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Steven D. Smith

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Donald A. Giannella Memorial Lecture

NONESTABLISHMENT "UNDER GOD"? THE NONSECTARIAN PRINCIPLE

STEVEN D. SMITH*

I. INTRODUCTION

IT is imprudent to try to do too much in a single lecture, so I want to attempt one fairly modest (but still, I believe, important) task. I stress that what follows is not offered as a complete theory of nonestablishment, much less of the First Amendment. My more modest goal is to try to disentangle three themes that are often conflated with baneful effect. We can call these the "public secularism principle," the "neutrality principle" and the "nonsectarian principle."¹ My own view is that the first two of these principles have exercised a pernicious influence over First Amendment jurisprudence, but if the third could be extracted so that its own distinctive virtues could be appreciated, it might provide valuable mooring for what is at present a deeply disoriented discourse.

As an introduction to this issue, consider the controversial decision of the United States Court of Appeals for the Ninth Circuit in *Newdow v. United States Congress*,² declaring the inclusion of the words "under God" in the Pledge of Allegiance unconstitutional. The court incurred widespread criticism for its decision, but even if you believe (as I do) that the result

* Warren Distinguished Professor of Law, University of San Diego. A version of this lecture was presented in a workshop at the University of San Diego School of Law, and I thank the participants for their helpful suggestions. The audience at the Gianella Lecture at Villanova University School of Law raised challenging questions and objections calling for further reflection, but it seemed best to leave the lecture itself more or less in the form in which it was delivered.

1. I bow to convention here in referring to these themes as "principles." It might be better to call them—or at least to call the one I favor here—"ideals," "aspirations" or "guiding criteria." If any reader thinks that what I am calling here the "nonsectarian principle" does not really qualify as a true constitutional "principle," I will be relieved. Cf. STEVEN D. SMITH, *GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA* 62–82 (2001) (questioning value of "principles" in Establishment Clause jurisprudence).

2. 328 F.3d 466 (9th Cir. 2003) (holding that "under God" violates Establishment Clause and teacher-led recitation of Pledge of Allegiance is unconstitutional), *cert denied*, 124 S. Ct. 386 (2003), *cert. granted in part*, 124 S. Ct. 384 (2003), *rev'd on other grounds sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004).

was wrongheaded, this criticism may seem to be a case of blaming the messenger. After all, the Ninth Circuit merely applied, in a plausible and faithful way, the doctrines announced by its institutional superior, the United States Supreme Court.³ Clear away all of the mostly sophomoric sophistry and it is pretty straightforward, really.⁴ The Supreme Court has said that government is constitutionally forbidden to endorse religion.⁵ The words “under God” endorsed religion when Congress added them to the Pledge of Allegiance in 1954—indeed, Congress added them partly for that purpose—and surely, for millions of Americans, they still do. Q.E.D.⁶

Of course, one might also argue that the criticism of the decision *was* deserved because, as we will see later, the Supreme Court has indicated that it has no intention of applying the “no endorsement” doctrine in a plausible and faithful way and that it *does not want* the doctrine applied in a plausible and faithful way.⁷ So perhaps faithful application of the Supreme Court’s pronouncements is actually unfaithful to the Supreme Court’s pronouncements. It’s hard to say: depending on whether the Court decides to reach the merits of the case, we may soon find out.⁸

For present purposes, in any case, we can focus on one of the *Newdow* majority’s particular assertions:

A profession that we are a nation “under God” is identical, for Establishment Clause purposes, to a profession that we are a nation “under Jesus,” a nation “under Vishnu,” a nation “under Zeus,” or a nation “under no god,” because none of these professions can be neutral with respect to religion.⁹

3. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989) (ruling that Establishment Clause prohibits government from endorsing religion).

4. See, e.g., *Elk Grove*, 124 S. Ct. at 2321 (O’Connor, J., concurring) (explaining that government should not endorse any religion or religious belief).

5. See, e.g., *County of Allegheny*, 492 U.S. at 594.

6. For a much more detailed (and, I think, persuasive) argument on this point, see Steven G. Gey, “*Under God*,” *the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865 (2003).

7. For further discussion of the “no endorsement” doctrine, see *infra* notes 59–71 and accompanying text.

8. As it turned out, the Supreme Court decided *not* to reach the merits, but instead reversed on standing grounds. See *Elk Grove*, 124 S. Ct. at 2312 (reversing Ninth Circuit decision on grounds that noncustodial parent lacked standing). However, Chief Justice Rehnquist and Justices O’Connor and Thomas wrote concurring opinions addressing the merits. See *id.* at 2312–27 (Rehnquist, C.J., O’Connor, J., & Thomas, J., concurring) (concluding that school district policy requiring teachers to lead students in reciting Pledge of Allegiance does not violate Establishment Clause). The issue now awaits relitigation by a party with standing. Because of this disposition of the case, the legal posture of the issue remains largely unchanged. Accordingly, it seemed possible and appropriate to leave the lecture largely in the form in which it was delivered. I have, however, added several references to the concurring opinions in footnotes.

9. *Newdow v. United States Cong.*, 328 F.3d 466, 487 (9th Cir. 2003), *amended by* 328 F.3d 466 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 386 (2003), *rev’d on other grounds sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004).

The court evidently intended this observation as a powerful rhetorical up-
percut—a sort of *reductio ad absurdum* of the case for keeping “under God”
in the Pledge.

But *are* these different professions in fact identical? In their actual
content, the professions are obviously far from identical; they may even be
antithetical (“under God,” as opposed to “under no god”). Still, depend-
ing on what categories or criteria we are using, we *can* view the professions
as “identical” in the sense that they fall into the same class or category. If
your consuming interest is “baseball,” for example, so that for you the in-
teresting categories for classifying the various things people say are “state-
ments about baseball” and “statements *not* about baseball,” then all of the
professions recited by the court would, thus, fall into the second category:
they are not about baseball. In that sense we might carelessly say that
these statements are “identical.” In *Newdow*, the Ninth Circuit explicitly
assumed an Establishment Clause principle of “neutrality” that effectively
constructed two categories for classifying public professions: “neutral to-
ward religion” and “*not* neutral toward religion.” Within that conceptual
scheme, the court plausibly concluded that all of the professions it listed
were *not* neutral toward religion—and hence were “identical.”

Okay so far. But we can still ask: is this a sensible conceptual scheme?
Many people might feel intuitively that there *is* a significant difference
among these various statements; so they might wonder about the cogency
of a scheme within which the differences between “under God,” “under
Jesus,” “under Vishnu” and “under *no god*” do not even register. In sup-
port of this suspicion, they might observe that under the Ninth Circuit’s
approach, many of the most cherished pronouncements in the American
political tradition—including Lincoln’s Second Inaugural Address, the
Declaration of Independence and (ironically) Jefferson’s Virginia Statute
for Religious Freedom¹⁰—would likewise fall into the forbidden category
and hence would need to be banished, or at least expurgated.¹¹ This con-
clusion seems troublesome. Could it be that the Ninth Circuit’s whole
approach—an approach, I reiterate, enjoined upon it by the Supreme
Court—misconceived the constitutional principles at stake?

