bother each other.

This formula works only so long as neither of you offers a religious argument that is supposed to govern something that will affect both of you. Suppose, for example, that you propose that homosexual sex be criminalized because it's an abomination before God. How am I to respond? If I disagree, my obvious answer is to say that your religious beliefs are wrong. By hypothesis, that is what I really think. But it's not nice to say that. So I have to twist around to find some way to say that your views ought not to govern political decisions, without having to say that they're false.

This strategy has been a disaster. A doctrine that purports to be grounded in universal respect has left a lot of actual citizens feeling profoundly insulted. This suggests that the social norm should be revisited. As soon as A invokes religious reasons for his political position, then it must be OK for B to challenge those reasons. It may be acrimonious, but at least we'll be talking about what really divides us (and we'll avoid the strange theoretical pathologies that have plagued modern liberal theory, though these are mainly confined to the academy). It's more respectful to just tell each other what we think and talk about it.

Open discussion also takes religious claims seriously, which American liberals urgently need to do. Alienation from religion has been a disaster for the American left. In the United States, progressive change—the enactment of the Establishment Clause, the abolition of slavery, the New Deal, and the Civil Rights Act of 1964—has been achieved only by an alliance of the secular and the religious. Those on the left who rail against religion are playing into the hands of their enemies.

So what are the limits of religious influence over politics in American constitutional law?¹⁰⁴

Recall that a major purpose of the Establishment Clause is to prevent the corruption of religion by government manipulation. This means, at a

104. The argument that follows is elaborated in Koppelman, *Secular Purpose*, *supra* note 102.

minimum, that the state is forbidden from declaring religious truth. The classic formulation is that of *Epperson v. Arkansas*: “Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice.”¹⁰⁵ 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.

The axiom that government may not declare religious truth entails restrictions on government conduct. It is a familiar point in free speech law that conduct which is not itself speech may nonetheless communicate a message and so be appropriately treated as speech.¹⁰⁶ 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.” 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.¹⁰⁷ There is no substantive constitutional right to do any of these things. The problem with this law lies in its message It asserts as plainly as if it declared in so many words 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.

105. *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968).

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

107. On these prohibitions in Jewish law, see 14 *ENCYCLOPAEDIA JUDAICA* 567 (1971).

Steven D. Smith objects that “virtually every action taken by government at least tacitly teaches, if not the truth, then the falsity of some religious beliefs.”¹⁰⁸ Thus, for example, teaching Darwin in the public schools implicitly contradicts the views of biblical literalists and six-day creationists. Laws against murder contradict the religious beliefs of the Aztecs. A stop sign on a corner implicitly declares that it is not contrary to God’s will for the state to erect stop signs.

To see why Smith’s objection is not fatal, consider Robert Audi’s observation that the justification for some laws “evidentially depend[s] on the existence of God (or on denying it) or on theological considerations, or on the pronouncements of a person or institution *qua* religious authority.”¹⁰⁹ Not all laws depend on theological considerations in this way. The law mandating the stop sign has no such evidential dependence. Nor the homicide law. Nor the inclusion of Darwin in the curriculum.

The ban on government declaring religious truth would, however, be violated if a science teacher were to say, at the end of the lesson, that “Darwin proves that God doesn’t exist.” The question of how Darwin is to be integrated into a religious view is not one that the schools are authorized to address.

There are, of course, nice questions on the margin. Laws prohibiting the teaching of evolution, or requiring the posting of the Ten Commandments in every classroom in a state, are so obviously theologically-loaded that the Court rightly judges that they go too far.¹¹⁰ But in the evolution case, unless the science teacher starts denying God’s existence, the state is taking no particular religious line. A very wide range of religious views are consistent with Darwin’s theory.

Of course, government should give reasons for what it does, but it can easily do that without embedding its actions in any particular religious narrative. It is easy to defend the law against murder without saying anything at all about Aztec theology. Perhaps some religious orthodoxy is in some sense implicit in the stop sign at an intersection; at a minimum, it excludes the proposition that God wants you to speed through the intersection without slowing down. But there are many different theologies that can and do coincide in rejecting this proposition. People with radically

108. Steven D. Smith, *Barnette’s Big Blunder*, 78 CHI.-KENT L. REV. 625, 657 (2003); see also SMITH, FOREORDAINED FAILURE, *supra* note 13, at 81–90. My response to Smith is elaborated in Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI.-KENT L. REV. 729 (2003) [hereinafter Koppelman, *No Expressly Religious Orthodoxy*].

109. ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON 89 (2000).

110. See *Stone v. Graham*, 449 U.S. 39, 42–43 (1980) (per curiam) (invalidating state law requiring the posting of the Ten Commandments in every classroom in Kentucky); *Epperson*, 393 U.S. at 109 (invalidating anti-evolution statute).

differing theological views can have adequate reasons for obeying both laws. The question is whether any given law is capable of justification without directly relying on theological considerations or religious authority.¹¹¹ The statute authorizing the stop sign is an example of such a law.¹¹²

Because [religious neutrality] focuses on *what* government is saying rather than on *who* supported any particular law, the participation of the religious is unimpaired. The courts should monitor legislative output, not inputs. Citizens may make whatever religious arguments they like in favor of a law, so long as the law that is ultimately passed is justifiable in nonreligious terms. Because government may not take a position on religious truth, a law that can only be justified in religious terms is invalid. This means that courts have to assess the plausibility of whatever secular purposes are proffered by the state. Thus, for example, in cases involving mandated teaching of “creation science” or “intelligent design,” the issue is whether the articulated secular purpose makes sense on its own terms. The only federal court that has squarely confronted that question found that “intelligent design” was not a plausible scientific theory, and was therefore a religious view in disguise.¹¹³

The requirement that a law have a secular purpose will, of course, prevent some people from getting what they want in the political process, but any meaningful constitutional restriction will do that. This objection quarrels 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.

111. See Koppelman, *Secular Purpose*, *supra* note 102, at 88.

112. Christopher Eberle has objected, in conversation, that this understanding of the Establishment Clause puts great weight on a distinction between morally equivalent actions. Laws such as the Sabbath statute are unconstitutional because they communicate religious messages, even though the government has not made any explicit religious statement at all. But teaching evolution is permissible even though it logically implies the falsity of certain specific religious beliefs—beliefs that are salient for many citizens. In both cases, everyone understands that a religious message is being communicated.

Eberle’s concern must bypass the stop sign case, in which a religious view is implicit but not salient. That would distend the secular purpose requirement to the point of absurdity, because there would be no way to engage in any intentional action without violating it. Rather, the claim is that, if the principles extend to the Sabbath law, it should (must logically?) also extend to the science curriculum, forbidding any state action that is understood by some subset (how small?) of citizens to imply a religious message—even if that message is unlikely to have been salient to anyone else. This is, of course, an optional expansion of the requirement, but it could destroy the capacity of the state to pursue legitimate and perhaps urgent secular purposes. It is not incoherent to make the secular purpose requirement easier to satisfy than this, so that a law will not be invalidated unless the case for it manifestly satisfies Audi’s condition. This is what contemporary American law does, quite robustly and intelligibly. The problem is not purely one of moral philosophy. It is how to implement the Establishment Clause with workable rules of law.

113. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

VI. CONCLUSION

Sebastian Castellio, one of the earliest proponents of religious toleration, in 1554 declared it senseless to penalize “those who differ from the mighty about matters hitherto unknown, for so many centuries disputed, and not yet cleared up.”¹¹⁴ The state is as incompetent to decide religious questions today as it was then.

The American regime of religious neutrality refuses to adjudicate those theological disputes. This very refusal, targeted at religious questions, implicitly recognizes the value of religion. The state reveals its reverence for the Absolute by omitting all reference to it in public decisionmaking.

American religious neutrality demands that the state be silent about religious truth, but the silence is eloquent and highlights the importance of what is not articulated. It is like a rest in music.

114. SEBASTIAN CASTELLIO, CONCERNING HERETICS: WHETHER THEY ARE TO BE PERSECUTED AND HOW THEY ARE TO BE TREATED 123 (Roland H. Bainton et al. trans., 1935) (1554).