I think the answer is yes, and I suggest that the error results from
conflating what is a valid and important American tradition of nonsectari-
anism with the quite different notions of secularism and neutrality.

II. THREE PRINCIPLES

Let me start with a rough description of what these three principles
mean. I trust that you will not expect anything definitive; after all, these
terms are often used variously, loosely and (as I have said)
interchangeably.

10. For further discussion, see *infra* notes 35–43 and accompanying text.

11. See Steven D. Smith, *Law and Cultural Conflict: Barnette’s Big Blunder*, 78
CHI.-KENT L. REV. 625, 665–66 (2002).

A. *Public Secularism*

The principle of “public secularism” is a principle that pervades a good deal of constitutional discourse and is reflected in modern constitutional doctrine insisting that government must act only for “secular” purposes.¹² The term “secular” is used in different senses, and there is a perfectly respectable usage which understands “secular” to mean something like “of or pertaining to this world,”¹³ as opposed to things that pertain to some other world or sphere. In this sense, something can easily be *both* “secular” *and* “religious.” Thus, historians and others distinguish the “secular clergy”—the clergy that works in the world, in parishes—from the “regular clergy” who retreat from the world to the seclusion of a monastery.¹⁴ To call parish priests “secular” in no way implies that they have abandoned their religious vocation.¹⁵

If the term “secular” is used in this positive way, then I agree that our constitutional tradition amply supports the assumption that government is supposed to act within the realm of the “secular.” And occasionally courts may use the term in this positive sense. For instance, in *Lynch v. Donnelly*,¹⁶ the first nativity scene case, the Supreme Court said that a crèche commemorating the birth of Jesus served a “secular” function—it commemorated “a significant historical religious event long celebrated in the Western World.”¹⁷ At the same time, the Court insisted that this conclusion in no way derogated from the religious quality of the crèche.¹⁸ There should be nothing especially inflammatory in these claims: Christmas is widely celebrated in American culture and tradition, and Christmas is typically linked to the birth of Jesus—as historical an event as the birth of George Washington or George W. Bush.

Indeed, at a deeper level, and perhaps by accident, the *Lynch* majority was also theologically cogent. The birth of Jesus, after all, dramatically manifests the Christian doctrine of the Incarnation, which is precisely the claim—a deeply and even scandalously “secular” claim—that God *came into and lived within this world* not just as an exalted visitor but as a full-blooded, fully human participant. So if “secular” is used in this inclusive sense, then whether the crèche is considered from a cultural or from a

12. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (noting that statute must have secular legislative purpose).

13. The battered dictionary that I still have from undergraduate days, for instance, gives as its first definition of “secular”: “of or relating to the worldly or temporal.” WEBSTER’S NEW COLLEGIATE DICTIONARY 1044 (1973).

14. For a further discussion of the evolution of the terms “secular” and “religious,” see JOSE CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 12–17 (Univ. of Chicago Press 1994) (examining etymological origins of “secular”).

15. See *id.* at 13 (stating that priests can be both religious and secular) .

16. 465 U.S. 668 (1984).

17. *Id.* at 680.

18. See *infra* note 24.

more theological perspective, the majority was plainly right to say that it is a "secular" symbol.

Lynch's critics, however, have routinely failed to grasp this point, and hence have repeatedly accused the majority of demeaning the crèche or denying its religious character.¹⁹ Because the *Lynch* majority emphatically did not say this—on the contrary, it explicitly *denied* saying or meaning any such thing²⁰—these critics sometimes resort to quoting Justice Blackmun's characterization to that effect in his dissent, as if Blackmun were accurately expressing the majority's view.²¹ That Blackmun understood the majority better than the majority understood itself seems improbable. So it all makes you wonder: can these critics read?

But the almost ritual criticism becomes intelligible if we recognize that the critics are presupposing a different conception of the term "secular." "Secular," in this usage, *means* "not religious": "secular" and "religious" are the poles of a dichotomy. So if Warren Burger said the crèche served a "secular" function, he *must* have meant that the crèche had lost its religious quality;²² and if he also explicitly denied meaning this, well, then he must have been merely confused.

It's clear, I think, that *someone* is confused. But although the critics may have grossly misread *Lynch*, I must concede that their usage of "secular" is more common in modern constitutional discourse. So "secular" is typically understood by what it is *not*—that is, not "religion"—rather than by what it *is*.

19. Justice Blackmun's characterization was typical: the majority, he charged, had "relegated [the crèche] to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning." *Lynch*, 465 U.S. at 727 (Blackmun, J., dissenting).

20. *See, e.g., id.* at 685 n.12 (noting both secular and religious aspects of crèche). The Court noted:

Justice Brennan states that "by focusing on the holiday 'context' in which the nativity scene [appears], the Court 'seeks to explain away the clear religious import of the crèche,' and that it has equated the crèche with a Santa's house or reindeer. Of course this is not true.

Id. (citations omitted). The Court also stated:

The city contends that the purposes of the display are "exclusively secular." We hold only that Pawtucket has a secular purpose for its display, which is all that *Lemon v. Kurtzman* requires. Were the test that the government must have "exclusively secular" objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated.

Id. at 681 n.6 (citation omitted).

21. *See, e.g.,* WINNIFRED FALLERS SULLIVAN, PAYING THE WORDS EXTRA: RELIGIOUS DISCOURSE IN THE SUPREME COURT OF THE UNITED STATES 88 (1994) ("Burger's opinion reduces the meaning of the crèche to, in Justice Blackmun's words, 'a neutral harbinger of the holiday season.'").

22. *See, e.g.,* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1295 (2d ed. 1988) ("Given the undeniable religious roots of legislative prayers and crèches, the Court must have meant that those practices, although born of religion, had with time lost their religious nature.").

In sum, the principle of “public secularism,” as reflected for instance in the *Lemon v. Kurtzman*²³ doctrine’s “secular purpose” requirement, is commonly understood to mean that government must refrain from acting religiously, or for religious purposes, or in support of religion.

B. *Neutrality*

Next let us consider the principle of “neutrality.” Even more notoriously than the term “secular,” “neutrality” is used in many different senses:²⁴ it is, as Justice Harlan observed, a “coat of many colors.”²⁵ Its dominant sense in constitutional discourse, though, seems to be one of “not taking sides.” So government must refrain from taking (or even appearing to take) a position either for or against “religion.”²⁶ Government must neither advance nor inhibit religion, and must not do things that send messages either endorsing or disapproving religion.²⁷

Just how the principles of “public secularism” and “neutrality” square—or clash—with each other presents a complicated problem. One obvious difficulty arises because at least some religious perspectives disapprove of public secularism; they regard it as a species of atheism.²⁸ So a secular government will plainly *not* be neutral with respect to *that kind* of religion.²⁹ Another difficulty is that, in some contexts, neutrality is often taken to mean that “religion”—religious schools or “faith-based organizations”—may be, or even must be, included among the recipients of governmental aid or among the participants in public service programs.³⁰ Such neutrality-based inclusion creates a tension with a commitment to keeping government within the domain of the “secular.” So one might conclude that “public secularism” and “neutrality” are at odds with each other, at least in some contexts, and that courts would have to choose

23. 403 U.S. 602 (1971).

24. For a critical discussion of some leading versions of neutrality, see STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 77–97 (1995).

25. *Bd. of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring).

26. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989) (plurality opinion) (noting that Establishment Clause “prohibits government from appearing to take a position on questions of religious belief”).

27. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 669 (2002) (O’Connor, J., concurring); *Lemon*, 403 U.S. at 612.

28. *See, e.g., JOHN COURTNEY MURRAY, S.J., THE PROBLEM OF GOD, YESTERDAY AND TODAY* 99 (1964) (“Atheism is the public philosophy, established by law. The establishment was accomplished by the law of separation of church and state . . .”).

29. Of course, some religious perspectives also disapprove of neutrality—which is the source of a similar conundrum for the neutrality principle itself. *See, e.g., SMITH, supra* note 24, at 81–88.

30. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995); *cf. Locke v. Davey*, 124 S. Ct. 1307, 1311 (2004) (holding that states have “play in the joints” in deciding whether or not to include religion in general assistance programs).

between them. Which is it—"secularism" or "neutrality"? Indeed, this tension is easily visible in, for example, the resistance of more separationist justices to the neutrality theme in some school aid or school voucher cases.³¹

Still, the dominant understanding in modern religion clause jurisprudence—I am merely reporting, not commending—seems to view these principles not merely as compatible but as entailing each other, or even as merely different labels for, or dimensions of, the same basic principle. Government must be religiously "neutral," and it maintains its neutrality by being "secular." Or government must be "secular," and this restriction entails that government must be religiously "neutral."³²

C. *Nonsectarianism*

We have looked at "public secularism" and "neutrality;" so then what would a "nonsectarian" principle contemplate? I have already noted that the "nonsectarian" theme is often conflated with the others that I have mentioned. And it is not hard to see how this might happen. Suppose we take the term "sectarian," as people sometimes do, to be a rough synonym for "religious." Then "nonsectarian" comes to mean "not religious." "Not religious," as we have seen, is the dominant modern meaning of "secular." So a "nonsectarian" state would by this understanding necessarily be a "secular" state. And by whatever logic, or abuse thereof, the modern understanding has come to equate public "secularism" with "neutrality," "nonsectarian" thus would become equivalent to "neutral."

The principles *can* be viewed as a unified bundle, and I suspect they often *are* viewed in this way. Indeed, I suspect that the "neutrality" and "public secularism" principles gain much of their appeal by presenting themselves as restatements of the "nonsectarian" principle. But "nonsectarian" also *can* have (and more naturally or conventionally *does* have) an importantly different meaning—a meaning that is potentially valuable and hence should not be squandered by lumping it into an undifferentiated secularism or neutrality.

So I will observe that the term "sect" is typically *not* taken to be synonymous with "religion." Rather, it refers to one specific denomination or party picked from a set of many denominations or parties. Often "sect" connotes not merely a single religious party, but a narrowly self-defining and inward-looking party.³³

31. See, e.g., *Zelman*, 536 U.S. at 686 (Souter, J., dissenting).

32. For further discussion of the rationale for and relations between these themes, see Steven D. Smith, *The Pluralist Predicament: Contemporary Theorizing in the Law of Religious Freedom*, 10 *LEGAL THEORY* 51, 55–66 (2004).

33. See WEBSTER'S NEW COLLEGIATE DICTIONARY, *supra* note 13, at 1044 (defining "sect" as "dissenting or schismatic religious body; esp.: one regarded as extreme or heretical"). For the noun "sectarian," two definitions are offered: "an adherent of a sect" and "a narrow or bigoted person." *Id.*

In this sense, “sectarian” would describe the kind of religion that is narrow, exclusive or inward-looking. Conversely, “nonsectarian” would *not* mean “nonreligious” or “secular.” Rather, it would describe a position or attitude that engages with issues affecting religion *in an inclusive or ecumenical spirit*. A nonsectarian approach would emphasize and appeal to what different “sects” share with each other and with nonreligious parties and perspectives.

Taken in this entirely familiar sense, “nonsectarian” cannot be “either/or” or “once-and-for-all.” Though the disciples of “public reason” may try to wish the fact away, in the world we inhabit it is rarely possible for the state to act on beliefs that *everyone* shares. Consequently, “nonsectarian” is of necessity a term of degree: it is more like terms such as “bright,” “small” or “quick” than it is like qualities such as “pregnant,” “college graduate” or “registered voter,” qualities that in their conventional usage, one usually either has or does not have. The degree to which a measure is “nonsectarian” will vary with context: a position that might seem indisputably “nonsectarian” in one time and place—in a nineteenth century New England town, for example, in which nearly everyone may have been some variety of Protestant—will seem less so when other-minded believers enter the picture.

Taken as a potential constitutional principle, therefore, “nonsectarianism” could not be a sort of “all-or-nothing” command with a concrete meaning that stays constant over time and place. Instead, it would need to be understood more as an admonition to be as inclusive as circumstances permit, or to avoid gratuitous and potentially divisive religious specificity.

I will try to clarify the notion of nonsectarianism further as this paper proceeds. First, though, we can consider some reasons why a nonsectarian principle might be attractive.

III. THE SUPERIORITY OF THE NONSECTARIAN PRINCIPLE

We have seen that, contrary to common usage, the nonsectarian principle is significantly different than the public secularism and neutrality principles. Still, the fact that they are often conflated suggests that there are family resemblances. In particular, all three principles have a common purpose: they seek to promote the goal of an inclusive community in a pluralistic society.³⁴

34. The goal of an inclusive community is manifest in judicial discussions of the “no endorsement” doctrine—the purpose of the doctrine, the Justices say, is to prevent citizens from feeling like “outsiders.” See *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989) (plurality opinion); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring); *Newdow v. United States Cong.*, 292 F.3d 597, 608 (9th Cir. 2002) (explaining decision to strike “under God” from Pledge), *amended by* 328 F.3d 466 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 386 (2003), *rev’d on other grounds sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004).

This is, to be sure, a laudable purpose, and all three principles attempt to serve it. How then should we choose among them? This section of the paper offers three reasons for preferring the nonsectarian principle. These reasons probably overlap to a considerable extent; even so, I think they serve to highlight different aspects of the case for nonsectarianism. We might, for simplicity, refer to these reasons as the arguments from *tradition*, from *political viability* and from *candor*.

A. *Tradition*

The first argument observes that there is a strong theme of nonsectarianism in revered parts of the American constitutional tradition.³⁵ For present purposes, we might look specifically at two prominent examples. Consider first Jefferson's Bill for Establishing Religious Freedom³⁶—probably this country's seminal enactment on the subject of religious freedom. The Bill begins by proclaiming that "Almighty God hath created the mind free," and it goes on to assert that compulsion in matters of religion represents "a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do."³⁷ This is overtly, even aggressively, religious language; it hardly seems consistent with a public posture of nonreligious "secularism," or of "neutrality" toward religion. But the phrase "Almighty God" also resulted from the defeat of an attempt in committee to specify that the "lord both of body and mind" was Jesus Christ.³⁸ Jefferson's language can thus be classified as "nonsectarian," because it attempted to appeal to premises that most citizens of the time could accept.

As a second example, consider Lincoln's Second Inaugural Address—a stunningly profound statement which a London newspaper described at the time as "the noblest political document known to history."³⁹ Lincoln's speech is pervasively religious; it is, as one commentator observed, a "theological classic," containing within its twenty-five sentences "fourteen references to God, many scriptural allusions, and four direct quotations from the Bible."⁴⁰ Its religious appeal is all the more powerful because it was

35. For a useful quick summary of evidence for this claim, see *Lee v. Weisman*, 505 U.S. 577, 632–36 (1992) (Scalia, J., dissenting) (surveying history of Establishment Clause). For a more detailed and careful exposition, emphasizing the development of the nonsectarian principle in the nineteenth century, see Noah Feldman, *Nonsectarianism Reconsidered*, 18 J.L. & POL. 65 (2002).

36. Thomas Jefferson, Bill for Establishing Religious Freedom, *reprinted in THE SUPREME COURT ON CHURCH AND STATE* 25–26 (Robert S. Alley ed., 1988).

37. *See id.* at 25.

38. *See* JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 75 (1998) (discussing debate surrounding Bill's language).

39. ELTON TRUEBLOOD, *ABRAHAM LINCOLN: THEOLOGIAN OF AMERICAN ANGUISH* 137 (1973).

40. *Id.* at 135–36.

not the slick product of professional speech writers, but rather the expression of a lifetime of intense, often agonized reflection. Nonetheless, the speech carefully refrains from taking any narrowly sectarian position. Its nonsectarian attitude is not only performative, but is explicitly articulated. Americans of very different views, Lincoln observed, had “read the same Bible, and pray[ed] to the same God.”⁴¹ The speech carefully avoided placing blame entirely on one side or faction. And the speech culminated with Lincoln’s famous exhortation that Americans go forward “[w]ith malice toward none; with charity for all . . . with firmness in the right as God gives us to see the right.”⁴²

These instances of nonsectarianism could easily be multiplied. And there is plenty of recent evidence, including President Bush’s speeches to the nation immediately following the September 11 tragedy quoting scripture and imploring Americans to join with him in prayer. No lengthy rehearsal of the evidence seems necessary, because the conclusion seems inescapable. The “secularism” and “neutrality” principles are embarrassed by the fact of repeated, constant and explicit public endorsements and invocations of religion, beginning before the Constitution was adopted and continuing to the present day. By contrast, there *is* a long-standing, though imperfectly honored, American tradition of seeking to keep government and its expressions as nonsectarian as circumstances permit.⁴³ Thus, the nonsectarian principle, unlike its competitors that often try to piggyback on it, can claim strong support in our constitutional tradition.

B. *Political Viability*

Though the nonsectarian principle is more securely grounded in our tradition than its competitors, this fact will strike some people as a dubious recommendation. For a nation born in the Enlightenment, tradition has always been at best a suspect category.⁴⁴ But a related point can be made in terms of political viability. Arguably, many of our most central constitu-

41. SMITH, *supra* note 1, at 181.

42. *Id.* at 182–83. As it happens, Lincoln was superbly, perhaps uniquely, qualified to expound and reflect the nonsectarian position because this was his own hard-won view. *See id.* at 177–78 (discussing Lincoln’s religious background). Throughout his life, Lincoln struggled with religious questions; he pored over the Bible, talked with religionists of various stripes and often attended their services. *See id.* at 178 (discussing Lincoln’s religious practices). But he was unable to embrace any particular sect. *See id.* His elusive stance has been susceptible to various interpretations; but, amidst the uncertainties, we can confidently say that Lincoln’s faith was both deep and nonsectarian. *See id.* at 177–84 (discussing Lincoln’s religious beliefs).

43. *See* County of Allegheny v. ACLU, 492 U.S. 573, 604 (1989) (plurality opinion) (“The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically.”).

44. *See* Donald W. Livingston, *The Founding and the Enlightenment: Two Theories of Sovereignty*, in VITAL REMNANTS: AMERICA’S FOUNDING AND THE WESTERN TRADITION 243, 244 (Gary L. Gregg II ed., 1999) (stating that “[t]radition is the great horror of the Enlightenment”).

tional commitments are grounded in religious values or premises. At least according to one widely held and plausible view, religion did not merely provide the vocabulary in which these commitments were articulated; it was and is part of their very logic. Consequently, a principle that forbids governmental invocation of religion may have the effect of rendering us tongue-tied when it comes to explaining our most basic political commitments. And muteness on the most basic matters is not a promising foundation for enduring political community.

Consider, for instance, the commitment to equality. The Declaration of Independence asserts as one of the central truths on which the Republic was founded that "all men are created equal."⁴⁵ Likewise, in the *Gettysburg Address*, Lincoln recited this claim, stating that the nation was founded on the basis of a dedication to that proposition.⁴⁶ In recent decades, equality has become arguably the central value in some of our most justly celebrated political movements (in particular the civil rights movement), in a good deal of political philosophy and also in much constitutional law, not only under the Equal Protection Clause, but in First Amendment jurisprudence as well.⁴⁷ Yet this assertion of equality or equal worth, ennobling and exhilarating though it may be, is not on its face intuitively compelling or even plausible.

Thus, George Fletcher observes that "[a]s a descriptive claim, the thesis that 'all men are created equal' is obviously false. People differ in every conceivable respect—size, strength, intelligence, musical talent, beauty."⁴⁸ So then what is the justification for saying that all persons are in some important sense of equal worth? The Declaration of Independence is quite clear in offering a religious foundation for the doctrine of equality: we "are created" equal, and we are equal at least in the sense that we "are endowed by [our] Creator" with rights.⁴⁹ Thus, as Fletcher explains, "[b]ehind those *created* equal stands a Creator—the source as well of our basic human rights."⁵⁰

Perhaps the commitment to equality can be defended today on purely nonreligious grounds—but perhaps not. In a recent book, Jeremy Waldron argues that John Locke's commitment to equality was firmly based in religious assumptions, and that modern efforts to support the commit-

45. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

46. Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863).

47. See 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, 203 (2000) (describing "the equality of ideas principle that lies at the heart of the Free Speech Clause" and explaining that "[t]he equality of ideas principle posits that every idea has equal dignity in the competition for acceptance in the marketplace of ideas").

48. GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* 95 (2001).

49. *Id.* at 102.

50. *Id.*

ment on purely secular assumptions have not succeeded to this point.⁵¹ Waldron's concluding observations sound faintly ominous:

[M]aybe the notion of humans as one another's equals will begin to fall apart, under pressure, without the presence of the religious conception that shaped it Locke believed this general acceptance [of equality] was impossible apart from the principle's foundation in religious teaching. We believe otherwise. Locke, I suspect, would have thought we were taking a risk. And I am afraid it is not entirely clear, given our experience of a world and a century in which politics and public reason have cut loose from these foundations, that his cautions and suspicions were unjustified.⁵²

The same may be said, arguably, of our foundational commitment to human rights. This commitment seems central to our constitutional order, and once again, our seminal statement of that commitment justifies it on a religious premise: our inalienable rights are those with which we are "endowed by [our] Creator."⁵³ We have seen, of course, a variety of efforts to justify human rights on nonreligious grounds, but the success of these efforts is doubtful.⁵⁴ Often rights are linked to something like "human dignity," but both this quality itself and its capacity to generate "rights" remain obscure. In any case, the appeal to dignity may only push the question back a step because, as Mary Ann Glendon observes, "[m]ost [religious] believers . . . would say that dignity is grounded in the fact that human beings are made in the image and likeness of God."⁵⁵ In a similar vein, Michael Perry has argued that the idea of human rights is "ineliminably religious."⁵⁶ I have argued for a similar conclusion on quite different grounds.⁵⁷

All of these questions are hotly contested, of course, and I certainly do not pretend to have demonstrated here that our commitments to equality and to rights necessarily rest on a religious foundation. This is what I think I *can* safely say: first, our commitments to equality and to rights were, as a historical matter, justified on religious premises; second,

51. See generally JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE'S POLITICAL THOUGHT* (2002).

52. *Id.* at 243.

53. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

54. For one familiar expression of skepticism, see ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 69–70 (2d ed. 1984) (concluding that natural or human rights are fictitious because attempts to justify existence of such rights have failed).

55. Mary Ann Glendon, *Foundations of Human Rights: The Unfinished Business*, 44 AM. J. JURIS. 1, 13 (1999).

56. See MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 11–41 (1998).

57. See Steven D. Smith, *Nonsense and Natural Law*, in PAUL F. CAMPOS, PIERRE SCHLAG & STEVEN D. SMITH, *AGAINST THE LAW* 100 (1996).

many people today still accept these commitments on religious grounds; and finally, at least some thinkers believe that the commitments cannot be justified *except* on religious grounds. I concede that those who hold this view (and I include myself in the group) might be wrong. Even so, by inhibiting us as a public matter from reaffirming and relying on those grounds, the secularism and neutrality principles subtly place at risk the viability of our constitutional enterprise over the long haul.

C. *Candor*

This observation leads to my third reason for preferring the nonsectarian principle: it allows for the possibility of candor. Proponents of a constitutional principle do not offer it simply as a good idea or as the political position they happen to find attractive; instead, they introduce the principle with phrases like "*the Constitution requires.*" And this presentation typically calls for some attempt to reconcile the preferred principle with long-standing constitutional practices and precedents. If a principle is in fact contrary to our tradition, that attempt will usually call for some amount of, shall we say, artful pleading. And if the principle is also contrary to current practices that neither the polity nor the Justices are eager to relinquish, then further (usually not very artistic) artfulness will be called for in the attempt to explain why, contrary to first impressions (and second impressions, and third impressions), the principle does not require that these practices be eliminated after all. These efforts, however, can strain the discourse. At some point, the deceptiveness becomes so transparent that the discourse loses all credibility; "everyone knows" that the courts cannot really mean what they are forced, over and over again, to say.⁵⁸

There is ample reason to believe that the constitutional discourse of religious freedom has for some time persisted in approximately this condition. The evidence for this claim is abundant, but for the moment it may be enough to cite the layers of obfuscation that have arisen—of necessity, I think—around the modern "no endorsement" doctrine, which figured centrally in the Ninth Circuit's *Newdow* decision.⁵⁹

The problem arises because the Justices—or several of them, anyway—find irresistible the proposition that government should not make anyone feel like an "outsider" by endorsing religion. But these same Justices also are not prepared to declare "free exercise exemptions" for religious objectors unconstitutional; nor are they about to rule that the national motto, "In God We Trust," violates the Constitution, nor that Jefferson, Madison and the Founders transgressed a prospective constitu-

58. Though the competition is heated, probably the leading example by now, not available at the time the lecture was given, is Justice O'Connor's concurring opinion in *Elk Grove*. See generally *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2321–27 (2004) (O'Connor, J., concurring).

59. For further discussion of the holding in *Allegheny*, see *supra* note 3 and accompanying text.

tional principle when they wrote the Virginia Statute for Religious Freedom and the Declaration of Independence, nor that Lincoln violated the Constitution in his Second Inaugural Address or in his Gettysburg Address (which of course contained the same words that the Ninth Circuit recently found offensive: "one nation under God"), nor that George W. Bush violated the Constitution in his September 11th speeches. So, how do we square these seemingly incompatible inclinations?

As a first step, we might draw a distinction between the *endorsement* of religion and the *accommodation* of religion.⁶⁰ "Accommodation" is supposed to allow for free exercise exemptions. But this distinction reflects a false dichotomy: it is reminiscent of the student who says, "I didn't skip class; I just stayed home." Many people and many causes would like to be accommodated by the law—to be exempted from the draft, for instance, or from other burdensome laws. If we single out *religious* objectors to accommodate them while declining various other objectors, it is hard not to discern a kind of endorsement of religion in that selective accommodation.

And in any case, this distinction (or a similar distinction between *endorsing* and *acknowledging* religion⁶¹) would not excuse what appear to be explicit governmental statements favorable to or approving of religion (such as the national motto). Thus, further qualifications are needed. Why is it not an unconstitutional endorsement of religion to put "In God We Trust" on all of the nation's dimes and quarters and nickels? Why is it not a violation to begin sessions of the Supreme Court with the ringing plea "God save the United States and this Honorable Court"?

Well, the Justices explain, those expressions serve the purposes of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."⁶² Maybe, but it seems we are piling up the false dichotomies. "God save the United States" is not the sort of expression that *either* endorses religion *or* solemnizes a public occasion; it plainly does *both*. Indeed, it solemnizes precisely *by* invoking God's blessing, thereby endorsing religion.

So the Justices add that these expressions have "lost through rote repetition any significant religious content."⁶³ And if skeptics point out that many real people still *do* perceive religious content in words like "In God We Trust," the Justices visit one final indignity upon us: they explain that for these constitutional purposes it is not real people whose perceptions

60. See, e.g., *Bd. of Educ. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

61. See *Elk Grove*, 124 S. Ct. at 2322, 2325–26 (O'Connor, J., concurring).

62. *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

63. *Id.* at 716 (Brennan, J., dissenting) (citation omitted); see also *Elk Grove*, 124 S. Ct. at 2323 (O'Connor, J., concurring) (citing *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring)) (stating that religious content is adequately absent when practice is of such age and common use to be fairly called ubiquitous).

count. Rather, what matters is whether a "reasonable" or "objective" observer would perceive a message of endorsement.⁶⁴

This last embellishment on the "no endorsement" doctrine seems at once inevitable and deeply perverse. A doctrine that begins with the laudable objective of preventing anyone from feeling like an outsider on the basis of religion culminates in a construction that tells those offended by what they sincerely perceive to be a religious or anti-religious message not only that the message is legitimate, but that their perception to the contrary does not count because they are not "reasonable" observers. The doctrine sets out to remove injury, but instead merely adds insult.

Still, it is important to see that this "reasonable observer" test is a natural, probably necessary, corollary to the "no endorsement" doctrine. The "reasonable observer" technique may seem disingenuous, but I suspect that everyone who favors the "no endorsement" test will have to resort to it at some point. For example, you may be among the significant minority of citizens who are perfectly willing to honor the perceptions of actual citizens by striking "under God" from the Pledge, or "In God We Trust" from coins.⁶⁵ You may dismiss with contempt the Justices' explanation that a "reasonable" observer would see no endorsement of religion in these expressions. And you may be willing to say, on the same grounds, that George W. Bush routinely violates a constitutional principle in his official, presidential speeches (as probably every President before him has done)—and that Lincoln, Madison and even the great Jefferson deviated from constitutional principle when they invoked deity not just as private persons, but in their official expressions.⁶⁶ Okay so far. But I think we can treat it as almost axiomatic that in a country as religiously diverse as this one, virtually anything government does will be perceived by *someone* as endorsing or disapproving of religion.⁶⁷ So, to borrow a far-fetched example from Justice Stevens, what do you say to the person who thinks that an "exotic cow" in the national zoo conveys "the government's ap-

64. See *Elk Grove*, 124 S. Ct. at 2325 (O'Connor, J., concurring) (stating that relevant viewpoint for Establishment Clause is of reasonable observer "fully cognizant of the history, ubiquity and context of the practice in question").

65. See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2173-74 (1996).

66. Andrew Koppelman suggests that "Smith's attack on the public/private distinction notwithstanding, things can be said in a president's inaugural address that cannot be said in a statute. An officeholder making a speech can invoke God, but it is inappropriate and unconstitutional for a legislature to do so in a statute." Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI.-KENT L. REV. 729, 733 n.27 (2003). Even without attacking or doubting the public-private distinction, however, it is not easy to see how a speech given by a President at a public ceremony at which he is being inaugurated as President can be classified as mere "private" expression.

67. Cf. *Elk Grove*, 124 S. Ct. at 2321 (O'Connor, J., concurring) ("Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the [endorsement] test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause . . .").

proval of the Hindu religion"?⁶⁸ Or, to Douglas Laycock, who has suggested that, at least in principle, the names of cities like Los Angeles or Corpus Christi are unconstitutional endorsements of religion?⁶⁹ Or, to use a much more realistic and recurring example, you may think that public Christmas displays—including crèches—just *do* endorse Christianity, and that Justice O'Connor's claim that a "reasonable" observer would not see it this way (at least if there are enough Santas and elves around) borders on insulting.⁷⁰ But then what do you say to all of those citizens who protest that *removing* the crèche is "taking Christ out of Christmas" and thereby expressing a message of hostility toward Christianity? At some point, I suspect, all of us will be forced to resort to the Court's "reasonable observer" device. "You may perceive it that way," we will say, "but a *reasonable observer* wouldn't. You're just being obtuse. Get a life."

Or at least we will be forced to say something like this if we continue to insist that the Constitution commands government to be secular and religiously neutral, thereby prohibiting government from saying or doing things that endorse or disapprove of religion. And that of course is the point: these (admittedly quite alluring and well-intended) principles are so radically inconsistent with the reality of our political traditions and current practices that they can only be maintained by multiplying spurious dichotomies and transparent fictions, until the discourse becomes rampantly incredible. Modern First Amendment discourse inures us to such deceptions until, properly educated, we can believe—or at least *say*—six impossible things before breakfast without batting an eye.⁷¹

68. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 800 n.5 (1995) (Stevens, J., dissenting).

69. See Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. REV. 1, 8 (1986).

70. Mark Tushnet observes that Justice O'Connor's conclusion that the Pawtucket crèche did not endorse religion "came as a surprise to most Jews." Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 711–12 n.52 (1986). Leo Pfeffer asserts that the crèche was offensive not only to Jews but also to the National Council of Churches, Baptists, Unitarians and to Ethical Culturalists and secularists. See LEO PFEFFER, *RELIGION, STATE, AND THE BURGER COURT* 120 (1984).

71. See LEWIS CARROLL, *Through the Looking-Glass, in THE WORKS OF LEWIS CARROLL* 111, 163 (Roger Lancelyn Green ed., Spring Books 1965). Carroll writes:

"Let's consider your age to begin with—how old are you?"

"I'm seven and a half, exactly."

"You needn't say 'exactly'," the Queen remarked. "I can believe it without that. Now I'll give you something to believe. I'm just one hundred and one, five months and a day."

"I ca'n't believe *that!*" said Alice.

"Ca'n't you?" the Queen said in a pitying tone. "Try again: draw a long breath and shut your eyes."

Alice laughed. "There's no use trying," she said, "one *ca'n't* believe impossible things."

"I daresay you haven't had much practice," said the Queen. "When I was your age, I always did it for half-an-hour a day. Why sometimes I've believed as many as six impossible things before breakfast."

Id.

It is a virtue of the nonsectarian principle, I think, that it does not demand this sacrifice of us. The nonsectarian principle permits us—though, of course, it does not compel us—to be honest.

To be sure, honesty has its costs. In particular, the nonsectarian principle permits candor about one disquieting but inescapable reality: government often cannot be neutral among conflicting beliefs—not even among conflicting religious beliefs. Government cannot avoid treating some citizens on some occasions as “outsiders” or “second class citizens”—at least if those notions are used in the unnecessary and unfortunate sense in which the modern decisions use them. The governing of a political community necessarily involves judgments and beliefs, and in a large and diverse community some of those judgments and beliefs will inevitably be controversial. Further, many of those controversies will have a religious dimension (at least for many citizens). So the best we can hope for, to paraphrase Lincoln, is that the government might act on beliefs that are acceptable to some of the people all of the time and all of the people some of the time. But it simply will not be able to act on beliefs that are acceptable to all of the people all of the time. And the sooner we admit this painful fact, the sooner we may be able to begin to develop a more mature and realistic First Amendment discourse—and a more honest self-understanding.

IV. APPLYING NONSECTARIANISM

But what would a nonsectarian principle mean in practice? I hope that the previous discussion has already shed some light on that question, both through general explanation of the principle and through the two historical examples I have mentioned—namely, Jefferson’s Virginia Statute for Religious Freedom and Lincoln’s Second Inaugural Address. Still, further clarification and a more contemporary application may help illustrate the principle.

Let me begin by reiterating that the nonsectarian principle is not an “either/or” formula that we can simply slap down on any challenged expression or practice extracted from its context and then conclude that the expression or practice is or is not “nonsectarian.” The principle is one of degree and context. It urges government to be as ecumenical and inclusive as its purposes and the circumstances permit. At least within the domain of the “secular” in its positive sense,⁷² government is not forbidden to act on religious beliefs or to make religious expressions. Government should avoid acting on religion, however, in ways that are unnecessarily or gratuitously narrow or exclusionary.

72. See *supra* notes 13–15 and accompanying text.

A. *Caveats*

Could we borrow the standard terminology of constitutional doctrine and say that the “nonsectarian” principle means that government should not invoke religion except as “necessary” for some legitimate purpose? I would accept this formulation with two important caveats. First, it would be imprudent, I think, to hobble the principle with the sort of cheap, mechanical “rationalism” that so often appears in constitutional decisions and that Robert Nagel has so persuasively criticized.⁷³ To put the point differently, like other constitutional principles, this one is best implemented with the support of a Burkean sensibility that understands that in the maintenance of a complex political and cultural order, it is a grave misunderstanding to suppose that we can assess any particular measure by simply ticking off two or three discrete objectives or “interests” that the measure is supposed to achieve and then asking whether the measure is indispensable in achieving those interests. History and culture are more subtle and interconnected than that.

Second, and relatedly, in this context, “necessary” would need to be understood in approximately the sense that John Marshall famously elaborated in *M’Culloch v. Maryland*,⁷⁴ and for much the same reason. “Necessary,” that is, cannot be taken to mean that some particular means is “absolutely” or “indispensably” necessary in its particularity, because no particular means or expression will satisfy that test—but means and expressions *are* necessary. There is more than one way for me to return home to San Diego from here—I could go by car, bus, train or plane—so no particular means of transportation is strictly necessary; still, I do need to select one of these methods, and whichever one I select will be a particular one. In a similar vein, Marshall explained that in deciding whether an exercise of congressional power is “necessary,” it would be a fallacy to imagine that we could mean “absolutely” necessary. This is because, in most cases, more than one means of pursuing an objective is possible and we would thereby prevent ourselves from adopting any means at all.

Public expressions of reasons—for a particular measure, such as Jefferson’s Virginia Bill or the Declaration of Independence, or for a more general attitude of loyalty, as in the Pledge of Allegiance—have this same quality, I think. Usually no particular expression will be absolutely necessary when considered in isolation. But our form of government, resting heavily on the consent of the governed, depends on a tradition of public reason-giving—both for specific public actions and for general support of the government. And in deciding whether any particular reasons are “necessary,” we would do well to be guided by John Marshall’s observation that a means should be considered “necessary” if it is “appropriate” and “plainly adapted” to its end.

73. See ROBERT F. NAGEL, CONSTITUTIONAL CULTURES 106–20 (1989).

74. 17 U.S. 316 (1819).

In assessing particular expressions of reasons, these inquiries implicate not only the intellectual but also the cultural dimensions of a particular controversy. Suppose you ask why you should not cheat on your tax filings and, knowing that you are a committed utilitarian, I nonetheless respond to your question with a careful Kantian explanation: even if this reason satisfies some abstract test of philosophical adequacy, it still will not be a reason that speaks *to you*. In the same way, in our practice of public reason-giving, the adequacy of a reason will depend not only on its cogency as an abstract intellectual matter but also on its resonance with the beliefs actually present in the American political community. Take Jefferson's well-known statement that the "only firm basis" for liberties is "a conviction in the minds of the people that these liberties are of the gift of God."⁷⁵ Jefferson's claim may or may not be correct as a universal proposition or as a philosophical matter; but even if it is not correct, it still might be a cogent report on the condition of rights in the American cultural context.

These caveats lead me to acknowledge a feature of the nonsectarian principle that some people will see as a damning deficiency, but that I regard as a major virtue: properly understood, the principle is not conducive to an aggressive judicial role in policing the practices of American governments for Establishment Clause violations. It would be incorrect to say that the principle precludes *any* judicial oversight. If you are like other audiences, you will easily be able to challenge me with hypothetical examples of actions that would obviously violate a nonsectarian principle, and that a court could accordingly enjoin. For example: "what if the City Council voted to allocate half of its budget to the erection of a 100-foot high golden statute of Jesus in the town square?" And so forth. Still, cases as clear as this will probably be rare. And if the nonsectarian principle is applied in actual cases with the Burkean sensibility that I have alluded to,⁷⁶ and with a *M'Culloch* sense of "necessity," then a responsible court would be reluctant to pronounce some particular measure invalid, especially if it has been woven into the texture of a community's culture or institutions.

The principle is thus best understood as an aspiration for the community as a whole—one that contemplates sparing *judicial* enforcement, much in the same way that *M'Culloch* itself contemplated sparing judicial enforcement of the Constitution's principle of "enumerated powers." This consequence of the principle will be troublesome for those who have great confidence in the judgments of courts combined with a serious distrust of our nonjudicial institutions, or of the American people them-

75. THOMAS JEFFERSON, *Notes on the State of Virginia*, in THE PORTABLE THOMAS JEFFERSON 23, 215 (Merrill D. Peterson ed., 1975).

76. Obviously, the principle would not have to be applied with such sensibilities. Courts *can* actively apply even extremely nebulous standards, such as "undue burden."

selves. I have discussed the issue elsewhere,⁷⁷ but for now I will merely acknowledge the consequence and observe that, in my view, our history and modern experience give no adequate grounds for this combination of confidence and distrust. Moreover, if those attitudes are in fact justified, then I doubt that there is much hope that government “of the people, by the people, for the people” can “long endure.”

B. *Jefferson’s Statute Revisited*

With these explanations, we can return to Jefferson’s Virginia Statute for Religious Freedom to illustrate the nonsectarian principle a bit more closely before considering a more current example. As noted, the act began by asserting that “Almighty God created the mind free,” and it proceeded to elaborate on this rationale for religious freedom. I have already noted that this invocation of deity was neither “secular” in the dominant modern sense nor religiously neutral; but it *was* “nonsectarian,” at least in contrast to more specifically Christian language that some legislators preferred. So we can imagine a more sectarian version using such Christian language: “Christ the Lord created the mind free.” And it is even possible that a majority of Virginians were Christians and that, given the choice, they would have voted for the more sectarian version. Even so, the Christian language would have been gratuitous. Christians believed in “Almighty God,” after all, and the language of “Almighty God” fully conveyed the rationale for rights. So there was no good reason to limit the rationale to Christians.

Conversely, there may well have been Virginians who found even the more nonsectarian version offensive: they may not have believed in God, for example, or they may not have believed that God created the mind free. So why not delete the religious rationale altogether, we might ask, and substitute a purely secular rationale? Given the beliefs of Virginians of the time, however, it may be that no nonreligious rationale could have commanded anything approaching the level of assent that the religious rationale could.

In short, the more Christian rationale would have been gratuitously exclusive, while a nonreligious rationale (though more acceptable to some) might not have served the purpose. If so, then the nonsectarian rationale alluding to “Almighty God” may have been “necessary,” in a *M’Culloch* sense, to the purpose of the statute.

V. UNDER GOD? UNDER VISHNU?

This brings us back to the Pledge of Allegiance, and the words “under God.” Although it is entirely possible that the Supreme Court will eventually uphold these words by invoking one of the spurious distinctions men-

⁷⁷ See, e.g., Steven D. Smith, *Separation as a Tradition*, 18 J.L. & POL. 215, 260–67 (2002).

tioned earlier and denying that the words send any message endorsing religion,⁷⁸ few people will find this explanation believable. To most people I know, "God" is closely associated with religion, so the assertion that something is "under God" seems quite religious. But that fact alone should not invalidate the words. Rather, the question ought to be whether the words comply with the nonsectarian principle. Are they *unnecessarily* or gratuitously religious *in an exclusive sense*, relative to the purpose of the Pledge?

Given the reaction to the *Newdow* decision, I think we can fairly infer that a sizable majority of Americans prefer to have the words "under God" in the Pledge. Moreover, survey evidence shows that an overwhelming majority of Americans believe in God. These facts are relevant to the question I have posed, but they are not decisive. Conversely, critics of the words can point out that they are not strictly "necessary." We could have a Pledge without those words; indeed, until 1954 we *did* have a Pledge without the words. That fact is also relevant to our question, but not decisive.

The central question, once again, is whether the words are "necessary," in a *M'Culloch* sense, to the purpose of the Pledge. That purpose, I take it, is to evoke and express loyalty on the part of citizens to the sort of republic succinctly described in the Pledge. Is it an important feature of that republic that it is "under God"? Obviously, citizens disagree about this question in a variety of ways. Some may grant, as a purely descriptive and historical matter, that there is a long tradition (running from Washington to Jefferson and Madison to Lincoln to George W. Bush) of using *theistic rhetoric* in official and ceremonial pronouncements; and yet they may doubt that "under God" has truly been essential to Americans' conception of their Republic. Others may think that theistic foundations *have* been a central part of the American political tradition, but that we are by now mature enough to discard this objectionable element.⁷⁹ Still others may think that an America unwilling to acknowledge publicly and officially that it is "under God" would no longer command their serious allegiance. Or, for reasons alluded to earlier in the discussion of equality, they may think that bereft of our public commitment to a higher source, the foundations of our Republic would be arbitrary and fragile.⁸⁰

Though I am inclined to the latter view, I will not argue for it here.⁸¹ Instead, I will limit myself to two observations. First, the historical sequence of explicitly adding (or subtracting) words is relevant to this question, but not in any straightforward or simplistic sense. Adding words to a

78. Justice O'Connor advocated this course in *Elk Grove* (though of course she did not put the point in quite this way). See *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2321–27 (2004) (O'Connor, J., concurring).

79. Cf. JOHN RAWLS, *THE LAW OF PEOPLES* 131, 152–54 (1999).

80. See Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41, 52–69 (2003).

81. See generally Steven D. Smith, *Recovering (From) Enlightenment?*, 41 SAN DIEGO L. REV. 1263 (2004).

recitation or creed may change its meaning. Conversely, the addition may merely make explicit what was all along understood, but in a changed context in which *failure* to add the words would reflect a change in meaning. Suppose that you have not been in the habit of explicitly *saying* that you love your spouse—you are the strong, silent type, maybe, and in any case the fact has seemed too obvious to need saying—but then a situation arises in which your commitment is seriously called into question. Saying “I love you” at this point might merely make explicit what was all along understood and went “without saying.” Conversely, an omission to say the words in this context might indicate a major change in what had previously been understood. The words “under God” were explicitly added to the Pledge in 1954 in an effort to distinguish the American community from Communist foes.⁸² Given the long history of such pronouncements and the fact that the phrase “under God” echoes Lincoln’s Gettysburg Address, however, I think it would be hard to argue that its addition reflected any revision in the American self-understanding. It seems far more plausible to suppose that *taking the words out* would be the revisionary gesture.

Second, to return to the argument from *Newdow* with which we began, I think we can be confident in saying that, whether or not the words “under God” are unnecessarily exclusive, they are emphatically *not* identical, from the perspective of the nonsectarian principle, to “under Jesus,” “under Vishnu” or “under no god.”⁸³ From this perspective, whether these statements are “identical” is not something that can be determined by extracting them from their cultural context and measuring the denatured remainders against an abstract standard like “neutrality.” Instead, we need to consider them in the context of the Pledge and its function in the American Republic—a community with a history and composed of real people with real beliefs.

And when we look at the question in this more realistic light, it is quickly apparent that to equate “under God” with “under no God,” for example, is akin to asserting the identity of white and black. The Pledge, after all, is a pledge of allegiance; but the phrase of negation, far from expressing and eliciting the allegiance of the citizens, would amount to a gratuitous insult to the beliefs held by a majority of Americans. Though “under no God” might make the Pledge more attractive to a small minority, it would forfeit the loyalty of countless others, and thus would drastically undermine the purpose of the Pledge.

82. See *Elk Grove*, 124 S. Ct. at 2305–06 (describing brief history of Pledge). Specifically, the Court notes that “the Pledge of Allegiance evolved as a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles.” *Id.*

83. Cf. *id.* at 2326 (O’Connor, J., concurring) (noting that the pledge “does not refer to a nation ‘under Jesus’ or ‘under Vishnu,’ but instead acknowledges religion in a general way: a simple reference to a generic ‘God’”).

By contrast, it may well be that a majority of Americans believes that the Republic is in some sense "under Jesus." It is even imaginable that if the question were put to a vote, a majority of Americans would elect to include this more specific language in the Pledge (though I seriously doubt this). Even so, from the perspective of the nonsectarian principle, "under Jesus" is emphatically not identical to "under God," as the *Newdow* court asserted. "Under Jesus" is a far more exclusive statement than "under God." Moreover, it seems to be gratuitously exclusive because even on the (perhaps debatable) assumption that most Americans have been and are Christians, it is not clear how our political commitments—to equality, to natural rights—depend on anything that is distinctively or exclusively Christian.⁸⁴ Probably the two statesmen and thinkers to whom we most often appeal for almost prophetic statements of the meaning of America have been Jefferson and Lincoln; and although *deity* or *Providence* figure prominently and essentially in each man's thought, it is doubtful that either was a Christian in any very secure and orthodox sense.

VI. CONCLUSION

In sum, the Ninth Circuit's claim of identity among the assertions "under God," "under Jesus," "under Vishnu" and "under no god" is from one perspective plausible; from another perspective the claim is preposterous. I think the sense in which the claim is preposterous is the important one. In any case, the difference helps to underscore the vital distinction among principles that are often conflated. If any sort of order and honesty is to be introduced into First Amendment jurisprudence, the conflation needs to be corrected. We need to recover our "nonsectarian" tradition from the notions of neutrality and secularity that have served to subvert it.

84. Although Christianity has surely been historically important in the development of Western commitments to values such as human rights and equality, it is arguable that its political significance in promoting these commitments has derived not so much from its distinctively Christian theology as from its capacity to carry, support and develop a classical natural law tradition. See generally JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS* (1960).

